CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF GÜLMEZ v. TURKEY

(Application no. 16330/02)

JUDGMENT

STRASBOURG

20 May 2008

FINAL

29/09/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gülmez v. Turkey,

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

Françoise Tulkens, *President,*
Antonella Mularoni,
Ireneu Cabral Barreto,
Rıza Türmen,
Danutė Jočienė,
Dragoljub Popović,
Nona Tsotsoria, *judges,*

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 29 April 2008,

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

PROCEDURE

1. The case originated in an application (no. 16330/02) 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 Ali Gülmez ("the applicant"), on 23 July 2001.

2. The applicant was represented by Mr Ünal Kuş and Mrs Gül Altay, lawyers practising in İstanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 14 April 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1965 and is serving his prison sentence in the Ankara Sincan F-type prison.

5. In March 2000, the applicant, who was accused of murder, armed robbery and membership of an illegal organisation, namely the TKP-ML (*Türkiye Komünist Partisi / Marksist Leninist*, Turkish Communist Party / Marxist Leninist), was placed in detention on remand in the Nevşehir prison.

6. On 19 December 2000 the applicant was transferred to the Ankara Sincan F-type prison.

7. On 2 January 2001 the Disciplinary Board of the F-type prison ("the Board") found the applicant guilty of having damaged prison property and, pursuant to Article 157 of the Regulations on the administration of penitentiary institutions and the execution of sentences ("the Regulations"), prohibited him from receiving visitors for a period of three months. According to the Board's decision, on 24 December 2000 the applicant had broken the ventilation in his ward and written the name of an illegal organisation on his wall. The decision of the Board was reviewed and upheld by the Ankara State Security Court, in accordance with Article 116/5 of the Code of Criminal Procedure. The court delivered its decision on the basis of the case file. It also referred to the applicant's statement in which he had admitted committing these acts in protest against the general situation in F-type prisons. The penalty was enforced between 25 January 2001 and 25 April 2001.

8. On 13 March 2001 the Board once again imposed a disciplinary sanction on the applicant and prohibited him from receiving visits for two months. According to the Board's decision, on 15 February 2001, following a meeting with his lawyer, the applicant had refused to be searched by prison officers and had shouted slogans. In his defence submissions, the applicant admitted that he had resisted the prison officers when he was ordered to take off his shoes. On 28 March 2001 the Board's decision was reviewed and upheld by the Ankara State Security Court. The applicant filed an objection with the public prosecutor against this decision under Article 162 of the Regulations. On 2 May 2001 the public prosecutor rejected the applicant's request. The penalty was enforced between 27 April and 27 June 2001.

9. On 17 May 2001 the Board found the applicant guilty of having damaged prison property, possessing a sharp cutting instrument made from a prison bed, and having an excessive amount of money in his possession. It accordingly prohibited him from receiving visitors for a period of three months. In the meantime, Law no. 4675 entered into force, which stipulated that decisions delivered by Disciplinary Boards were to be reviewed by the Enforcement Judge. Accordingly, on 21 June 2001, the decision of 17 May 2001 was reviewed. The judge upheld the Board's decision, on the basis of the case file and taking into account the applicant's statement. This decision was served on the applicant on 3 July 2001 and the penalty was enforced between 31 July and 30 October 2001.

10. On 21 May 2001 the applicant received a reprimand for having chanted slogans in the prison. The Board held that the applicant should be warned that he would receive heavier penalties if he continued committing similar offences.

11. On 18 and 22 May 2001 respectively, the prison guards prepared two incident reports according to which the applicant had damaged public property by breaking the loudspeaker in his cell and had incited other inmates to disturb order by chanting slogans. In his statement dated 25 May 2001, the applicant admitted that he had chanted slogans but denied that he had damaged the loudspeaker in his cell. On 29 May 2001 the Board found the applicant guilty and prohibited him from receiving visitors and from sending and receiving letters for a period of a month. On 21 June 2001 the decision was reviewed and upheld by the Enforcement Judge. That decision was served on the applicant on 29 June 2001 and he filed an objection against it. On 4 July 2001 the Enforcement Court dismissed the applicant's objection and the penalty was enforced between 29 June and 29 July 2001.

12. On 6 June 2001 the applicant was caught by prison guards as he was climbing onto the window bars of his cell. In his statement dated 14 June 2001, the applicant maintained that he had climbed up to reach a newspaper which was allegedly on the roof. On 18 June 2001 the applicant was once again prohibited from receiving visitors for three months by the Board for having climbed onto the window bars. On 2 July 2001 the penalty was reviewed and upheld by the Enforcement Judge. That decision was served on the applicant on 1 November 2001.

II. RELEVANT LAW AND PRACTICE

A. Domestic legislation

Regulations on the administration of penitentiary institutions and the execution of sentences (no. 6/8517), dated 1 August 1967

13. These Regulations provide as follows:

Article 157

"Those whose acts constitute a breach of convicts' obligations arising from laws, regulations and orders, or are prohibited, shall be liable to one of the following disciplinary penalties according to the nature and severity of the circumstances:

1– Reprimand;

2– Deprivation of the right to receive visitors;

3– Deprivation of the right to send and receive letters;

4– Solitary confinement. ...

A prisoner may be simultaneously sentenced to the penalties of a deprivation of the right to receive visitors and the right to send and receive letters. ...”

Article 159

“The penalty of a deprivation of the right to receive visitors deprives convicts of the right to receive visitors during the visiting hours set out in the internal regulations.

This penalty cannot be imposed on a prisoner for more than three months.”

Article 163

“Before a disciplinary sanction is imposed, a prisoner who is charged with a disciplinary offence shall be heard with regard to the acts of which he is accused.”

Article 165

“Disciplinary penalties imposed by the Disciplinary Board shall be executed promptly. If the director of the institution or at least two members of the disciplinary board, or the convict, consider that the decision concerning a disciplinary penalty is erroneous or insufficient, he or they can file an objection within twenty-four hours with the public prosecutor’s office.

Decisions taken by the public prosecutor shall be final.”

Article 176 § 6

“Decisions concerning disciplinary penalties and measures [in respect of remand prisoners] shall be enforced following the approval of the judge.”

The Law on Enforcement Judges, no. 4675 (dated 16 May 2001)

14. Section 4 of Law no. 4675, which lays down the competence of Enforcement Judges, provides that objections filed against disciplinary sanctions shall be dealt with by such a judge. Article 5 provides that the prisoner concerned, his/her close relative or legal representative, can file an objection against a disciplinary sanction. Furthermore, Article 6 stipulates that the Enforcement Judge shall decide on the basis of the case file, without holding a hearing. This judge may conduct an examination *ex officio* or request further information from the parties if the interests of justice so require. An appeal lies against the decisions of Enforcement Judges to the nearest Assize Court.

The Law on the Enforcement of Sentences and Preventive Measures (dated 1 January 2005)

15. This legislation lays down new provisions on prison discipline, including a list of punishable acts, the penalties relating to them and the

procedure to be followed. In one of its reports (CPT/inf (2008) 13), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment examined the legislation and found that these new provisions did not call for any particular comment. However, it raised two questions concerning disciplinary procedures, namely lawyers' participation in disciplinary proceedings, and its corollary, lawyers' access to their clients' disciplinary file. Furthermore, the CPT queried whether the current provisions of the legislation rule out the involvement of a lawyer during disciplinary proceedings. In this context, it referred to Rule 59 of the European Prison Rules (see the next paragraph).

B. Relevant international legal instruments

European Prison Rules

16. The recommendation of the Committee of Ministers to Member States of the Council of Europe on the European Prison Rules (Rec (2006)2, adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies), insofar as relevant, reads as follows:

"Discipline and punishment

56.1 Disciplinary procedures shall be mechanisms of last resort. ...

57.2 National law shall determine:

a. the acts or omissions by prisoners that constitute disciplinary offences;

b. the procedures to be followed at disciplinary hearings;

c. the types and duration of punishment that may be imposed;

d. the authority competent to impose such punishment; and

e. access to and the authority of the appellate process.

58. Any allegation of infringement of the disciplinary rules by a prisoner shall be reported promptly to the competent authority, which shall investigate it without undue delay.

59. Prisoners charged with disciplinary offences shall:

a. be informed promptly, in a language which they understand and in detail, of the nature of the accusations against them;

b. have adequate time and facilities for the preparation of their defence;

c. be allowed to defend themselves in person or through legal assistance when the interests of justice so require;

d. be allowed to request the attendance of witnesses and to examine them or to have them examined on their behalf; and

e. have the free assistance of an interpreter if they cannot understand or speak the language used at the hearing.

60.1 Any punishment imposed after conviction of a disciplinary offence shall be in accordance with national law.

60.2 The severity of any punishment shall be proportionate to the offence. ...

60.4 Punishment shall not include a total prohibition on family contact. ...

61. A prisoner who is found guilty of a disciplinary offence shall be able to appeal to a competent and independent higher authority."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

17. The applicant complained that the conditions of his detention at the Sincan F-type Prison amounted to a breach of Article 3 of the Convention. In this respect, he maintained that he had been kept in isolation in a cell. This provision reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

18. The Government stressed that the general situation in the prison complained of by the applicant was compatible with the requirements of Article 3 of the Convention. In this respect, they maintained that the ward in which the applicant was kept could not be considered to have been a cell. They stated that the living unit was designed to accommodate three persons and it had two floors; the lower floor contained a toilet, shower, and small kitchen and the second floor was used as a sleeping area and had beds and drawers. In addition, each living unit had a small yard for ventilation purposes. The Government further pointed out that the Court had already examined F-type prison conditions in the past and found no breach of Article 3 in this respect.

19. The Court reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in

considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (see *Peers v. Greece,* no. 28524/95, §§ 67-68, 74, ECHR 2001-III).

20. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

21. The Court recalls that it has in the past examined similar complaints and declared them inadmissible (see *Gündoğan v. Turkey* (dec.), no. 29/02, 13 December 2005; *Yılmaz Karakaş v. Turkey* (dec.), no. 68909/01, 9 November 2004). It finds no particular circumstances in the instant case or any elements which disclose treatment of the prohibited severity, which would require it to depart from this jurisprudence.

22. In view of the above, the Court concludes that the applicant has not laid the basis of an arguable claim and that this part of the application should therefore be declared inadmissible as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

23. The applicant maintained under Article 6 of the Convention that the disciplinary sanctions imposed on him had been arbitrary, as he had been deprived of his right to defend himself in person before the domestic authorities. Article 6, in so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

A. Applicability of Article 6

24. The Government argued that this complaint should be rejected as being incompatible *ratione materiae* since Article 6 of the Convention was not applicable to disciplinary proceedings.

25. The applicant made no submissions on the question of the applicability of Article 6.

26. The Court notes that the proceedings in the present case did not involve the determination of a criminal charge against the applicant. Having regard to its established case-law on this point, it therefore agrees with the Government that the criminal head of Article 6 is inapplicable in the instant case (see *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X; *Štitić v. Croatia*, no. 29660/03, §§ 51-63, 8 November 2007).

27. Nevertheless, the Court must consider whether the civil head of Article 6 is applicable, as by the end of the domestic proceedings the applicant had been deprived of his visiting rights for nearly a year. In doing so, it should examine whether there was a dispute (*contestation*) over an arguable right under domestic law, and whether or not the said right was a "civil" one.

28. As to the first condition, the Court reiterates that, in accordance with its established case-law, Article 6 § 1 of the Convention is applicable only if there is a genuine and serious "dispute" (see *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 30, § 81) over "civil rights and obligations". The dispute may relate not only to the existence of a right but also to its scope and the manner of its exercise (see, *inter alia*, *Zander v. Sweden*, judgment of 25 November 1993, Series A no. 279-B, p. 38, § 22). The outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, *inter alia*, *Masson and Van Zon v. the Netherlands*, judgment of 28 September 1995, Series A no. 327-A, p. 17, § 44; *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, pp. 45-46, § 56). Furthermore, "Article 6 § 1 extends to '*contestations*' (disputes) over (civil) 'rights' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether they are also protected under the Convention" (see, *inter alia*, *Editions Périscope v. France*, judgment of 26 March 1992, Series A no. 234-B, p. 64, § 35; *Zander*, cited above).

29. It is observed that the domestic law provided judicial remedies against disciplinary sanctions imposed on prisoners. As a result, the applicant had a right to challenge the disciplinary sanctions before the domestic courts (see, *mutatis mutandis*, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, §§ 62-63, ECHR 2007-...).

30. With regard to the second condition, the Court notes that the restriction of the applicant's visiting rights clearly fell within the sphere of his personal rights and was therefore civil in nature (see *Ganci v. Italy*, no. 41576/98, § 25, ECHR 2003-XI).

31. In view of the above, the Court finds that Article 6 is applicable in the instant case.

B. Compliance with Article 6

32. The applicant maintained that he did not have a fair hearing during the disciplinary proceedings in question, as the domestic courts had delivered their decisions on the basis of the case file without holding a hearing.

33. The Government did not comment on the merits of this complaint.

34. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, among other authorities, *Szücs v. Austria*, judgment of 24 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2481, § 42; *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, pp. 14-15, § 33).

35. The Court further recalls that, under Article 6 § 1, holding a public hearing is not an absolute right. A hearing may not be necessary in the particular circumstances of a case, for example when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations (see *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002). It is also recalled that the right of access to court, by its very nature, calls for regulation by the State, which may vary in time and in place according to the needs and resources of the community and individuals (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 38). The State has a margin of appreciation in making such regulations but the limitations applied must not restrict or reduce the access left to the individual in such a way as to impair the essence of this right (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, § 57)

36. At this point, the Court refers to Article 59 (c) of the European Prison Rules which stipulates that prisoners charged with disciplinary offences shall be allowed to defend themselves in person or through legal assistance when the interests of justice so require (paragraph 16 above).

37. Turning to the facts of the present case, the Court observes in the first place that, at the material time, Article 163 of the Regulations (paragraph 13 above) stated that no disciplinary sanction could be imposed on a prisoner before his or her submissions in defence were taken. However, according to Article 6 of Law no. 4675, prisoners' appeals against disciplinary sanctions imposed on them were examined on the basis of the case file by the Enforcement Judge and subsequently by the nearest Assize Court. As a result, no public hearing was held during the proceedings relating to the present applicant. Both the Enforcement Judge and the Assize Court, who examined the applicant's cases, took their decisions on the basis of the documents in the case file. The applicant's defence submissions had only been taken into account just before the Disciplinary Board imposed the various sanctions. The applicant was also not given the opportunity to defend himself through a lawyer before the domestic courts who determined his disciplinary appeals.

38. In view of the foregoing, the Court concludes that the applicant could not effectively follow the proceedings against him.

39. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

40. The applicant complained that the disciplinary penalties which restricted his visiting rights for approximately a year constituted a breach of Article 8 of the Convention, which reads insofar as relevant as follows:

> "1. Everyone has the right to respect for his private and family life, ... and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder ..."

A. Admissibility

41. The Government submitted that the complaint concerning the first disciplinary penalty of 2 January 2001 should be rejected for having been introduced outside the six months time-limit laid down in Article 35 § 1 of the Convention. In that connection, they maintained that, as no objection had been filed against the decision, the disciplinary penalty had become final on 8 January 2001, but that the application had not been lodged with the Court before 23 July 2001.

42. The Government further argued that the application should be rejected for non-exhaustion of domestic remedies. In that connection they pointed out that, pursuant to Article 165 of the Regulations, the applicant

could have filed an objection with the public prosecutor against the Disciplinary Board's decisions and against the decisions of the Enforcement Judge.

43. However, as regards the six months time-limit, the Court observes that, in the present case, the applicant received five consecutive disciplinary penalties. As a result, his right to receive visitors was restricted for almost a year. The Court therefore considers that these penalties should be considered together, in their aggregate. Accordingly, as the last disciplinary sanction against the applicant was imposed on 18 June 2001, the application should be considered to been submitted within the six-month time-limit in accordance with Article 35 § 1 of the Convention. Consequently, this aspect of the Government's objection cannot be upheld.

44. As regards the Government's second objection concerning the exhaustion of domestic remedies, the Court considers it to be closely linked to the merits of the complaint. It therefore joins it to its examination of the merits of the Article 8 complaint.

B. Merits

45. The Government stated that the prison authorities, in the exercise of their discretionary powers, deemed it necessary to restrict the applicant's visiting rights in order to maintain order. They submitted that the restriction, which was based on Article 157 of the Regulations, did not constitute a breach of Article 8 § 2 of the Convention. Lastly, they stated that the applicant had the possibility of challenging the disciplinary penalties before the domestic authorities.

46. The Court reiterates that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 69, ECHR 2005-...). For example, they continue to enjoy the right to respect for family life (see *Messina v. Italy (no. 2)*, no. 25498/94, § 61, ECHR 2000-X; *Ploski v. Poland*, no. 26761/95, judgment of 12 November 2002; *X. v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, Decisions and Reports (DR) 30, p. 113) and the right to respect for correspondence (see *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61). Any restrictions on these rights have to be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment.

47. The Court also recalls that any interference with an individual's right to respect for private and family life will constitute a breach of Article 8 unless it was "in accordance with the law", pursued a legitimate aim or aims

under paragraph 2, and was "necessary in a democratic society", in the sense that it was proportionate to the aims sought to be achieved (see, among other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 45, ECHR 2000-VIII).

48. In the present case the Government do not contest the facts as submitted by the applicant. The Court therefore considers that the restriction on the applicant's visiting rights for nearly a year constitutes, in itself, an interference with his right to respect for his family life under Article 8 of the Convention.

49. To assess whether the interference complained of was "in accordance with the law", the Court must inevitably assess the relevant domestic legislation in force at the time in relation to the requirements of the fundamental principle of the rule of law. The expression "in accordance with the law" refers to the quality of the legislation in question. Domestic law must afford a measure of protection against arbitrary interference by public authorities with Convention rights, in respect of which the rule of law would not allow unfettered powers to be conferred on the Executive. Consequently, the law must indicate with sufficient clarity the scope of any executive discretion and the manner of its exercise (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI). The law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to the impugned measures.

50. In the present case, the restriction imposed on the applicant's visiting rights was based on Article 157 of the Regulations (paragraph 13 above). The Court notes that these Regulations were published and accessible to the applicant. However, they did not indicate in precise terms the punishable acts and related penalties. This, in the Court's opinion, left the authorities a wide degree of discretion in determining the disciplinary sanctions which could be imposed. In the instant case, six disciplinary sanctions were imposed on the applicant for damaging prison property, chanting slogans and refusing to be searched. As a result, the applicant was deprived of visits for approximately a year. At this point the Court also reiterates that, under Article 60.4 of the European Prison Rules, no disciplinary punishment should include a total prohibition on family contacts (paragraph 16 above).

51. The Court further takes note of the legislation which entered into force on 1 January 2005 (Law no. 5275 on the Enforcement of Sentences and Preventive Measures, paragraph 15 above). The new provisions on prison discipline give a list of punishable acts, the penalties relating to them and the procedure to be followed. This legislation did not call for any comment when examined by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

52. Having regard to the above considerations, the Court is not convinced that the Regulations, as they were in force in 2001, were

sufficiently clear and detailed to afford appropriate protection against any wrongful interference by the authorities with the applicant's right to family life.

53. In the particular circumstances of the case, the Court cannot but conclude that the interference with the applicant's family life was based on legal provisions which did not meet the Convention's "quality of law" requirements.

54. In the light of this conclusion, the Court is not required to determine whether the interference pursued a legitimate aim or aims under paragraph 2 of Article 8 and was "necessary in a democratic society". It further follows that the Government's preliminary objection (paragraph 44 above) concerning non-exhaustion of domestic remedies must be dismissed.

55. The Court therefore concludes that there has been a violation of Article 8 in the present case.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

56. The applicant further invoked Article 7 (the prohibition on retroactive criminal legislation) and Article 18 of the Convention (the prohibition on the application of the Convention's legitimate restrictions for ulterior purposes).

57. The Government contested these allegations.

58. The Court finds nothing whatsoever in the case file which might disclose a violation of these provisions. 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.

V. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

A. Article 46 of the Convention

59. Under this provision:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

60. The Court's conclusions as regards the complaint about the lack of a public hearing suggest that the violation of the applicant's rights under Article 6 of the Convention originated in a problem arising out of the state of the Turkish legislation, namely Law no. 4675 on Enforcement Judges, which has affected a number of prisoners who have challenged the

disciplinary sanctions imposed on them. Several other applications concerning the same issue are pending before the Court. Without prejudging the merits of those cases, the above facts indicate that the problem at issue is of a systemic nature.

61. At this point, the Court takes note of the legislation which entered into force on 1 January 2005 (Law no. 5275 on the Enforcement of Sentences and Preventive Measures). The new provisions on prison discipline give a list of punishable acts, the penalties relating to them and the procedure to be followed. It appears that they are sufficiently clear and detailed to afford appropriate protection against any wrongful interference by the authorities. Nevertheless, the procedure to be followed in disciplinary proceedings remains unchanged, and the prisoners charged with disciplinary offences are still not allowed to defend themselves in person or through legal assistance.

62. It has been the Court's practice in similar applications to identify such systemic problems and their source so as to assist the Contracting States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments (for further details see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 229-237, ECHR 2006-...; *Sejdovic v. Italy* [GC], no. 56581/00, §§ 119-127, ECHR 2006-...; *Lukenda v. Slovenia*, no. 23032/02, §§ 89-98, ECHR 2006-... or *Scordino v. Italy (no. 3)* (just satisfaction), no. 43662/98, §§ 11-16, ECHR 2007-...).

63. Having regard to the systemic situation which it has identified, the Court is of the opinion that general measures at national level appear desirable in the execution of the present judgment in order to ensure the effective protection of the right to a fair hearing in accordance with the guarantees set forth in Article 6 of the Convention. In this respect, the respondent state should bring its legislation in line with the principles set out in Articles 57 § 2 (b) and 59 (c) of the European Prison Rules (see also, *mutatis mutandis*, *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-..., where the Court underlined the evolution in European penal policy by referring to the European Prison Rules).

B. Article 41 of the Convention

64. 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."

1. Damage

65. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

66. The Government contested the claim.

67. Ruling on an equitable basis, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage.

2. Costs and expenses

68. The applicant also claimed EUR 4,000 for the costs and expenses incurred in the proceedings before the Court. In support of his claim, the applicant submitted a legal fee agreement.

69. The Government contested the claim.

70. 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 were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court finds it reasonable to award the sum of EUR 1,500 under this head.

3. Default interest

71. The Court considers it appropriate that the default interest 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 complaints under Articles 6 § 1 and 8 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

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

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into New Turkish liras at the rate applicable at the date of settlement:

(i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(ii) EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Deputy Registrar	Françoise Tulkens President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Mularoni, joined by Judge Tsotsoria, is annexed to this judgment.

F.T.
F.E.P.

CONCURRING OPINION OF JUDGE MULARONI, JOINED BY JUDGE TSOTSORIA

I agree with the conclusions of the majority that there has been a violation of Articles 6 § 1 and 8 of the Convention in this case.

However, my reasoning is partly different.

Article 6

As to the applicability of this Article, I have to say that the Court's case-law concerning disciplinary sanctions imposed on prisoners does not seem to me to be always consistent.

The Court has found a violation of Article 6 in cases against some countries, whereas it continues in committees to declare similar complaints raised against other countries inadmissible.

While I am very much looking forward to getting more detailed criteria from the Grand Chamber as to the applicability of Article 6 to this kind of complaint, I can agree that Article 6 applies in this case under its civil head, as by the end of the domestic proceedings the applicant had been deprived of his visiting rights for nearly a year. Applying the *Ganci v. Italy* principles (no. 41576/98, §§ 24-25, ECHR 2003-XI) to the specific circumstances of the case, the issue of the applicability of Article 6 is easily determined.

Having said that, I do not understand why reference was made to the *Vilho Eskelinen and others v. Finland* Grand Chamber judgment in paragraph 29 of the judgment. That case concerns access to court for civil servants and has absolutely nothing to do with the issue of disciplinary sanctions imposed on prisoners. I am very much afraid that said reference serves the purpose of introducing the principle that, from now on, a presumption exists that Article 6 applies to any disciplinary sanction imposed on prisoners when domestic law provides judicial remedies.

I am of the opinion that the chambers of the Court should not engage in judicial hyper-activism, moving rapidly, in the absence of clear Grand Chamber guidelines, from a case-law under which Article 6 of the Convention was not applicable at all to disciplinary proceedings to a case-law according to which Article 6 should always apply, regardless of the nature and gravity of the disciplinary sanction imposed, whenever judicial protection is afforded at domestic level. Even leaving aside that such an approach might discourage the High Parties to the Convention from affording judicial protection with respect to minor disciplinary sanctions, I would point out that Article 6 of the Convention limits its scope to hearings for the determination of "civil rights and obligations", as well as "criminal charges". If a major extension of the scope of Article 6 has to be made with reference to disciplinary sanctions imposed on prisoners, with a view to

considering any kind of sanction, even minor ones, as having an impact on a civil right, I think that this should be for the Grand Chamber to decide.

May I add that imposing on domestic courts to hold public hearings in all procedures concerning disciplinary sanctions, regardless of their gravity, would to my mind represent a disproportionate burden and risk undermining the courts' ability to deal with cases within a reasonable time. The Grand Chamber having recently found that there was no such obligation in a case involving "criminal" issues (see *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-...), I do not believe that it is appropriate for a chamber of the Court to impose such an obligation in cases involving disciplinary sanctions where the "civil limb" of Article 6 is at stake.

For this reason, I come to the conclusion that there has been a violation of Article 6 in this case for one reason only: that the applicant was not given the opportunity to defend himself through a lawyer before the domestic courts which determined his disciplinary appeals. The severity of the total sanction imposed on him cannot justify any derogation from the principle of legal representation before domestic courts.

Article 8

As to the violation of this Article, the majority confines its examination to the issue of "legality". It concludes that the interference with the applicant's family life was based on legal provisions which did not meet the Convention's "quality of law" requirements, and that there is no need to determine whether the interference pursued a legitimate aim or aims under paragraph 2 of Article 8 and was necessary in a democratic society (§§ 53-54 of the judgment).

However, since the Court takes note of the legislation which entered into force on 1 January 2005 and points out that the new legislation should in principle meet the Convention's quality of law requirements (§ 51 of the judgment), I should like to emphasise an additional element.

Even assuming that in new similar cases the interference might be lawful and pursue a legitimate aim, I would consider such interference unnecessary in a democratic society. Total prohibition of family contacts for a year is a clearly disproportionate disciplinary sanction, touching the core of Article 8.

Application of Article 46 of the Convention

I have a serious problem with this portion of the judgment (§§ 59-63) for the following reasons.

1) Paragraph 60 of the judgment summarises the reason for finding a violation of Article 6 as being "the lack of a public hearing". I consider that the wording of paragraph 60 is not consistent with paragraphs 37 and 38 and

the conclusion that Article 6 was breached because "the applicant could not effectively follow the proceedings against him".

May I add, assuming that the majority holds the view that lack of a public hearing is the main reason for finding a violation of Article 6, that I would deeply disagree with such a conclusion, for the reasons developed above.

2) I have serious doubts that paragraph 63 of the judgment will serve the declared purpose of assisting the respondent State in finding the appropriate solution and the Committee of Ministers in supervising the execution of the judgment, for the following two reasons.

On the one hand, I have difficulties in understanding the reference to Article 57 § 2 (b) of the European Prison Rules, which provides that "national law shall determine the procedures to be followed at disciplinary proceedings". Such procedures are already determined at domestic level, as stated in paragraph 15 of the judgment. What clearly emerges from that paragraph is that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment examined the legislation and only raised two questions, namely lawyers' participation in disciplinary proceedings and lawyers' access to their clients' disciplinary files. Limiting the reference to Article 59 (c) of the European Prison Rules would probably have better served the purpose of helping the respondent State and the Committee of Ministers.

Secondly, the reason for the reference to the *Dickson v. the United Kingdom* Grand Chamber judgment in the section relating to Article 46 remains a mystery to me, as in that case the Court refrained from suggesting the adoption of any provision of the European Prison Rules under Articles 46 or 41 of the Convention.