CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF DJAVIT AN v. TURKEY

(Application no. 20652/92)

JUDGMENT

STRASBOURG

20 February 2003

FINAL

09/07/2003

In the case of Djavit An v. Turkey,

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

Mr L. CAFLISCH, *President*,
Mr P. KŪRIS,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr K. TRAJA, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 30 January 2003,

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

PROCEDURE

1. The case originated in an application (no. 20652/92) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Cypriot national, Mr Ahmet Djavit An ("the applicant"), on 8 September 1992.

2. The applicant, who had been granted legal aid, was represented by Mr M. Shaw QC, practising in London. The Turkish Government ("the respondent Government") were represented by their Agent, Mr Z.M. Necatigil.

3. The applicant alleged a violation of Articles 10, 11 and 13 of the Convention, on account of the refusal by the Turkish and Turkish-Cypriot authorities to allow him to cross the "green line" into southern Cyprus in order to participate in bi-communal meetings.

4. The application was declared partly admissible by the Commission on 14 April 1998 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The respondent Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicant and the respondent Government each filed observations on the merits (Rule 59 § 1). In addition, third-party comments were received from the Cypriot Government, which had exercised its right to intervene (Article 36 § 1 of the Convention and Rule 61 § 2). The parties replied to those comments (Rule 61 § 5).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

THE FACTS

8. The applicant is a Cypriot national of Turkish origin who was born in 1950 and is a paediatrician residing in Nicosia, north of the "green line".

9. In addition to being a critic of the Turkish-Cypriot authorities and of the Turkish military presence in the northern part of Cyprus, which he defines as "occupation", the applicant is the "Turkish-Cypriot coordinator" of the Movement for an Independent and Federal Cyprus, an unregistered association of Turkish and Greek Cypriots founded in 1989 in Nicosia. The movement has a Turkish-Cypriot coordinating committee in the northern part of the island and a Greek-Cypriot coordinating committee in the southern part. The purpose of the Movement is to develop close relations between the two communities. To that end, it organises bi-communal meetings of a political, cultural, medical or social character.

10. The applicant is normally unable to obtain a permit from the Turkish and Turkish-Cypriot authorities to visit the "buffer-zone" or the southern part of the island in order to participate in various bi-communal meetings. Thus, between 8 March 1992 and 14 April 1998, the date of the Commission's admissibility decision, only 6 out of 46 requests for such permits were granted. Further, between 18 April 1998 and 16 October 1999 two more permits were refused, one of which, however, was granted later on. The requests that were turned down concerned, *inter alia*, a UNFICYP (United Nations Peacekeeping Force in Cyprus) Spring Fair at Nicosia International Airport in May 1992, a bi-communal medical seminar organised by the UNHCR (United Nations High Commissioner for Refugees) in June 1992, a meeting of the coordinating committee for the "Movement for an Independent and Federal Cyprus" at the Ledra Palace in October 1992 as well as two meetings for the reorganisation of this committee in April and July 1994, a seminar on cardiology organised by the UNHCR in June 1994, a general meeting of the New Cyprus Association in December 1997 and a number of receptions organised by the German embassy in Nicosia. Moreover, in May 1992 the above-mentioned

authorities refused to allow Greek Cypriots to attend a meeting organised by the applicant in the northern part of the island.

11. The applicant claimed that the Council of Ministers of the "Turkish Republic of Northern Cyprus" (the "TRNC") had adopted a decision prohibiting him from contacting Greek Cypriots. Reference to this decision was allegedly made in a letter dated 3 February 1992 by the Health Minister of the "TRNC" to the applicant, which reads as follows:

> "According to the information our Ministry has received, you were informed by the Ministry of Foreign Affairs and Defence orally and this has been a decision of the government and we have nothing to add in our capacity as the Ministry."

12. On 7 May 1992 the applicant wrote to the Prime Minister of the "TRNC" requesting to be informed of the content of the Council of Ministers' decision referred to in the above-mentioned letter, but received no reply.

13. On 29 May 1992 he sent a letter of protest to the Foreign Minister of Turkey, which has also remained unanswered.

14. On 18 May 1994 the Directorate of Consular and Minority Affairs of the Ministry of Foreign Affairs and Defence of the "TRNC" informed the applicant that "the permission requested by [his] letter of 19 April 1994 was refused for security reasons, in the public interest and because [he had] made propaganda against the State".

15. On 24 May 1994 the applicant wrote to the Deputy Prime Minister of the "TRNC", asking whether the previous decision of the Council of Ministers was still in force since he was not allowed to visit the buffer-zone or cross over into Nicosia. He received no answer and on 19 July 1994 he sent a reminder, which also remained unanswered. However, the applicant claimed that, in an article published in a newspaper on 18 March 1996, the former Deputy Prime Minister (to whom he had sent the above-mentioned letters) had stated that when he had held this position he had requested an explanation by the Prime Minister as well as the President of the "TRNC" in relation to the refusal of permits, but had not received an answer.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

16. The Court observes that, in the proceedings before the Commission, the respondent Government raised several objections to the admissibility of the application. The Commission considered these objections under the following heads: (1) alleged lack of jurisdiction and responsibility of the respondent State in respect of the acts complained of; (2) alleged failure by

the applicant to comply with the six-month rule; and (3) alleged failure by the applicant to exhaust domestic remedies.

17. The Court further observes that the Commission, in its admissibility decision of 14 April 1998, rejected the respondent Government's challenges under the first head and partly under the second head. As regards the latter, the Commission decided to declare inadmissible the part of the application which related to the period before 8 March 1992. Moreover, the Commission decided to reserve to the merits stage the issues raised under the third head. The Court therefore considers it appropriate to examine the respondent Government's argument on this point as well as the issue of jurisdiction that the respondent Government raised again in their submissions on the merits of this application, in the form of preliminary objections.

A. As to the respondent State's responsibility under the Convention in respect of the alleged violations

18. As in the proceedings before the Commission, the respondent Government disputed Turkey's liability under the Convention for the violations alleged in the application. In their submissions to the Court, the respondent Government claimed that the acts complained of were imputable exclusively to the "TRNC", an independent and sovereign State established by the Turkish-Cypriot community in the exercise of its right to self-determination. In particular, the respondent Government submitted that the control and day-to-day administration of the designated crossing-points, such as that of the Ledra Palace, and the issuance of permits were within the exclusive jurisdiction and/or responsibility of the authorities of the "TRNC" and not of Turkey.

19. In relation to this the respondent Government disagreed with the findings of the Court in *Loizidou v. Turkey* ((preliminary objections), judgment of 23 March 1995, Series A no. 310, and (merits), judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI), and in its judgment of 10 May 2001 in the inter-State case of *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001-IV). They also contended that the Commission, in its decision as to the admissibility of the present application, had not interpreted the decision in *Chrysostomos and Papachrysostomou v. Turkey* correctly (nos. 15299/89 and 15300/89, Commission's report of 8 June 1993, Decisions and Reports (DR) 86-A, p. 4).

20. The applicant and the Cypriot Government disputed these submissions, relying essentially on the reasons given by the Court for rejecting similar objections raised by Turkey in *Loizidou* (preliminary objections and merits) and in *Cyprus v. Turkey*, all cited above. They asserted that Turkey was responsible under the Convention for all acts and

omissions of the "TRNC" as well as its control over "the border area" and crossings.

21. The Court refers to its dismissal of the respondent Government's preliminary objections in *Loizidou* (*merits*), cited above, as to Turkey's alleged lack of jurisdiction and responsibility for the acts complained of (pp. 2232-36, §§ 49-57). More precisely, the Court considered in that judgment and in connection with that particular applicant's plight:

> "52. As regards the question of imputability, the Court recalls in the first place that in its above-mentioned Loizidou judgment (*preliminary objections*) (pp. 23-24, § 62) it stressed that under its established case-law the concept of 'jurisdiction' under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. ...
>
> 56. ...
>
> It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' ... Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus."

22. Many of the considerations in the above-mentioned case were confirmed by the Court in its judgment in *Cyprus v. Turkey*. The Court observes that in its latter judgment it rejected the Government's arguments that it had been mistaken in its approach to the issues raised by *Loizidou*, especially on the matter of Turkey's liability for alleged violations of Convention rights (see *Cyprus v. Turkey*, §§ 69-81) and it considered that Turkey's responsibility was not limited to property issues such as those considered in *Loizidou*. In particular, the Court stated the following:

> "77. It is of course true that in *Loizidou* the Court was addressing an individual's complaint concerning the continuing refusal of the authorities to allow her access to her property. However, it is to be observed that the Court's reasoning is framed in terms of a broad statement of principle as regards Turkey's general responsibility under the Convention for the policies and actions of the 'TRNC' authorities. Having effective overall control over northern Cyprus, its responsibility cannot be confined to

the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey."

23. Accordingly, the Court dismisses the respondent Government's aforementioned objections and concludes that the matters complained of in the instant application fall within the "jurisdiction" of Turkey within the meaning of Article 1 of the Convention and therefore entail the respondent State's responsibility under the Convention.

B. Exhaustion of domestic remedies

1. Arguments before the Court

(a) The respondent Government

24. The respondent Government maintained that the applicant had not attempted to exhaust the remedies available to him within the judicial and administrative system of the "TRNC", as required by Article 35 of the Convention. In this connection they submitted that there were effective and adequate remedies within the judicial system of the "TRNC", which were easily accessible to the applicant, offered him reasonable prospects of success and were capable of providing him with redress. Affirming the impartiality and independence of the judicial system in the "TRNC", the respondent Government submitted the following points.

(i) The Constitution of the "TRNC" incorporated provisions for human rights drawn from the 1960 Cypriot Constitution, and also the European Convention on Human Rights, which formed part of the laws of the "TRNC". Under the Constitution fundamental rights and liberties could only be restricted by law and only for the purposes that were provided for in law. Articles 136 to 155 of the Constitution provided for access to independent courts and for judicial review of administrative action on the grounds of illegality or error of law and excess and/or abuse of power (Article 152) as well as judicial review of legislation by way of reference to the Supreme Constitutional Court (Article 148) and institution of proceedings for annulment of legislation and subsidiary legislation (Article 147). In particular, Article 152 of the Constitution provided that the High Administrative Court had exclusive jurisdiction to adjudicate finally on a complaint that a decision, act or omission of any body, authority or person exercising any executive or administrative authority was contrary to any of the provisions of the Constitution, or of any law or subsidiary legislation thereunder, or exceeded or abused the powers vested in such

body or authority or person. The applicant could have brought administrative proceedings in the High Administrative Court for annulment of the relevant decision or decisions of the Council of Ministers and/or responsible ministry and/or any authority that had allegedly prevented him from crossing over to southern Cyprus.

(ii) The courts had also adopted certain principles which included, *inter alia*, the rules of natural justice or procedural fairness and the principles of reasonableness, proportionality and reasoning of administrative acts. In order to take effect in relation to the person concerned, the administrative decision had to have been properly taken and served on the person concerned. Unless this had been done the purported act would have been incomplete and would not have come into operation *vis-à-vis* the person concerned.

(iii) It would have been very unlikely for any administrative act or decision to be characterised as an "act of State" and to be excluded from judicial review. Judicial review of an administrative act relating to matters of high policy would have been treated just like any other administrative act, subject to principles of administrative law relating to the exercise of discretionary powers granted under legal and constitutional provisions. The alleged refusals by the authorities to permit the applicant to visit southern Cyprus would not have been regarded by the courts in the "TRNC" as a political act outside their competence. Although the authorities might have been held to have had a certain amount of discretion regarding the merits of the issue involved, the court would not have declined jurisdiction if there had been a procedural defect relating, for instance, to the elaboration and service of the relevant administrative act or decision, or the lack of legal provisions allowing the authorities to take the relevant decision, particularly if such a decision were to restrict or limit the exercise of a right or liberty enshrined in the Constitution.

(iv) Under Article 76 of the "TRNC" Constitution there was a right of individual petition to the authorities of the State. Failure by the appropriate authority to reply to a petition made under the above-mentioned provision within a period of thirty days constituted an "omission" of the authorities under Article 152 of the Constitution giving the complainant the right to apply to the High Administrative Court.

(v) It was also possible to submit petitions to the Petitions Committee of the Legislative Assembly of the "TRNC" under the Petitions Law (no. 30/1976);

(vi) In addition, the applicant could have submitted a complaint to the Attorney-General of the "TRNC" about the matter. Under the Constitution the Attorney-General was an independent officer of the State, and if the applicant had complained to him, he could have taken up the matter with the competent bodies of the State.

(vii) In view of the fact that the applicant had been given permission on many occasions to visit southern Cyprus, his argument that he was not required to exhaust domestic remedies due to the existence of an "administrative practice" to refuse applications to visit southern Cyprus was unfounded. Each application was considered by the Ministry of Foreign Affairs and Defence on its own merits and, in case of refusal, it was open to the applicant to challenge such refusal on its merits and/or on procedural grounds.

(viii) In the light of the Court's judgment in *Cyprus v. Turkey*, the applicant's argument that "TRNC" remedies were inherently illegal as they emanated from an illegal situation was unfounded on both legal and factual grounds.

25. Finally, the respondent Government maintained that the applicant had by-passed the judicial bodies of the "TRNC" not because of the lack of effective judicial remedies but because he was not willing to avail himself of the available remedies. In this connection, they referred to the significance of the applicant's political motivation as well as the political aspect of the present application. They alleged that the applicant was a person of extreme and provocative views that many Turkish Cypriots might have thought transcended the boundaries of criticism. They stated that his style of writing was reminiscent of similar, if not identical, expressions on the same points that were often used in the four inter-State applications by Cyprus against Turkey. In this connection, they mentioned the reference by the applicant to the International Association for the Protection of Human Rights in Nicosia on his legal-aid form, hinting at Greek-Cypriot involvement, assistance or instigation, and found it surprising that he should denigrate to such an extent the State in which he lived and/or the authorities, including the judiciary, of that State.

(b) The applicant

26. The applicant countered the arguments of the respondent Government with submissions that included the following points.

(i) Although the Court, in its judgment in *Cyprus v. Turkey*, was not persuaded that the "TRNC" courts were inherently illegal under international law and thus in principle incapable of offering effective remedies, it was nevertheless true under Article 35 § 1 of the Convention that the definition and application of domestic remedies should be in accord with the rules and requirements of international law. These constituted the essential boundaries of the provision which could not be crossed.

(ii) The respondent Government had failed to discharge the burden of proof for Convention purposes (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV). In particular, they had not addressed the key questions of the effectiveness of any of the claimed remedies with regard to the applicant and in the light of the situation. Their

observations simply noted generally a range of provisions of the "TRNC" Constitution with no attempt to point to a remedy for the applicant.

(iii) The applicant had never been informed of, and had been entirely unable to discover, any proper legal basis for his treatment. Any effective remedy claimed by the respondent Government had to be seen in this light. The applicant had been prevented in an arbitrary and erratic fashion from carrying out his attempts to establish and further contacts with Greek Cypriots in southern Cyprus with a view to developing friendly relations. He had consistently sought to discover the reasons underlying the refusal to allow him to visit southern Cyprus. There did not appear to be any statutory basis in the law of northern Cyprus regulating contacts between north and south. Requests for permission to cross into the south were always treated arbitrarily, with no proper notice of refusal or no notice at all, and were often dealt with negatively, in that express permission to cross was not sent to the relevant crossing-point, or was refused orally, so that the decision was impossible to challenge in practice. The applicant believed that for political reasons he would not in any event have been treated fairly. He understood that oral decisions concerning him had been taken and he argued that he had not obtained anything in writing apart from veiled threats.

(iv) Article 12 of the "TRNC" Constitution expressly provided that no interpretation could be accepted which implied any right to engage in activities aimed at changing the "rights and status" of the "TRNC". In this connection, the applicant pointed to a letter from the Directorate of Consular and Minority Affairs of the Ministry of Foreign Affairs and Defence of the "TRNC" dated 18 May 1994 that justified the refusal of a permit requested by the applicant on the ground that he engaged in propaganda against the State as well as for reasons pertaining to security and the public interest.

(v) Entry regulations into the "TRNC" (and thus by necessary implication exit and re-entry) and the principles of implementation were based on decisions of the Council of Ministers of the "TRNC" which in the legal system of the "TRNC" were not subject to any judicial review (see *Cyprus v. Turkey*, cited above, Commission's report of 4 June 1999, § 109);

(vi) In view of the fact that the "TRNC" courts did not have jurisdiction over the Turkish forces manning the dividing line, no "TRNC" court decision supporting the applicant's claim would have or could have any binding effect upon the relevant Turkish forces, not least because both Turkey and the "TRNC" maintained that they were separate independent States.

(vii) In any event the arbitrary and erratic practices with regard to permission to cross over into southern Cyprus were such as to amount to an administrative practice. As affirmed and accepted by the Court in its judgment in *Cyprus v. Turkey*, the policy of impeding bi-communal contacts, at least from 1996, amounted to an administrative practice. Unlike the position in the inter-State case, however, the violation of the applicant's

Convention rights fell within the period covered by the Commission's admissibility decision of 14 April 1998, so that he was absolved from the obligation to exhaust domestic remedies. The argument was that the practice in question amounted to arbitrarily disrupting and impeding such contacts and not that every single contact was prevented. Such a practice had been maintained throughout the period relevant to his application.

(c) The Cypriot Government

27. The Cypriot Government made observations similar to those of the applicant, disputing the arguments of the respondent Government. In their submissions the Cypriot Government argued that remedies within the "TRNC" judicial system did not constitute effective domestic remedies requiring exhaustion for the purposes of Article 35 § 1 of the Convention. Alternatively, they submitted that the illegality of those remedies in international law amounted to a "special circumstance" absolving the applicant from the requirement of exhaustion. The Cypriot Government disagreed with the decision both of the Commission in its report of 4 June 1999 and of the majority of the Court in its judgment of 10 May 2001 in *Cyprus v. Turkey* that remedies available within the "TRNC" could be regarded as "domestic remedies". They also raised the following additional points.

(i) The respondent Government had failed to specify the exact remedies available to the applicant with the requisite degree of certainty within the "TRNC" legal system, being accessible and capable of affording effective redress with reasonable prospects of success. The observations of the respondent Government could only be taken to refer to the possibility of an application for "judicial review" based on the "constitutional" rights referred to; that had not been shown to be effective in practice, or to be sufficiently certain to meet the requirements of Article 35.

(ii) In order to have been effective, any remedy for the present violations would have had to be able to prevent or forestall the violation. No such means could ever have been available since the applicant had never been given formal notification of the decision in advance enabling him to challenge the refusal, but had been notified only at the time it was implemented – by means of a refusal of permission to cross the line. In practical terms, it would have been extremely difficult, if not impossible, for the applicant, or others in the same position, to initiate any process by which an effective remedy, capable of overturning the decision, could have been granted. A challenge mounted after the event would not have been an effective remedy or established a right of passage for the future since each application to cross the Turkish cease-fire lines was separate and resulted in a separate refusal (that was not, however, communicated in advance).

(iii) In view of Article 12 of the "TRNC" Constitution, any political activity, including bi-communal activity, which was aimed at promoting the

case for terminating Turkey's illegal occupation of northern Cyprus and for re-establishing the rule of law and thus bringing about "changes" to the perceived "status" of the "TRNC" as an independent State was denied "constitutional" protection, negating consequently the rights to freedom of assembly, association or expression. Thus, it could not be said that a constitutional challenge by the applicant would have enjoyed reasonable prospects of success.

(iv) The evidence established a practice of restricting freedom of movement and thereby suppressing freedom of expression and association and of preventing the involvement of Turkish Cypriots in bi-communal organisations and activities taking place in the south. Thus the situation differed from that before the Court in the inter-State case. In the present case there was evidence of the practice of imposing politically motivated restrictions on freedom of movement in order to prevent Turkish-Cypriot opponents of the regime from travelling to the south in order to exercise their rights to freedom of expression and association (see US State Department Country Reports on Human Rights, 1993, 1994 and 1996; *Cyprus v. Turkey*, Commission's report cited above). There was direct evidence of the application of this practice to the applicant and others. Despite the scale of this practice, the respondent Government were unable to point to any example of a case where a successful challenge had been brought on comparable facts. The position was essentially the same for other Turkish Cypriots wishing to cross from the north to the south.

(v) Alternatively, even if the Court were to conclude that there was insufficient evidence to establish the existence of an administrative practice, the pattern of repeated violations was still relevant. Where, as here, there was a pattern of politically motivated restrictions on freedom of expression and association, the absence of any clear remedy, or any previous instances of such a remedy being applied for or granted, was plainly relevant to the determination of whether the respondent Government had demonstrated that the suggested remedies were available in practice and had reasonable prospects of success (see *Akdivar and Others*, cited above).

(vi) The courts of the "TRNC" were neither independent nor impartial when called upon to determine political disputes or disputes involving supporters or opponents of the "TRNC".

2. The Court's assessment

28. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies which are available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought

subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Akdivar and Others*, cited above, p. 1210, §§ 65-67).

29. It is incumbent on the respondent Government claiming non-exhaustion to indicate to the Court with sufficient clarity the remedies to which the applicant has not had recourse and to satisfy the Court that the remedies were effective and available in theory and in practice at the relevant time, that is to say that they were accessible, were capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Akdivar and Others*, cited above, p. 1211, § 68, and *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 77, § 35).

30. As regards the application of Article 35 § 1 to the facts of the present case, the Court firstly observes that in paragraph 102 of its judgment of 10 May 2001 in *Cyprus v. Turkey* it held that, for the purposes of former Article 26 (current Article 35 § 1), remedies available in the "TRNC" may be regarded as "domestic remedies" of the respondent State and that the question of their effectiveness is to be considered in the specific circumstances where it arises. In this connection Court considers, as it did in the above judgment, that the reliance by the applicant and the Cypriot Government on the illegality of the "TRNC" courts seems to contradict the assertion they make that Turkey is responsible for the violations alleged in northern Cyprus – an assertion which has been accepted by the Court (see paragraphs 21-23 above). In particular the Court stated the following in *Cyprus v. Turkey*:

> "101. ... It appears ... difficult to admit that a State is made responsible for the acts occurring in a territory unlawfully occupied and administered by it and to deny that State the opportunity to try to avoid such responsibility by correcting the wrongs imputable to it in its courts. To allow that opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimisation of a regime which is unlawful under international law."

31. The Court also notes that the same contradiction arises between the alleged unlawfulness of the institutions set up by the "TRNC" and the argument of the applicant and the Cypriot Government, to be examined at a later stage (see paragraphs 70-74 below), that there has been a breach of Article 13 of the Convention: it cannot be asserted, on the one hand, that there has been a violation of that Article because a State has not provided a remedy while asserting on the other hand that any such remedy, if provided, would be null and void (see *Cyprus v. Turkey*, cited above, § 101).

32. As regards the possible remedies cited by the respondent Government, the Court considers that the latter's assertions cannot suffice to justify the objection they have raised at this stage of the proceedings. In their submissions to the Court the respondent Government referred to a number of constitutional provisions with emphasis, firstly, on the judicial review of administrative acts, decisions and omissions of any body, authority or person exercising administrative or executive power; secondly, on the possibility of recourse to the High Administrative Court in the event of failure by the authorities of the "TRNC" to reply to an individual petition within the time allowed; and, thirdly, on the submission of a complaint to the Attorney-General. The Court notes that the respondent Government's submissions regarding this point are very general. The respondent Government have not shown that any of the remedies cited would have afforded redress in any way whatsoever to the applicant. Moreover, the Court does not consider that a remedy before the administrative courts can be regarded as adequate and sufficient in respect of the applicant's complaints, since it is not satisfied that a determination can be made in the course of such proceedings concerning the refusal of the permits at the "green line". The same applies to the submission of complaints to the Attorney-General of the "TRNC".

33. Furthermore, the submission by the respondent Government of a list of various cases brought by Turkish Cypriots before the "TRNC" courts does not affect the Court's conclusions in the above paragraphs. The Court notes in this connection that there is no similarity between the present proceedings and those cases as none of them concerned allegations of refusal by the authorities of the "TRNC" to grant permits to Turkish Cypriots to cross the "green line" into southern Cyprus.

34. Finally, the Court also notes the decision of the Commission in *Cyprus v. Turkey* (Commission's report cited above, § 264) in which the Commission noted that entry regulations into the "TRNC" and the principles of implementation are based on decisions of the Council of Ministers of the "TRNC" and are not subject to any judicial review. The Commission was referring to the entry into or exit from the "TRNC" of Greek Cypriots and not to the exit from (and entry into) the "TRNC" of Turkish Cypriots, as in the instant case. The respondent Government stated that the body taking the decision as to whether a permit will be granted is the Ministry of Foreign Affairs and Defence of the "TRNC". In that respect, it seems that a distinction exists between the two situations. The respondent Government have not clarified this point in their submissions. However, the Court considers that it is not necessary to examine the point in the present case.

35. It reiterates that it is not for the Convention bodies to cure of their own motion any shortcomings or lack of precision in the respondent

Government's arguments (see *Stran Greek Refineries and Stratis Andreadis*, cited above).

36. Accordingly, the Court concludes that, in the absence of convincing explanations from the respondent Government and in the light of all the above, the application cannot be rejected for failure to exhaust domestic remedies. The Court thus dismisses the respondent Government's objection on that point. In view of this conclusion, the Court considers that it is not necessary to address the issue of administrative practice.

37. The Court would emphasise, in accordance with its judgment in *Cyprus v. Turkey*, that its ruling is confined to the particular circumstances of the present case. It is not to be interpreted as a general statement that remedies are ineffective in the "TRNC" or that applicants are absolved from the obligation under Article 35 § 1 to have normal recourse to the remedies that are available and functioning. It is only in circumstances such as those which have been shown to exist in the present case that it accepts that applicants may apply to the Court for a remedy in respect of their grievances without having made any attempt to seek redress before the local courts.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicant complained that the refusals by the Turkish and Turkish-Cypriot authorities to allow him to cross the "green line" in order to participate in bi-communal meetings had prevented him from exercising his right to freedom of expression, including the freedom to hold opinions and ideas and to receive and impart information, as guaranteed by Article 10 of the Convention, which reads as follows:

> "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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

39. The Court notes that the issue of freedom of expression cannot in the present case be separated from that of freedom of assembly. The protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention (see *Ezelin v. France*, judgment of 26 April 1991, Series A

no. 202, p. 20, § 37). Thus, observing that the applicant's grievances relate mainly to alleged refusals of the "TRNC" authorities to grant him permits to cross over the "green line" and meet with Greek Cypriots, the Court considers that Article 11 of the Convention takes precedence as the *lex specialis* for assemblies, so that it is unnecessary to examine the issue under Article 10 separately. The Court will, however, have regard to Article 10 when examining and interpreting Article 11.

III. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

40. The applicant complained that the refusals by the Turkish and Turkish-Cypriot authorities to allow him to cross the "green line" in order to participate in bi-communal meetings had prevented him from exercising his right to freedom of assembly and association with Greek Cypriots in breach of Article 11 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Submissions before the Court

1. The respondent Government

41. The respondent Government submitted that the complaints of the applicant related in essence to freedom of movement, guaranteed under Article 2 of Protocol No. 4 to the Convention, which Turkey had not ratified. Accordingly, the respondent Government maintained that the intention of the applicant was to circumvent this legal impediment by attempting to dress up the complaints in the form of a violation of Articles 10 and 11 of the Convention.

42. Furthermore, the respondent Government pointed out that *Loizidou* was distinguishable from the present case in that the applicant was in essence able to exercise his rights under the above-mentioned provisions. His alleged inability to visit southern Cyprus on the few occasions during the period in respect of which this application had been found admissible had not in any way affected his Convention rights. On the contrary, they

contended that during the period in question the applicant had been able to attend a number of gatherings in southern Cyprus.

43. The respondent Government claimed that, although the Commission had acknowledged that limitations on freedom of movement, whether arising from a person's deprivation of liberty or from the status of a particular area, might indirectly affect other matters, this did not mean that deprivation of liberty or restriction of access to a certain area interfered directly with any other right protected under the Convention (see *15 foreign students v. the United Kingdom*, nos. 7671/76 etc., Commission decision of 19 May 1977, DR 9, p. 185).

44. Moreover they maintained that it was not possible to characterise the gatherings mentioned by the applicant, such as exhibitions, festivals, concerts, fairs and receptions, as "assembly" under Article 11 of the Convention. This provision, the Government submitted, did not include gatherings for purposes of entertainment, or such occasions where people come together to share, or enjoy, the company of others. In this context, the Government pointed out that the applicant's arguments were based on a concept of "association" in the sense of the mere possibility for people to come together without necessarily doing so in an organised form, and did not relate to any specific interference with attempts by the applicant to form an association, in the sense of an organisational structure, with Greek Cypriots. They stated that the Movement for an Independent and Federal Cyprus, of which the applicant was the Turkish-Cypriot coordinator, had been formed without any interference by the Turkish-Cypriot authorities. Additionally, nearly all the instances mentioned by the applicant of his inability to visit southern Cyprus were not in any way connected with the activities of the above-mentioned association.

45. Finally, the respondent Government contended that, in any event, the exercise of the rights asserted by the applicant was subject to the restrictions permitted under Article 11 § 2 of the Convention.

2. The applicant

46. The applicant disputed the arguments of the respondent Government. He submitted that his complaints had not focused in practice or in theory upon freedom of movement as such. It was the inability to engage in peaceful discourse and intercourse, to pursue the basic democratic rights of receiving and imparting "information and ideas with those on the island of Cyprus who shared his aims of a peaceful and friendly resolution of the problems of that island without interference by public authority and regardless of frontiers" that lay at the heart of his application. In the circumstances of the current situation in Cyprus, he felt that it was only by meetings between Turkish and Greek Cypriots that ideas for a peaceful political settlement could be truly imparted, received and exchanged. However, he stated that such meetings could not be held in northern Cyprus

and meetings of equivalent range and quality could not be organised anywhere other than in southern Cyprus. Thus, the lack of a proper system to regulate crossing from north to south and the arbitrary and erratic way in which he alleged he had been prevented from attending various relevant meetings in the south had substantially and adversely affected his Convention rights to freedom of assembly and association as well as expression.

47. The applicant stated that in this context the element of "movement" was purely a by-product of the essential rights in question. He argued that his case was analogous in this respect to that in *Loizidou*, where the issue of freedom of movement was considered by the Court to be a peripheral aspect of the core complaint concerning the right to property. Furthermore, he noted that *15 foreign students* (cited above), referred to by the respondent Government in their submissions, was not relevant to the present application or appropriate since that case did not concern freedom of movement.

48. Moreover, it was submitted by the applicant that, although the case-law to date on the interpretation of the term "assembly" was not extensive and had focused on demonstrations, Article 11 of the Convention covered the right of persons to gather together in order to further their common interests in a peaceful manner, whether in public or private meetings (see *Rassemblement jurassien and Unité jurassienne v. Switzerland*, no. 8191/78, Commission decision of 10 October 1979, DR 17, p. 93). In this sense, the applicant stated, the actions in relation to him fell within the framework of Article 11 and constituted a violation of its provisions. The activities complained of had had the effect as well as the intention of severely disrupting the possibility afforded by peaceful assembly of furthering attempts at mutual reconciliation and peaceful settlement of a grievous situation in Cyprus. He maintained that the essence of the various meetings held had been to bring together Turkish and Greek Cypriots with the intention of working towards such goals. The actions complained of had resulted in great difficulty in ensuring Turkish-Cypriot participation in such endeavours. The applicant distinguished *Cyprus v. Turkey* from his own case since the conclusions of the Court in that case under Article 11 of the Convention with regard to Turkish Cypriots had referred to the position of Turkish Cypriots in general and not to the position of a specific person or persons.

49. In relation to freedom of association the applicant stated that the minimum organisation and stability tests required were fulfilled by the Movement for an Independent and Federal Cyprus.

50. The applicant contended that he was not aware of any relevant law regulating the matters of which he complained and that there was no legal protection against arbitrary interference by the public authorities with his rights. In this connection he argued that the respondent Government had made no effort at all to indicate the grounds on which such interference

might have been justified, nor had they shown it to be necessary in a democratic society.

51. Finally the applicant maintained that, in accordance with the principle of protection from arbitrariness in the exercise of authority, the respondent Government, once aware of complaints about the violations of Article 11 of the Convention, were obliged to conduct a prompt and effective investigation (see *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, pp. 1184-85, §§ 122, 124, and pp. 1187-88, §§ 133-34, and *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159 and 3163, §§ 115 and 123). According to the applicant, failure to do this exacerbated the violations and constituted a further distinct violation of Article 11.

3. The Cypriot Government

52. The Cypriot Government disputed the arguments of the respondent Government. They maintained that the non-ratification by the respondent Government of Protocol No. 4 to the Convention had no bearing on the applicant's complaint that the restrictions imposed on his freedom to travel to the south infringed his rights under Articles 10 and 11 of the Convention. In support of this argument, the Cypriot Government stated that the Court had held on a number of occasions that the fact that the subject matter of a particular complaint was addressed in an optional Protocol which the State concerned had not ratified did not prevent consideration of the complaint under a provision of the Convention itself (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 24 April 1985, Series A no. 94, and *Guzzardi v. Italy*, judgment of 2 October 1980, Series A no. 39). They also referred to the conclusions of the Court in *Loizidou* and the findings of both the Commission and the Court in relation to the position of the Karpas Greek Cypriots in *Cyprus v. Turkey*.

53. Finally, the Cypriot Government maintained that the respondent Government had not justified the interference with the applicant's rights and had thus failed to demonstrate that the measures taken in the present case met the test established in Article 11 § 2 of the Convention.

B. The Court's assessment

1. Preliminary remark

54. The Court first observes that the applicant's complaint under Article 11 of the Convention is not limited to the question of freedom of movement, that is, to physical access to the southern part of Cyprus. His complaint, as set out in his submissions, is that the authorities, by constantly refusing to grant him permits to cross the “green line”, have effectively

prevented him from meeting Greek Cypriots and from participating in bi-communal meetings, thus affecting his right to freedom of assembly and association, contrary to Article 11 of the Convention. It is this complaint, as formulated above, that was addressed by the applicant as well as the Turkish and the Cypriot Governments in their submissions to the Court. In this connection the Court also refers to its findings and reasoning in *Loizidou* (merits), rejecting similar arguments raised by the respondent Government regarding freedom of movement (judgment cited above, p. 2237, §§ 60-63).

55. Seen in the above light the Court cannot accept the characterisation of the applicant's complaint as being limited to the right to freedom of movement. Article 11 of the Convention is thus applicable.

2. General principles

56. The Court observes at the outset that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively (see *G. v. Germany*, no. 13079/87, Commission decision of 6 March 1989, DR 60, p. 256; *Rassemblement jurassien and Unité jurassienne*, cited above, p. 93; and *Rai and Others v. the United Kingdom,* no. 25522/94, Commission decision of 6 April 1995, DR 81-A, p. 146). As such this right covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly (*Rassemblement jurassien and Unité jurassienne*, cited above, p. 119, and *Christians against Racism and Fascism v. the United Kingdom*, no. 8440/78, Commission decision of 16 July 1980, DR 21, p. 138, at p. 148).

57. The Court notes in addition that States must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right (see *Ezelin*, cited above). Lastly, the Court considers that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights (see *Christians against Racism and Facism*, cited above, p. 148).

3. Application of the above principles to the instant case

58. In the present case, the Court points out that the Commission, in its admissibility decision of 14 April 1998, declared admissible only the part of the application which related to the period after 8 March 1992. The Court's jurisdiction *ratione temporis* only permits it to consider the period from the above date until 14 April 1998, the latter being the date of the admissibility decision, that is, a period of six years and one month. Thus, alleged

violations of Convention rights not occurring within this period are outside the scope of the present judgment.

59. The Court observes that during the above period the respondent Government refused to grant permits to the applicant on a substantial number of occasions. Although the applicant was allowed to cross over the "green line" and attend some meetings, these were very few in comparison with the number of times he was not permitted to cross over. In particular, during the period under consideration, only six out of forty-six requests were granted. The Court notes that in some of these instances permits were granted to other persons who had submitted requests, but not to the applicant. In this connection the Court also reiterates its findings in *Cyprus v. Turkey* in relation to the rigorous approach taken by the "TRNC" authorities to bi-communal contacts after the second half of 1996 by the imposition of restrictions and, indeed, prohibitions (§§ 368-69). In the instant case, between 2 February 1996 and 14 April 1998, the applicant was refused a permit every time he requested to cross over to southern Cyprus for the purpose of attending bi-communal meetings (ten in total).

60. The Court considers that, despite the varied nature of the meetings the applicant wished to attend, they all shared a core characteristic: they were bi-communal. Thus, irrespective of the form they took and by whom they were organised, their aim was the same, namely, to bring into contact Turkish Cypriots living in the north and Greek Cypriots living in the south with a view to engaging in dialogue and exchanging ideas and opinions with the hope of securing peace on the island. In the light of this objective, whether or not the applicant was to participate in these meetings as the Turkish-Cypriot coordinator of the Movement for an Independent and Federal Cyprus is irrelevant for determining the question of freedom of assembly, given the ambit of the right guaranteed by Article 11 of the Convention.

61. In view of the above, the Court considers that the refusals to grant permits to the applicant in order to cross into southern Cyprus in effect barred his participation in bi-communal meetings there, preventing him consequently from engaging in peaceful assembly with people from both communities. In this connection the Court observes that hindrance can amount to a violation of the Convention just like a legal impediment (see *Loizidou* (merits), cited above, p. 2237, § 63).

62. Accordingly, the Court concludes that there has been an interference with the applicant's right to the freedom of peaceful assembly guaranteed by Article 11 of the Convention.

63. Such an interference gives rise to a breach of this provision unless it can be shown that it was "prescribed by law", pursued one or more legitimate aims as defined in paragraph 2, and was "necessary in a democratic society".

64. It must first be examined whether the restriction complained of was "prescribed by law".

65. The Court reiterates that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A rule cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, for example, *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).

66. In the present case the respondent Government did not refer to any law or measures in the "TRNC" regulating the issuance of permits to Turkish Cypriots living in northern Cyprus to cross the "green line" into southern Cyprus for the purposes of attending bi-communal meetings. Furthermore, they did not provide any indication as to when refusal of such permits is allowed.

67. The task of the Court is only to assess the circumstances of the individual case before it. The Court concludes that there seems to be no law applicable in the present case regulating the issuance of permits to Turkish Cypriots living in northern Cyprus to cross the "green line" into southern Cyprus in order to engage in peaceful assembly with Greek Cypriots. Therefore, the manner in which restrictions were imposed on the applicant's exercise of his freedom of assembly was not "prescribed by law" within the meaning of Article 11 § 2 of the Convention.

68. In the light of the above the Court does not consider it necessary to examine whether the other requirements laid down by Article 11 § 2 of the Convention were satisfied. Further, in view of the above, the Court does not consider it necessary to address the issue of freedom of association.

69. Accordingly, the Court concludes that there has been a violation of Article 11 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

70. The applicant complained that no effective domestic remedy existed with regard to the violations of Articles 10 and 11 of the Convention, in breach of Article 13 thereof, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

71. The respondent Government stated that the allegations of the applicant under Article 13 were closely related to the issue of domestic remedies and thus their submissions in relation to the existence of effective and practical remedies within the "TRNC" available to the applicant were

also applicable with regard to this provision. In addition they submitted that, as decided by the Commission in *Chrysostomos and Papachrysostomou*, cited above, the applicant could not complain under Article 13 once he had chosen not to avail himself of existing available and effective remedies.

72. The applicant and the Cypriot Government reaffirmed their arguments in relation to the issue of domestic remedies and submitted that these were also applicable with regard to the question of effective remedies under Article 13 of the Convention.

73. The Court observes that, as regards the possible remedies cited by the respondent Government, they have not put forward any example showing their use in a case similar to the present one (see *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, Series A no. 302, p. 20, § 53). They have therefore failed to show that such remedies would have been effective.

74. It follows that there has been a violation of Article 13 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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."

76. The applicant submitted that he had suffered considerably as a direct result of his long-running attempt to enforce his freedoms of expression and assembly within the context of seeking peace in Cyprus by way of an agreement between the two communities.

A. Damage

1. Pecuniary damage

77. The applicant claimed damages in respect of pecuniary loss for which he gave no figure. He submitted that the delay in the consideration of his case had prevented him from obtaining a job in Nicosia, in the southern part of Cyprus, while the continuing lack of resolution of the issues in question had grievously affected his ability to secure a living in the north. He claimed that he had been prevented from attending further meetings and that his whole professional and financial situation had been seriously affected.

78. The respondent Government did not address the applicant's claim.

79. The Court considers that the applicant has not adduced any proof in support of the above claims. He has not shown that the delay in the consideration of his case has affected his ability to earn his living in northern Cyprus or that he has been prevented at any time from securing employment in southern Cyprus.

80. Therefore, the Court does not find any causal link between the matter found to constitute a violation of the Convention and the pecuniary damage allegedly sustained by the applicant. In accordance with the principles of its case-law, it rejects the entirety of the applicant's claim under this head (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV).

2. Non-pecuniary damage

81. The applicant claimed compensation for non-pecuniary damage in the sum of 50,000 pounds sterling (GBP) for prolonged anxiety, frustration and stress over an extended and continuing period. He contended that the above damage constituted a direct consequence of the actions and omissions for which the respondent State was responsible under the Convention.

82. The respondent Government did not address the applicant's claim.

83. The Court considers that the applicant must have suffered from a feeling of helplessness and frustration in the face of the continuous refusals by the authorities for over six years to grant him permits to cross over into southern Cyprus and participate in bi-communal meetings. The Court considers that this cannot be compensated solely by the findings of violations.

84. Accordingly, the Court, having regard to the nature of the case and deciding on an equitable basis, awards the applicant the sum of 15,000 euros (EUR), which it considers would represent fair compensation for the non-pecuniary damage sustained.

B. Costs and expenses

85. The applicant also claimed a total of GBP 6,175 for legal costs and expenses.

86. The Court is not satisfied that all the costs and expenses claimed under this head were necessarily incurred and are reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). Further, the Court notes that the applicant was granted legal aid. Therefore, it considers it appropriate to award the applicant the sum of EUR 4,715.

C. Default interest

87. The Court considers that the default interest should be fixed at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* by six votes to one the Government's preliminary objections;

2. *Holds* unanimously that it is not necessary to examine separately the applicant's complaint under Article 10 of the Convention;

3. *Holds* by six votes to one that there has been a violation of Article 11 of the Convention;

4. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;

5. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 4,715 (four thousand seven hundred and fifteen euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (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;

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

Done in English, and notified in writing on 20 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Lucius CAFLISCH
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

L.C.
V.B.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my great regret, I cannot agree with the majority's opinion and reasoning or with their conclusions in the present case, for the following reasons.

1. On the island of Cyprus two communities – the Turkish community and the Greek community – once lived and still live side by side, on an equal footing, but not always on very good terms, it must be admitted.

2. It will be remembered that the fateful day as far as the Cypriot "affair" or "crisis" is concerned was 15 July 1974. That was the date of the *coup d'état* organised by the Greek colonels with the intention of annexing the island to Greece (enosis). The head of State, Archbishop Makarios, fled the country and asked for assistance from the UN Security Council.

3. Following the *coup d'état*, whose declared aim was to put an end to the Cypriot State's existence, Turkey intervened alone (in view of the indifference of the other two guarantor States) to save the Republic; the intervention was based on the guarantee agreement between three States (the United Kingdom, Greece and Turkey), which gave them the right to intervene, separately or jointly, if the situation so required. It was therefore effected in implementation of a clause in an international instrument.

4. The above-mentioned events considerably altered the existing political situation and led to the separation of the two communities and division of the island (the southern part, Greek, and the northern part, Turkish). I must add that this separation had already been perceptible since 1963. With the situation deteriorating day by day, the buffer-zone had been set up and the UN forces interposed as far back as 1964.

Subsequently, the "green line" – or demarcation line – was drawn between the south and north of the island, under the protection and surveillance of the UN forces. The population exchange was agreed between the Turkish authorities and the Greek authorities.

5. First, a few particulars to clarify the status of the buffer-zone and the "green line". In his report of 7 December 1989 – Security Council document S/21010 – on the UN operation in Cyprus the Secretary-General of the United Nations made the following observations about a demonstration on the demarcation line on 19 July 1989:

> "In the evening of 19 July, some 1,000 Greek Cypriot demonstrators ... forced their way into the United Nations buffer-zone in the ... area of Nicosia. The demonstrators broke through a wire barrier maintained by UNFICYP and destroyed a UNFICYP observation post. They then broke through the line formed by UNFICYP soldiers and entered a former school complex where UNFICYP reinforcements regrouped to prevent them from proceeding further ..."

The Secretary-General continued:

> "The events described above created considerable tension in the island and intensive efforts were made, both at United Nations Headquarters and at Nicosia, to contain and resolve the situation. On 21 July, I expressed my concern at the events that had taken place and stressed that it was vital that all parties keep in mind the purpose of the United Nations buffer-zone as well as their responsibility to ensure that that area was not violated. The President of the Security Council ... also stressed the need strictly to respect the ... buffer-zone." (See *Chrysostomos and Papachrysostomou v. Turkey*, nos. 15299/89 and 15300/89, Commission's report of 8 July 1993, Decisions and Reports (DR) 86-A, pp. 12-14, § 42; see also *Loizidou v. Turkey* (preliminary objections), no. 15318/89, judgment of 23 March 1995, Series A no. 310, opinion of the Commission, pp. 50-54, §§ 76 et seq.)

6. That means that freedom of movement between northern and southern Cyprus ceased to be possible in July 1974 and that the impossibility is not imputable to Turkey alone or to the Turkish Republic of Northern Cyprus (the "TRNC"). In a way, it is the international community (the United Nations) which has taken on the responsibility of ensuring respect for the "green" demarcation line.

The division of Cyprus was not an arbitrary act due to Turkey's intervention but an act which was the result and consequence of an agreement between the two communities (Turkish and Greek) in Vienna on 31 July and 2 August 1975. That agreement is applied, as we have just seen, under UN supervision. Two subsequent agreements, in 1977 and 1979, advocated a bi-zonal solution and provided that each community would be responsible for the administration of its own territory. Questions of freedom of movement, place of residence, etc., were settled under the bi-zonal and bi-communal system.

My *first conclusion* is that although the "TRNC" is not recognised by the international community, the buffer-zone and the "green" demarcation line are, and they must be respected according to the needs and circumstances of the time. Another paragraph taken from *Loizidou* (opinion of the Commission cited above) eloquently makes that point:

> "82. The Commission finds that it is not in this connection required to examine the status of the 'Turkish Republic of Northern Cyprus'. It notes that the demonstration on 19 March 1989, in the course of which the applicant was arrested in northern Cyprus, constituted a violation of the arrangements concerning the respect of the buffer-zone in Cyprus... The provisions under which the applicant was arrested and detained ... served to protect this very area. This cannot be considered as arbitrary.
>
> 83. The Commission therefore finds that the applicant's arrest and detention were justified under Article 5 § 1 (f), as applied to the regime created in Cyprus by international agreements concerning the buffer-zone."

The terms "buffer-zone" and "green line" therefore do not mean "public green space" or "English garden"; they are not a "park" that one can walk through as one wishes to meet one's friends nor are they a "sports field".

7. We must bear in mind the very marked political colouring of the instant case. A court must, of course, concentrate on the legal aspect of the case before it; but it cannot always entirely avoid being caught up in political situations and taking them as the "facts of the case". International law tends to take into account historical and political situations as relevant and valid "facts", even if they are the outcome of illegal acts. Before 1989 the tendency in international law was not to go back further than one generation; at present the perspective has changed and the past is probed as far back as possible to reach the original illegality (as was the case with events in the Balkans).

8. The northern part of Cyprus is not a black hole. There is a socially and politically organised, democratic and independent community there, with its own legal system; the name and classification we give it are of no import. Can one deny the political existence of Taiwan?

In fact, in its report in *Chrysostomos and Papachrysostomou* and its opinion in *Loizidou* (both cited above), the European Commission of Human Rights examined the applicants' complaints (concerning the lawfulness of detention, peaceful enjoyment of possessions, etc.) from the standpoint of the law in force in northern Cyprus as such (see paragraphs 148-49 and 174, and paragraphs 76-79 respectively). Here is what the Commission said in its opinion in *Loizidou*:

> "76. The Commission has examined whether the applicant was deprived of her liberty 'in accordance with a procedure prescribed by law', as required by Article 5 § 1. It recalls that, on the question whether an arrest is 'lawful', including whether it complies with 'a procedure prescribed by law', the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. ...
>
> 77. As regards domestic law in [northern] Cyprus, the Commission notes that, under Chapter 155, section 14(1), sub-paragraphs (b) and (c) of the Criminal Procedure Law ..., any police officer may, without warrant, arrest any person who commits in his presence [an] offence...
>
> 78. The Commission further notes that the applicant, having crossed the buffer-zone, was arrested in northern Cyprus by Turkish Cypriot policemen ...
>
> 79. Having regard to the above elements, the Commission finds that the arrest and detention of the applicant in [northern] Cyprus, by police officers acting under Chapter 155, section 14, of the Criminal Procedure Law, took place 'in accordance with a procedure prescribed by law', as required by Article 5 § 1 of the Convention."

9. As Judge Baka said in his dissenting opinion in *Loizidou v. Turkey* (merits) (judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI):

> "... Article 159 of the 'TRNC' Constitution and certain other legal provisions cannot be completely set to one side as devoid of all effect merely on the basis of the international non-recognition of the entity in northern Cyprus."

Moreover, the Court itself, in paragraph 45 of *Loizidou* (merits), noted:

> "[I]nternational law recognises the legitimacy of certain legal arrangements and transactions in such a situation [international non-recognition of the 'TRNC', for instance as regards the registration of births, deaths and marriages, 'the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory' (see, in this context, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] International Court of Justice Reports 16, p. 56, §. 125)."

Would it not be pertinent to enquire whether non-attribution of "legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely" (see paragraph 44 of *Loizidou* (merits)) would not amount to ignoring the effects "only to the detriment of the inhabitants of the [t]erritory", to use the words quoted by the Court in paragraph 45 of the same judgment? Especially when it is remembered that tens of thousands of Turkish Cypriots were displaced from southern to northern Cyprus after the Vienna agreements.

10. That is why the Court was careful to emphasise, in connection with the exhaustion of remedies in the present case, that "its ruling is confined to the particular circumstances of the present case. It is not to be interpreted as a general statement that remedies are ineffective in the 'TRNC' or that applicants are absolved from the obligation under Article 35 § 1 to have normal recourse to the remedies that are available and functioning" (see paragraph 37 of the present judgment).

11. In the present case the majority dismissed the respondent Government's preliminary objection of inadmissibility for non-exhaustion of domestic remedies, in particular because they were unable to prove to the Court that there had been cases similar to this one. Are the respondent Government responsible for the fact that before the proceedings instituted by the applicant no action had been brought before the national authorities to secure recognition, through a decision, of a right allegedly held under the Convention?

12. I feel I must emphasise once more that northern Cyprus is not a vacuum. Notwithstanding its international situation, its provides for all the needs of its inhabitants. The judicial authorities, in particular, discharge their duties there as in any other State. They try the cases submitted to them, which may be brought before them both by nationals of the country and by aliens, notably by British companies.

13. My *second conclusion* is that this case should have been declared inadmissible for failure to exhaust domestic remedies, as the Convention requires. That being so, the complaint concerning Article 13 also falls.

14. Lastly, this case is not about either freedom of expression or freedom of association. Moreover, the applicant has expressed his opinion both in his writings and publications and through his application to the Commission.

He may, if he wishes, gain access to southern Cyprus otherwise than by crossing the "green line". He was prevented from crossing the "green line" and the buffer-zone not just by the authorities of the respondent Government but pursuant to international agreements enforced in the first place by the UN forces, and by the Turkish-Cypriot forces in the north and Greek-Cypriot forces in the south.

15. In truth, the present case is purely and simply about freedom of movement. But that freedom is not absolute. In public international law there is no general right to cross a State border or demarcation line to gain access to this or that property or to meet associates or friends in the name of freedom of association. I refer in that connection to what Judges Bernhardt and Lopes Rocha said in their dissenting opinion in *Loizidou* (merits), concerning access to immovable property: "The case of Mrs Loizidou is not the consequence of an individual act of Turkish troops directed against her property or her freedom of movement, but it is the consequence of the establishment of the borderline in 1974 and its closure up to the present day." Mr Djavit An's case was the result of the same closure of the same borderline.

16. I will close my remarks on the present judgment with a reference, *mutatis mutandis*, to the conclusions of the European Commission of Human Rights in *Loizidou* (opinion of the Commission, cited above):

> "97. The Commission considers that a distinction must be made between claims concerning the peaceful enjoyment of one's possessions and claims of freedom of movement. It notes that the applicant, who was arrested after having crossed the buffer-zone in Cyprus in the course of a demonstration, claims the right freely to move on the island of Cyprus, irrespective of the buffer-zone and its control, and bases this claim on the statement that she owns property in the north of Cyprus.
>
> 98. The Commission acknowledges that limitations of the freedom of movement – whether resulting from a person's deprivation of liberty or from the status of a particular area – may indirectly affect other matters, such as access to property. But this does not mean that a deprivation of liberty, or restriction of access to a certain area, interferes directly with the right protected by Article 1 of Protocol No. 1. In other words, the right to the peaceful enjoyment of one's possessions does not include, as a corollary, the right to freedom of movement (see, *mutatis mutandis*, applications nos. 7671/76 etc., 15 foreign students v. the United Kingdom, decision of 19 May 1977, DR 9, p. 185, at pp. 186 ff.).
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> 99. The Commission therefore finds that the applicant's claim of free access to the north of Cyprus, which has been examined above (at paragraphs 81 ff.) under Article 5 of the Convention, cannot be based on her alleged ownership of property in the northern part of the island.
>
> 100. It follows that it discloses no issue under Article 1 of Protocol No. 1.
>
> ...

101. The Commission concludes ... that there has been no violation of Article 1 of Protocol No. 1 to the Convention."

17. My *third conclusion* is that just as a person in police custody or detention pending trial cannot claim to be the victim of an infringement of his right to respect for his family life (Article 8) or his freedom of association (Article 11) on account of the fact that it is impossible for him to participate in a meeting of the association to which he belongs, so in the present case it cannot be considered that there has been a violation of Article 11 of the Convention as regards the applicant.