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Introductory Note to the European Court of Human Rights (GC): Şahin v. Turkey

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INTRODUCTORY NOTE TO THE EUROPEAN COURT OF HUMAN RIGHTS (GC): ŞAHİN v. TURKEY
BY CHRIS JENKS*
[October 20, 2011]
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Introduction

The Grand Chamber of European Court of Human Rights in *Şahin v. Turkey*¹ considered whether disparate outcomes from different court systems of the same state evaluating the same set of facts constituted a violation of the European Convention's right to a fair hearing.² In a closely contested opinion, the Court found there was no violation of the Convention.

The case requires detailed discussion of two different Turkish court systems, thus yielding an outcome that on its face may be mistaken for having narrow application. While the micro-level Turkish procedural discussion is required, the *Şahin* case also provides broader, macro lessons on the legitimacy of military court decisions and limitations on the Court's role writ large.

Background

The case stems from the efforts of Nejdett and Perihan Şahin to supplement their state pension following the death of their son, a Turkish army pilot who died in 2001 when his plane, which was transporting Turkish troops, crashed for unknown reasons. Everyone on board, thirty-four Turkish service members in total, perished in the crash. While the plane crash occurred in Turkey, because the troops being transported were engaged in counterterrorism operations, the parents argued they were eligible to receive additional pension monies under Turkey's Anti-Terrorism Act. The pension fund authority disagreed, and the parents appealed to the Ankara Administrative Court ("Administrative Court"). The Administrative Court rejected their appeal as outside its jurisdiction, referring the parents to the Supreme Military Administrative Court ("Military Court"). The Military Court also rejected the parents' claim.

The parents appealed the Military Court's decision on the grounds that the Administrative Court, which had claimed no jurisdiction, had ruled in favor of additional pension requests submitted by family members of other Turkish service members killed in the same plane crash. Nonetheless, the Military Court rejected the parents' appeal. The parents then filed an application with the European Court of Human Rights ("European Court"), claiming that the disparate outcomes were in violation of Article 6 § 1 of the European Convention under which "everyone is entitled to a fair . . . hearing"³

After the Section Chamber held, six votes to one, that there had been no violation of the Convention, the parents appealed to the Grand Chamber, which, in a much closer decision, ten votes to seven, upheld the earlier judgment.

The case provided the Grand Chamber the opportunity to reiterate "that it is not its task to take place of the domestic courts." At least part of the rationale for that limitation was set forth in a brief section of the opinion, which addressed the differing court structures throughout Europe and the presence or absence of mechanisms to settle conflicts of law between domestic courts. The majority found that the case was one of first impression and that the issue was not the conflicting decisions of courts within the same branch of the state's judicial system, but the disparity "between the judgments of two hierarchically unrelated, different and independent types of courts."⁴

The case is interesting as the factual situations leading up to the differing Turkish court decisions were identical: family members of Turkish service members all killed in the same crash and making the same request for a pension increase under the provisions of the same law, the Anti-Terrorism Act.

While acknowledging the rarity of the same event being interpreted differently by domestic courts, the majority held that a "mere finding of a conflict of case-law is not sufficient in itself to constitute a violation of Article 6 of the Convention." Rather, the European Court concluded that the test was the impact of the conflicting case law in terms of a fair trial and the principle of legal certainty. The European Court agreed that jurisdiction properly

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lay with the Military Court and that the Military Court's decision was "duly reasoned," the resulting decision to deny the parents' pension increase request was deemed neither arbitrary nor unreasonable. That the European Court ruled that the Military Court provided a fair hearing under the Convention is significant in and of itself and helps further mark the boundaries of the Court's consideration of military courts.

Broadly speaking, the *Şahin* case stands in contrast to previous decisions that suggest the European Court is looking to expand its role. Instead, the Court goes to lengths to "avoid unjustified interference in the exercise by the States of their judicial functions" However, given how close the decision was, it remains to be seen how stark that contrast is in practice.

ENDNOTES

- 1 *Şahin v. Turkey*, App. No. 13279/05 (Eur. Ct. H.R. Oct. 20, 2011).
- 2 See European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.
- 3 The minority disputes that characterization, citing the "flagrant inconsistency within the same branch of the court system," referring to the Administrative Court (emphasis in original). Different chambers of the Administrative Court reached opposite conclusions on whether that court had jurisdiction to consider the various family members' claims.
- 4 For arguably the opposite boundary of the European Court's consideration of military processes, see *Al Skeini v. United Kingdom*, App. No. 55721/07 (Eur. Ct. H.R. July 7, 2011) (holding that British military investigations of the deaths of Iraqis killed by British troops did not comply with Article 2 of the Convention).

GRAND CHAMBER

CASE OF NEJDET ŞAHİN AND PERİHAN ŞAHİN v. TURKEY

(Application no. 13279/05)

JUDGMENT

STRASBOURG
20 October 2011

This judgment is final but may be subject to editorial revision.

In the case of Nejdet Şahin and Perihan Şahin v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:
Nicolas Bratza, *President*,

Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Christos Rozakis,
Corneliu Bîrsan,
Anatoly Kovler,
Elisabet Fura,
Ljiljana Mijović,
Egbert Myjer,
David Thór Björgvinsson,
George Nicolaou,
Luis López Guerra,
Nona Tsotsoria,
Ann Power-Forde,
İşıl Karakaş,
Guido Raimondi, *judges*,
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 9 March and 21 September 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 13279/05) 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 two Turkish nationals, Mr Nejdet Şahin and Mrs Perihan Şahin ("the applicants"), on 9 April 2005.
2. The applicants, who had been granted legal aid, were represented by Mr K. Karabulut, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by Mr M. Özmen, their co-Agent.
3. The applicants alleged that the proceedings before the domestic courts had been unfair because of the conflicting decisions delivered by the different courts (Article 6 § 1 of the Convention).

* This text was reproduced and reformatted from the text available at the European Court of Human Rights website (visited Mar. 26, 2012) <http://www.echr.coe.int/ECHR/EN/hudoc>.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 27 May 2010 it was declared admissible by a Chamber of that Section, composed of the following judges: Françoise Tulkens, Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Danute Jočienė, Dragoljub Popović, András Sajó, Işıl Karakaş, and also of Sally Dollé, Section Registrar, which found, by six votes to one, that there had been no violation of Article 6 § 1 of the Convention.

5. On 25 August 2010, the applicants requested that the case be referred to the Grand Chamber by virtue of Article 43 of the Convention and Rule 73. On 4 October 2010 the panel of the Grand Chamber accepted that request.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. As Jean-Paul Costa was unable to attend the second deliberations, Nicolas Bratza replaced him as President of the Grand Chamber, and Egbert Myjer, first substitute, became a full member (Rule 11). Corneliu Bîrsan, second substitute, replaced Kristina Pardalos, who was unable to attend.

7. The applicants, but not the Government, filed written observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 March 2011 (Rule 59 § 3).

There appeared before the Court:

– *for the Government*

Mr M. ÖZMEN, *Co-Agent*,
Mr K. ESENER,
Mr O. ÇİDEM,
Mr M. K. ERDEM,
Mr N. YAMALI,
Mr I. ERTÜZÜN,
Mrs F. SÖZEN,
Mrs İ. KOÇAYIĞIT,
Mrs A. ÖZDEMİR, *Advisers*.

– *for the applicants*

Mr K. KARABULUT, *Counsel*,
Mrs M. TUNCEL, *Assistant*.

The Court heard addresses by Mr Karabulut and Mr Özmen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1949 and 1950 respectively and live in Ankara.

10. Their son, an army pilot, died on 16 May 2001, when his plane crashed near the village of Malatya (Akçadağ / Güzyurdu) while transporting troops from Diyarbakır to Ankara. Thirty-three other servicemen died in the same accident, five of them also members of the plane's crew.

11. On 10 May 2002 the applicants applied, through their lawyer, to the Turkish Pension Fund Authority to award them the pension payable under section 21 of Law no. 3713, the Anti-Terrorism Act (hereinafter "Law no. 3713").

12. In a letter dated 23 May 2002 the Pension Fund Authority noted that the applicants had been awarded, *inter alia*, a monthly war disability pension under section 64 of Law no. 5434, as well as a lump sum equal to thirty times the highest salary of a public servant. It further noted that their son's death had not been caused by an act of terrorism within the meaning of Law no. 3713 but by the fact that, for an unknown reason, his plane had crashed. It was therefore not possible to increase their monthly invalidity pension to the level of the monthly

salary paid to an equivalent serving member of the military.

13. On 15 July 2002 the applicants appealed, through their lawyer, to the Ankara Administrative Court against that decision. They submitted, in particular, that their son had died while transporting troops engaged in the fight against terrorism from northern Iraq, so his death should be considered to have occurred in the context of the fight against the terrorism.

14. On 1 April 2003 the 4th Chamber of the Ankara Administrative Court rejected their appeal as being outside its jurisdiction, considering that it was rather a matter for the Supreme Military Administrative Court. Referring to a judgment of the Jurisdiction Disputes Court of 14 May 2001 (E.2000/77, K.2001/22), it held:

“... to determine whether the administrative act is ‘linked to military service’ and decide which court has jurisdiction, the object of the act must be examined. If the act was done in keeping with military requirements, procedure and practice, it must be considered to be linked to military service ... Whether or not a non-military authority was at the origin of the act is of no consequence – the Supreme Military Administrative Court is the Court responsible for examining a case [brought by] a member of the armed forces. In the present case the issue is an application for a monthly pension made by the claimants under Law no. 3713 ... To determine whether the claim falls within the scope of that Law, regard must be had to ... the purpose of the military service and the specificity of the locations where it is effected, as well as military aptitude, to show that the impugned act was done in keeping with military needs, procedure and practice.

Where this is the case ... it is for the Supreme Military Administrative Court to examine and resolve the dispute.

This was, moreover, the line of reasoning of the Jurisdiction Disputes Court’s decision no. E: 2000/77, K: 2001/22, published in the Official Gazette ... of 18.06.2001.”

15. On 3 June 2003 the applicants brought their case before the Supreme Military Administrative Court. In their statement of claim they included a decision adopted by the 10th Chamber of the Ankara Administrative Court on 22 January 2003 (E.2002/1059, K.2003/27) in what they considered a similar case (see paragraph 26 below).

16. On 10 June 2004 the Supreme Military Administrative Court rejected their claim. First of all, it observed that the applicants had been awarded a monthly war disability pension as well as a lump sum equal to thirty times the highest salary of a public servant, calculated in accordance with additional section 78 to Law no. 5434 and readjusted in accordance with Law no. 4567. It then noted that their request to have their monthly pension increased to the level of that paid to an equivalent serving member of the military had been rejected by the competent authorities. It pointed out that entitlement under section 21 of Law no. 3713 was restricted to cases where an agent of the State had been directly wounded, disabled or killed as a result of acts of terrorism. It considered that the mere fact that the victim had been employed in work connected with the fight against terrorism did not suffice. As the deceased had not been killed by an act of terrorism, the impugned administrative act was not unlawful.

17. One of the judges expressed a dissenting opinion in which he criticised such a restrictive interpretation of Law no. 3713. Pointing out that it was not disputed that the applicants’ son had died in a plane crash while co-piloting a plane carrying troops returning from an anti-terrorism operation, he considered that the crux of the matter was whether the death fell within the scope of section 21 of Law no. 3713. In his opinion, in view of the purpose of the deceased’s mission that provision was certainly applicable to the circumstances of the case.

18. On 6 July 2004 the applicants lodged an appeal against the judgment of the Supreme Military Administrative Court. In his pleadings their lawyer explained that in his submissions of 10 June 2004 and at the hearing before the Supreme Military Administrative Court the same day he had produced four decisions adopted by the ordinary administrative courts, namely the 6th, 10th and 11th Chambers of the Ankara Administrative Court, concerning applications similar to the applicants,” lodged by four families of servicemen who had died in the same accident as their son; in those decisions the Courts had found in favour of the claimants. He complained that the Supreme Military Administrative Court had made no reference to those cases, and argued that the solution adopted was contrary to the constitutional principles of equality before the law and consistency of the law.

19. In a judgment of 30 September 2004 the Supreme Military Administrative Court rejected the applicants' appeal as being ill-founded and found the impugned judgment to be in conformity with the law and the requisite procedure. That judgment was served on the applicants' lawyer. The postmark on the envelope was dated 11 October 2004.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Brief presentation of Turkey's court system

20. Turkey's judicial system breaks down into three categories: the ordinary courts, which include civil and criminal courts; the administrative courts and the military courts. These categories in turn break down into subdivisions according to the subject at issue. These three branches of courts are each headed by their own Supreme Court: the Court of Cassation for the ordinary law courts, the Supreme Administrative Court for the administrative courts and the Military Court of Cassation and the Supreme Military Administrative Court for military matters.

21. Under the provisions of Article 157 of the Constitution, the Supreme Military Administrative Court is the body which judicially examines at first and last instance disputes arising from administrative decisions and acts concerning either military personnel or military service, even where they emanate from non-military authorities. Where the dispute concerns compulsory military service, the interested party does not have to be a member of the military.

22. A special court called the Jurisdiction Disputes Court has the power to settle conflicts that may arise between the ordinary, administrative and military courts concerning their jurisdiction and decisions (Article 158 of the Constitution).

B. Relevant domestic law

23. Section 21 of Law no. 3713¹ of 12 April 1991 (the Anti-Terrorism Act) reads as follows:

“The provisions of Law no. 2330 on pecuniary compensation and monthly pension rights apply to public employees who are wounded or disabled, or die or are killed as a result of terrorist acts, in the performance of their duties, inside and outside the country, or, if they were no longer in active service, because of their [former] duties. ...”

24. The relevant provisions of Law no. 2247 of 12 June 1979 (which entered into force on 22 June 1979) on the creation and operation of the Jurisdiction Disputes Court, read as follows:

Section 10

“A conflict of jurisdiction is raised when the Principal State Counsel concerned asks the Jurisdiction Disputes Court to examine a question of jurisdiction following the rejection of an objection of lack of jurisdiction in a dispute before the ordinary, administrative or military courts ...”

Section 17

“There is a positive conflict of jurisdiction when cases in which the parties, subject and cause of action are the same are lodged with two different types of court – ordinary, administrative or military – and each court adopts a decision whereby it considers that it has jurisdiction to hear the case.”

Section 24

“There is conflict of judgments when the enforcement of a right is rendered impossible by a divergence between the final decisions adopted by at least two of the courts referred to in section 1, provided that those decisions concern the same subject and the same cause of action – but not matters of jurisdiction – and that at least one of the parties [to the case] is the same...”

Section 28

“The Jurisdiction Disputes Court immediately gives notice of all the conclusions reached in its

decisions to the various Principal State Counsel concerned, the court which applied to it to settle the conflict of jurisdiction, the court or courts awaiting its decision and the persons or bodies that requested settlement of the conflict. The courts concerned, as well as all the authorities, bodies and persons concerned, must abide by the decisions of the Jurisdiction Disputes Court and apply them without delay.”

Section 29

“The decisions of the sections and the full court are final. Decisions of principle and decisions of the sections deemed pertinent by the President shall be published in the Official Gazette.”

Section 30

“Conflicts between decisions of the sections of the Jurisdiction Disputes Court shall be settled by decisions of principle of the full court ... decisions of principle in matters of jurisdiction are binding on the Jurisdiction Disputes Court and all judicial bodies; decisions of principle on the substance delivered in cases of conflicting judgments are binding only on the Jurisdiction Disputes Court.”

C. Relevant domestic case-law and practice

1. *Judgments of the ordinary administrative courts and the Supreme Military Administrative Court*

25. Apart from the action brought by the applicants, seventeen actions under Law no. 3713 were brought before the domestic administrative courts by the families of victims of the plane crash of 16 May 2001 following the rejection of their claims by the Turkish Pension Fund.

In fourteen cases, four of which concerned close relatives of the plane's crew members, the appeals were heard by the Ankara Administrative Court, which ruled in favour of the victims' families. On 19 June 2002 (decision E.2002/87, K.2002/870), 22 January 2003 (decision E.2002/1059, K.2003/27), 31 March 2003 (decision E.2003/148, K.2003/522) and 26 June 2003 (decisions E.2002/100, K.2003/1073 and E.2002/101, K.2003/1053), 19 October 2004 (decisions E.2004/3051, K.2004/1535 and E.2004/3055, K.2004/1536), 6 and 14 October 2005 (decisions E.2005/1973, K.2005/1424 and E.2005/1743, K.2005/1011), 8 and 29 March 2006 (decisions E.2006/653, K.2006/594 and E.2006/678, K.2006/551), 27 September 2007 (E.2007/764, K.2007/1849) and 29 and 30 January 2008 (E.2008/82, K.2008/184 and E.2007/1491, K.2008/135), different chambers of the Ankara Administrative Court (the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 10th and 11th Chambers) adopted judgments in which they acknowledged that the circumstances of the plane crash fell within the scope of Law no. 3713.

26. In particular, on 22 January 2003 (decision E.2002/1059, K.2003/27), in response to an appeal to set aside the decision of the pension fund to refuse an application filed by the parents of the deceased pilot to receive the supplementary pension provided for in Law no. 3713, the 10th Chamber of the Ankara Administrative Court pronounced a judgment which included the following passages:

“... After examination of the file, [it appears] that ... the claimants' son was the pilot of the aircraft ... whose job it was to transport special troops on a mission against the separatist terrorist organisation PKK, together with their weapons and equipment, to the operation zone and also to take troops leaving that zone back to their units. ... He died on 16 May 2001, when his plane crashed during that mission. After the accident the claimants were awarded a monthly war disability pension under section 64 of Law no. 5434 ... Considering that their son's death fell within the scope of Law no. 3713, they applied for a monthly pension under that Law ... They brought the present action following the authorities' refusal of that application ...

Examination ... of the above-mentioned legal provisions and the case file reveals that the claimants' son was killed on 16 May 2001 when the aircraft in which he was transporting troops back from an anti-terrorist mission crashed. The mission in question was clearly part of the fight against terrorism ... accordingly, the impugned administrative act must be set aside ...”

27. Each time an appeal was lodged with it against the above-mentioned judgments of the Ankara Administrative Court, the Supreme Administrative Court upheld the approach of the first-instance court (decisions E.2002/4268,

K.2005/333; E.2003/1775, K.2005/5476; E.2003/3110, K.2006/843; E.2003/3860, K.2004/4655; E.2003/3856, K.2004/4656; E.2005/2298, K.2007/8147; E.2005/1399, K.2007/6047; E.2006/1352, K.2009/7096; E.2006/1802, K.2009/7096; E.2007/2275, K.2009/8317; E.2006/9775, K.2009/7138; E.2008/715, K.2010/3868; E.2008/7839, K.2010/3870).

28. On 28 March 2003, referring to the Jurisdiction Disputes Court's decision of 14 May 2001 (E.2000/77, K.2001/22 – see paragraph 31 below), the 5th Chamber of the Ankara Administrative Court held that it did not have jurisdiction to hear an appeal, lodged by the family of a sergeant who died in the same plane crash, to set aside the pension fund's decision rejecting their claim for a monthly pension under Law no. 3713 (decision E.2002/754, K.2003/346). The case was brought before the Supreme Military Administrative Court, which, in a judgment of 13 May 2004, dismissed the appeal, finding that the deceased had not been a victim of terrorism (decision E.2003/14, K.2004/754). On 30 September 2004 it dismissed a subsequent appeal against that judgment (decision E.2004/1199, K.2004/1480).

29. On 2 October 2009 the deceased's widow filed another application with the pension fund for the monthly pension provided for under Law no. 3713, in her own name and on behalf of her son. The application was rejected and an appeal was lodged with the 5th Chamber of the Ankara Administrative Court, which that court rejected on 11 March 2010, finding that it lacked jurisdiction (E.2009/1631, K.2001/343)². In its reasoning it referred to a judgment of the Jurisdiction Disputes Court of 11 December 2006 (E.2006/246, K.2006/236 – see paragraph 32 below).

2. *Judgments of the Jurisdiction Disputes Court*

30. On 22 February 1999, in response to a request to settle a conflict between the solutions adopted respectively by the ordinary administrative courts and the Supreme Military Administrative Court, which had reached different conclusions in a matter concerning similar points of fact and law, the Jurisdiction Disputes Court adopted a decision (E.1998/75, K.1999/4) which included the following reasoning:

“The first paragraph of section 24 of Law no. 2247 on the creation and operation of a Jurisdiction Disputes Court, as amended by Law no. 2592, stipulates: “There is conflict of judgments when the enforcement of a right is rendered impossible by a divergence between the final decisions adopted by at least two of the courts referred to in section 1, provided that those decisions concern the same subject and the same cause of action – but not matters of jurisdiction – and that at least one of the parties [to the case] is the same.

By virtue of this provision, in order for there to be conflict of judgments all the following conditions must be met cumulatively: (a) the decisions at the origin of the conflict must have been adopted by at least two [different] courts from among the ordinary, military or administrative courts; (b) the subject matter, the cause of action and at least one of the parties must be the same; (c) the two decisions must be final; (d) the decisions must rule on the merits of the case; and (e) the enforcement of the right must have been made impossible by the divergence between the decisions.

Examination of the decisions alleged to be in conflict reveals that they are judgments pronounced by the ordinary administrative courts and the military administrative court, in which, objectively, the subject matter and the cause of action, while based on different material facts, are identical, and at least one of the parties (the respondent administrative authority) is the same; the judgments in question have become final after the exhaustion of the appeals process, and they both rule on the merits. That being so, it is established that the first four conditions required under section 24 in order for there to be conflict of judgments have been met.

As to whether the result in the instant case has been to render impossible the enforcement of a right ..., in situations where it is impossible for a person to secure the enforcement of a right because of conflicting judgments delivered by two different courts, section 24 leaves it to the Jurisdiction Disputes Court to settle the matter ...

... the administrative court's judgment setting aside the earlier decision does not affect the judgment of the Supreme Military Administrative Court dismissing the application; the respondent administrative authority, which had to annul the measure in the light of the administrative court judgment

in favour of H. and F.G., is under no obligation to execute that judgment in respect of N.T., who was not party to those proceedings. As the action brought by N.T. was dismissed, N.T. cannot be considered to have a right recognised by a judicial decision.

... the claimant cannot claim to have a right recognised by a judicial decision, so her application must be dismissed pursuant to section 24 of Law no. 2247, as the condition that it is “impossible to enforce the judgment”, required for there to be a conflict of judgments, has not been established.

31. On 14 May 2001 the Jurisdiction Disputes Court adopted a decision (no. E.2000/77, K.2001/22), the relevant passages of which read as follows:

“... Summary: The application to set aside the pension fund’s decision rejecting a claim for a disability pension ... filed by a person declared by a medical report to be unfit for military service, who considered that his health problem had been caused by his military service, is a matter for the Supreme Military Administrative Court to resolve.

...

The merits: ... Under Article 157 of the Constitution, the Supreme Military Administrative Court, although instituted by non-military authorities, is the court of first and final jurisdiction for the judicial review of disputes arising from administrative acts or conduct linked to military service and concerning military personnel. However, it has been established that for disputes arising out of military obligations, it is not necessary to determine whether the person concerned was a member of the armed forces. ... In order for the Supreme Military Administrative Court to be able to examine a case, the impugned administrative act must concern a “member of the armed forces” and be “linked to military service ...”

To determine whether the administrative act is “linked to military service” and decide which court has jurisdiction, the subject matter of the act must be examined. If the act was adopted in keeping with military traditions, principles and practice, it must be considered to be linked to military service ... More specifically, administrative acts linked to military service are those related to the capabilities ... of military personnel, their attitude and conduct, their military career, their rights and obligations as members of the military, the purpose of the military service and the specificity of the locations in which they serve. Whether or not a non-military authority was at the origin of the act is of no consequence – the Supreme Military Administrative Court is the court responsible for examining a case [brought by] a member of the armed forces who has been deprived of an advantage.

... where the administrative act concerns a member of the military and is linked to military service, it is for the Supreme Military Administrative Court to examine and settle the dispute.”

32. On 11 December 2006 the Jurisdiction Disputes Court adopted a decision (E.2006/246, K.2006/236) in which it determined which court had jurisdiction to hear disputes concerning pecuniary compensation under Law no. 3713. The relevant passages read as follows:

“The facts: The claimants’ son ... died on 16 May 2001 in the accident at Malatya-Akçadağ-Güzyurdu, when the troop transport plane flying him from Diyarbakır to Ankara after a mission in the state of emergency region crashed ...

In the proceedings lodged by the claimants following the pension fund’s refusal to award them a pension [although] they alleged that the death had occurred in the course of duties that fell within the scope of Laws nos. 2330 and 3713, the 3rd Chamber of the Ankara Administrative Court dismissed the application in a decision of 27/06/2002 (E. 2001/1616, K. 2002/1095), considering that what had happened had not been the result of terrorist acts. On appeal, the 11th Division of the Supreme Administrative Court, in a judgment of 30/01/2003 (E: 2002/3971, K: 2003/495), set aside the lower court’s decision, considering that the court should have acknowledged the claimant’s entitlement to the rights governed by Laws nos. 2330 and 3713, his son’s death having been

attributable to terrorist acts. The case was referred back to the lower court, which persisted in its decision, following which the Administrative Divisions of the Supreme Administrative Court, sitting in plenary, upheld the decision of the 11th Division of the Supreme Administrative Court in a judgment of 01/04/2004 (E: 2003/774, K: 2004/409) and again set aside the lower court's decision ...

Although the claimants applied to ... the respondent administrative authority for pecuniary compensation after the Supreme Administrative Court, sitting in plenary, confirmed that their son's death fell within the scope of Laws nos. 2330 and 3713, they received no reply.

... on 25 July 2005 the interested parties appealed to the ordinary administrative courts to set aside the administrative authority's implicit rejection ... The respondent administrative authority filed an objection for lack of jurisdiction, alleging that the Supreme Military Administrative Court had jurisdiction ... In a decision of 2 March 2006 the Ankara Administrative Court dismissed that objection and declared that it did have jurisdiction. ... The respondent administrative authority filed an application to have the matter of jurisdiction settled ...

Principal State Counsel at the Supreme Military Administrative Court ... considers that the dispute ... lies within the jurisdiction of the Supreme Military Administrative Court, and that the decision of the 4th Chamber of the Ankara Administrative Court concerning jurisdiction should be set aside ... Principal State Counsel at the Supreme Administrative Court ... argues that the dispute ... is a matter for the ordinary administrative courts ...

... [in so far as], when it examined whether the death of the claimants' son, a serviceman, occurred because he was a victim of terrorist acts within the meaning of Law no. 3713, or in the course of duties covered by Law no. 2330 or as a result of such duties, or, as in this case ... when it reviewed the [rejection] measure, the pecuniary compensation board took into account the serviceman's military aptitudes ..., his conduct ..., his military career, his rights and duties as a serviceman, the purpose of the military service, the specificities of the locations of the military missions, and military regulations and traditions; and [in so far as,] in the present case, the condition that the administrative act must be linked to military service is fulfilled, the Supreme Military Administrative Court has jurisdiction in the matter at the origin of the dispute ..."

III. COMPARATIVE LAW

33. In some European countries there is only one Supreme Court. This approach is found in "common law" countries like Cyprus, Ireland and the United Kingdom, but also in Albania, Azerbaijan, Croatia, Denmark, Estonia, Georgia, Hungary, Iceland, Latvia, Moldova, Norway, Romania, San Marino, Serbia, Slovakia and Switzerland. Other countries, like Germany, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Finland, France, Italy, Lithuania, Luxembourg, "the Former Yugoslav Republic of Macedonia", Monaco, the Netherlands, Poland, Portugal, the Czech Republic, Sweden and Ukraine, have two or more supreme courts.

34. In many of these countries the law does not provide for any means of settling possible conflicts of case-law between the supreme courts, but only for means of resolving possible conflicts of jurisdiction. The authority responsible for settling such conflicts may be a court or a division of a court specially vested with this power (France, Luxembourg, Bulgaria, Lithuania, the Czech Republic). In Italy the law confers this power on the Court of Cassation; in Austria and Andorra, on the Constitutional Court, and in Monaco, on the Supreme Court. In Poland there is no judicial authority responsible for settling conflicts of jurisdiction. Lastly, only a small number of countries have courts tasked with resolving conflicts of case-law between supreme courts (Germany, Ukraine and Greece). In Bulgaria the legislation provides for an *a posteriori* means of resolving conflicts.

THE LAW

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

35. The applicants alleged that the proceedings before the domestic courts had been unfair and that the possibility that the same fact could give rise to differing legal assessments from one court to another was in breach of the

principles of equality before the law and consistency of the law. They submitted that the families of victims who died in the same plane crash as their son had submitted claims similar to theirs and had won their cases before the ordinary administrative courts.

36. The applicants relied on Article 6 § 1 of the Convention, the relevant parts of which read as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ...”

37. The Court notes that in their application form, as a subsidiary issue, the applicants also complained that the Turkish authorities had failed to take any action against the manufacturer of the plane that crashed. As this complaint has not been reiterated before the Grand Chamber, the Grand Chamber endorses the general approach adopted by the Chamber (Chamber judgment, § 62) and considers that there is no need for it to examine this point separately.

A. Chamber judgment

38. The Chamber considered that it was not its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts. Having regard to the stance taken by the Jurisdiction Disputes Court, which confirmed the jurisdiction of the Supreme Military Administrative Court, it further considered that the applicants could not claim to have been denied justice as a result of the examination of their dispute by that court or the conclusion it reached. It accordingly found that in the circumstances of the case there had been no violation of Article 6 § 1 of the Convention (Chamber judgment, §§ 54-61).

B. The parties' submissions

1. The applicants

39. For the applicants, there was no doubt that the Ankara Administrative Court, the Supreme Administrative Court and the Supreme Military Administrative Court had had similar cases referred to them. That being so, the decision of the Supreme Military Administrative Court not to allow their claim under Law no. 3713 had amounted to a conflicting decision as it ran counter to the interpretation made by the Ankara Administrative Court and the Supreme Administrative Court.

40. The applicants further submitted that the Supreme Military Administrative Court had ignored the judgments delivered by the ordinary administrative courts in similar cases – even though they had been brought to its attention – and that this had been in breach of the principle of equality enshrined in Article 10 of the Turkish Constitution. In addition, the applicants argued that a difference of interpretation between two supreme courts in the same country should not have the effect of depriving certain citizens of their rights. In that connection they reiterated their argument that the difference of interpretation between the ordinary administrative courts and the military administrative court had irrevocably infringed the principle of the consistency of the law.

41. They further argued that this conflicting interpretation also undermined the principle of legal certainty, as well as the general principles of law. In that regard the applicants challenged the conclusions of the Chamber, which, while finding it regrettable that different interpretations had been made of the same legal provisions, found that that alone did not suffice to undermine the principle of legal certainty.

42. Lastly, the applicants challenged the decision of the 4th Chamber of the Ankara Administrative Court that it had no jurisdiction in their case when other chambers of that court had considered that they did have jurisdiction. In this connection they complained that the Chamber had drawn no conclusion from this fact with regard to Article 6 of the Convention.

2. The Government

43. The Government submitted that in view of the principle of the independence of the courts, the decisions of one court had no binding effect on other courts, belonging to the same or different jurisdictions. Only the decisions of the supreme courts were binding on the lower courts within the hierarchical order of the same jurisdiction. Thus, the various decisions of the ordinary administrative courts had no binding effect either on other

ordinary administrative courts or, transversally, on the Supreme Military Administrative Court.

44. The Government further affirmed that the 4th Chamber of the Ankara Administrative Court's decision that it did not have jurisdiction to examine the applicants' case could not be said to have been arbitrary. The decision had been adopted in conformity with the criteria laid down in the judgment of the Jurisdiction Disputes Court of 14 May 2001, to which reference had been made and which had taken into account the link with military service to establish that jurisdiction lay with the Supreme Military Administrative Court. The Government likewise affirmed that the decision of the Supreme Military Administrative Court could not be said to have been arbitrary either, as it was in conformity with the provisions of section 21 of Law no. 3713: the cause of the plane crash had not been a terrorist attack.

45. The Government submitted that in the light of the legal provisions relating to the Law on the Jurisdiction Disputes Court, the facts of the present case did not concern a conflict of jurisdiction, or conflicting decisions. They maintained that there was no ambiguity or uncertainty as to which court had been competent to judge the applicants' case and that the domestic law was quite clear on the matter. Article 157 of the Constitution (see paragraph 21 above) stated that the Supreme Military Administrative Court was the body which judicially examined disputes concerning military personnel or military service, and that provision of the Constitution was reproduced in section 20 of the Law on the Supreme Military Administrative Court. In judgments of 14 May 2001 and 11 December 2006 (see paragraphs 31 and 32 above) the Jurisdiction Disputes Court had also confirmed that approach. The applicants' right to a court had therefore not been restricted by any ambiguity or uncertainty.

46. The Government further maintained that there had been no issue of conflicting interpretations of the law in this case. Referring to section 24 of the Law on the Jurisdiction Disputes Court (see paragraph 24 above) and to the Jurisdiction Disputes Court's judgment of 22 February 1999 (see paragraph 30 above), they submitted that settlement of conflicting decisions of courts in different jurisdictions occurred only in exceptional situations, where it became impossible to enforce a right established by a court decision. To go beyond the limits of that exceptional circumstance would amount to unlawful interference with the independence of the courts in the different jurisdictions, each of which had its own review machinery to settle conflicts of judgments. The Government referred in this connection to the case of *Karakaya v. Turkey* ((dec.), no. 30100/06, 25 January 2011).

47. The Government accepted that there were varying interpretations between courts in different jurisdictions, but maintained that it was the right court that had found against the applicants. The configuration of the Turkish courts into different jurisdictions was a matter of judicial organisation. The way in which the High Contracting Parties organised their judicial systems and the jurisdiction of their courts fell within the States' margin of appreciation. If one court which had jurisdiction in a matter adopted a decision that differed from that of a court which did not have jurisdiction, it would be unfair, the Government argued, to affirm that the latter decision should prevail.

48. Lastly, the Government considered that the present case was unique and differed from other cases concerning conflicting case-law which the Court had had to examine in the past, and that there was therefore no applicable precedent. They added that an unfavourable court decision did not mean that there was a lack of legal certainty in the application of the law.

C. The Court's assessment

1. General principles

49. The Court reiterates at the outset that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII; *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; and *Saez Maeso v. Spain*, no. 77837/01, § 22, 9 November 2004). Its role is to verify whether the effects of such interpretation are compatible with the Convention (see *Kuchoglu v. Bulgaria*, no. 48191/99, § 50, 10 May 2007, and *Işyar v. Bulgaria*, no. 391/03, § 48, 20 November 2008).

50. That being so, save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of the domestic law by the national courts (see, for example, *Adamsons v. Latvia*, no. 3669/03, § 118, 24 June

2008). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see *Engel and Others v. the Netherlands*, 8 June 1976, § 103, Series A no. 22; *Gregório de Andrade v. Portugal*, no. 41537/02, § 36, 14 November 2006; and *Adamsons*, cited above, § 118).

51. The Court has already acknowledged that the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see *Santos Pinto v. Portugal*, no. 39005/04, § 41, 20 May 2008).

52. The Court has been called upon a number of times to examine cases concerning conflicting court decisions (see, among other authorities, *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII; *Paduraru v. Romania*, no. 63252/00, ECHR 2005-XII (extracts); *Beian v. Romania* (no. 1), no. 30658/05, ECHR 2007-XIII (extracts); and *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, 2 July 2009), and has thus had an opportunity to pronounce judgment on the conditions in which conflicting decisions of domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention (see *Perez Arias v. Spain*, no. 32978/03, § 25, 28 June 2007; *Beian* (no. 1), cited above, §§ 34-40; *Ștefan and Ștef v. Romania*, nos. 24428/03 and 26977/03, §§ 33-36, 27 January 2009; *Iordan Iordanov and Others*, cited above, §§ 48-49; and *Schwarzkopf and Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008).

53. In so doing it has explained the criteria that guided its assessment, which consist in establishing whether “profound and long-standing differences” exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see *Iordan Iordanov and Others*, cited above, §§ 49-50).

54. The Court has also been called upon to pronounce judgment on conflicting decisions that may be made within a single court of appeal (see *Tudor Tudor v. Romania*, no. 21911/03, 24 March 2009) or by different district courts ruling at last instance (see *Ștefănică and Others v. Romania*, no. 38155/02, 2 November 2010). In addition to the “profound and long-standing” nature of the divergences in issue, the legal uncertainty resulting from the inconsistency in the practice of the courts concerned and the lack of machinery for resolving the conflicting decisions were also considered to be in breach of the right to a fair trial (see *Tudor Tudor*, cited above, §§ 30-32, and *Ștefănică and Others*, cited above, §§ 37-38).

55. In this regard the Court has reiterated on many occasions the importance of setting mechanisms in place to ensure consistency in court practice and uniformity of the courts’ case-law (see *Schwarzkopf and Taussik*, cited above). It has likewise declared that it is the States’ responsibility to organise their legal systems in such a way as to avoid the adoption of discordant judgments (see *Vrioni and Others v. Albania*, no. 2141/03, § 58, 24 March 2009; *Mullai and Others v. Albania*, no. 9074/07, § 86, 23 March 2010; and *Brezovec v. Croatia*, no. 13488/07, § 66, 29 March 2011).

56. Its assessment of the circumstances brought before it for examination has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see, amongst other authorities, *Beian* (no. 1), cited above, § 39; *Iordan Iordanov and Others*, cited above, § 47; and *Ștefănică and Others*, cited above, § 31). Indeed, uncertainty – be it legal, administrative or arising from practices applied by the authorities – is a factor that must be taken into consideration when examining the conduct of the State (see *Păduraru*, cited above, § 92; *Beian* (no. 1), cited above, § 33; and *Ștefănică and Others*, cited above, § 32).

57. In this regard the Court also reiterates that the right to a fair trial must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the fundamental aspects of the rule of law is the principle of legal certainty (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII), which, *inter alia*, guarantees a certain stability in legal situations and contributes to public confidence in the courts (see, *mutatis mutandis*, *Ștefănică and Others*, cited above, § 38). The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential

components of a State based on the rule of law (see *Paduraru*, cited above, § 98; *Vinčić and Others v. Serbia*, nos. 44698/06 and others, § 56, 1 December 2009; and *Ştefănică and Others*, cited above, § 38).

58. The Court points out, however, that the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008). Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Atanasovski v. "the Former Yugoslav Republic of Macedonia"*, no. 36815/03, § 38, 14 January 2010).

2. Application of these principles to the present case

(a) Preliminary remarks

59. The Court observes at the outset that the present case differs from those it has had the opportunity to examine in the past in that what is at issue here is not conflicting decisions in the case-law of courts of final jurisdiction within the same branch of the judicial system, but rather alleged disparities between the judgments of two hierarchically unrelated, different and independent types of court.

60. That being so, it considers that having been formulated in a substantially different context from the instant case, the criteria and principles developed in the above-mentioned case-law cannot be transposed as such to the present case, which, although it concerns a type of complaint on which the Court has already had the opportunity to rule, nevertheless raises a new legal question. They may, however, guide it in its assessment of the circumstances of this case. The Court shall therefore first consider whether there have been conflicting court decisions in the present case; if so, it will then examine whether, in the light of the particular circumstances of the present case, those conflicting decisions amounted to a violation of Article 6 § 1 of the Convention.

(b) Whether there were conflicting decisions

61. The Court reiterates that giving two disputes different treatment cannot be considered to give rise to conflicting case-law when this is justified by a difference in the factual situations at issue (see *Erol Uçar v. Turkey* (dec.), no. 12960/05, 29 September 2009). In the present case it appears from the evidence before the Court that the difference the applicants complained of resides not in the factual situations examined by the different domestic courts, which were identical, but in the application of the substantive law and the resulting *res judicata*.

62. In this regard, the Court points out that the parties submitted several decisions by the national courts concerning the families of servicemen who died in the same plane crash as the applicants' son. On reading those decisions, it notes first of all that the servicemen concerned fall into two categories: those whose mission was to fight terrorism, and the crew of the aircraft (see paragraphs 17 and 25-26 above).

63. It further notes that the different cases brought before the ordinary administrative courts on which the applicants rely in their allegation concerned appeals by the families of victims of the accident in question against the decision of the Turkish Pension Fund rejecting, *inter alia*, their applications for a pension under Law no. 3713.

64. Lastly, the Court observes from the materials in the case file that fourteen of the cases brought by the victims' families were examined on the merits by the ordinary administrative courts, which established a causal link between the plane crash and the fight against terrorism – a *sine qua non* condition for entitlement to the rights provided for in section 21 of Law no. 3713 – without making any distinction in respect of the type of duties performed by the deceased servicemen (see paragraphs 25-26 above).

65. The ordinary administrative courts thus found in favour of the claimants; their interpretation of the conditions of application of Law no. 3713 differed from that of the Supreme Military Administrative Court, which, in the applicants' case, found no such causal link and dismissed their application to set aside the decision of the Pension Fund (see paragraph 16 above).

66. This difference of interpretation resulted in the different legal treatment by the two types of court of what were essentially similar cases. Diametrically opposite conclusions were thus reached by the ordinary administrative courts (Ankara Administrative Court and Supreme Administrative Court) and the Supreme Military Administrative

Court. The Government have, moreover, accepted the existence of these different interpretations (see paragraph 47 above). It is worth noting here that in the decision pronounced by the Supreme Military Administrative Court in the applicants' case no mention was made of any differences capable of distinguishing their case from those examined by the ordinary administrative courts (see paragraph 16 above).

67. Clearly, then, the Court is faced with a very rare case where the circumstances and consequences of the same event – a plane crash – were interpreted differently by the domestic courts. Having said that, it should be remembered that the mere finding of a conflict of case-law is not sufficient in itself to constitute a violation of Article 6 of the Convention. The Court has to measure the impact of the conflicting case-law in terms of the principle of a fair trial and, in particular, against the yardstick of the principle of legal certainty.

(c) Whether the conflicting decisions resulted in a violation of Article 6 § 1 of the Convention

68. First of all, the Court observes that the issue of conflicting decisions in the circumstances of the present case is linked to the very organisational structure of the Turkish court system, where ordinary administrative courts, with general jurisdiction, coexist alongside a military administrative court, with special jurisdiction (see paragraphs 20-21 and 45 above). This, however, is just one example among others of the variety of legal systems existing in Europe, and it is not the Court's task to standardise them (see, *mutatis mutandis*, *Taxquet v. Belgium* [GC], no. 926/05, § 83, 16 November 2010).

69. Furthermore, in cases arising from individual petitions the Court's task is not to review the relevant legislation or an impugned practice in the abstract. Instead, it must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it (see, among other authorities, *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X, and *Taxquet*, cited above, § 83).

70. Here, therefore, the Court's task is not to review, *in abstracto*, the compatibility with the Convention of Turkey's court system, with its two different types of administrative court, but to determine, *in concreto*, the effect of the resulting conflict of case-law on the right to a fair trial enshrined in Article 6 § 1 of the Convention (see, for example and *mutatis mutandis*, *Padovani v. Italy*, 26 February 1993, § 24, Series A no. 257-B).

71. The Court observes, first of all, that the impugned conflicting judicial decisions concerning the interpretation of section 21 of Law no. 3713 were the result of simultaneous intervention by the ordinary administrative courts and the Supreme Military Administrative Court in cases raising essentially the same issue (see paragraphs 62-66 above). This reveals a conflict of jurisdiction between these two types of court which were called upon to give judgment, in parallel, on the same legal issue.

72. The Court therefore agrees with the Chamber's finding that the origin of the conflicting decisions the applicants complained of lies in the fact that these different courts failed to respect the boundaries of their respective jurisdictions (see Chamber judgment, § 57).

73. Having said that, in view of the Government's arguments that there was no doubt whatsoever that the Supreme Military Administrative Court had jurisdiction in the case at issue here (see paragraph 45 above), the Court notes that the Jurisdiction Disputes Court – established, *inter alia*, to settle conflicts of jurisdiction between the ordinary, administrative and military courts (see paragraphs 22 and 24 above) – has had occasion to rule on the question of the areas of jurisdiction of the ordinary administrative courts and the Supreme Military Administrative Court.

74. In so doing, it ruled that the Supreme Military Administrative Court had jurisdiction in cases concerning military pensions or allowances (see paragraphs 31-32 above). Indeed, when the 4th Chamber of the Ankara Administrative Court declared that the action brought by the applicants was outside its jurisdiction, and was rather a matter for the Supreme Military Administrative Court (see paragraph 14 above), it referred to the Jurisdiction Disputes Court's judgment of 14 May 2001 (see paragraph 31 above).

75. The Chamber found in this connection that the intervention of the Jurisdiction Disputes Court had helped to settle the divergence between the positions of the ordinary administrative courts and the military administrative court as regards their respective spheres of competence, bringing to an end, in principle, the intervention of the ordinary administrative courts in an area that fell under the jurisdiction of the military administrative court (see

Chamber judgment, §§ 57-58).

76. The Grand Chamber, however, does not share these conclusions. Having regard to the evidence adduced by the parties, it observes that in spite of the intervention of the Jurisdiction Disputes Court and its ruling that the Supreme Military Administrative Court had jurisdiction in the type of case in question, the ordinary administrative courts continued to accept cases similar to that of the applicants and to rule on the merits (see paragraphs 25-27 above).

77. According to the Government's explanations at the hearing before the Grand Chamber, while "decisions of principle" of the Jurisdiction Disputes Court concerning jurisdiction are binding, its other judgments merely have the value and authority of precedents meant to guide the domestic courts in their deliberations. A decision is "of principle" when it actually states as much.

78. In the present case the Court notes that the judgments of the Jurisdiction Disputes Court to which the Government referred (see paragraphs 44-45 above) in support of the jurisdiction of the Supreme Military Administrative Court were not decisions of principle, and that they have failed to impose themselves, by their sheer power of persuasion, on all the ordinary administrative courts, which have continued to examine – and to allow – claims similar to the applicants' (see paragraphs 25-27 above).

79. Having said that, and no matter what weight the ordinary administrative courts elected to give to the judgments of the Jurisdiction Disputes Court in question, the Court emphasises that in any event the role of the Jurisdiction Disputes Court is not to resolve conflicts of case-law. Although it does have the power to settle conflicts of judgments between different courts, it can do so only in the exceptional situation where the judgments are so irreconcilable that their execution would result in a denial of justice for the party concerned (see paragraphs 24 and 30 above), a situation which does not arise in the instant case. Its intervention thus has no bearing on the complaint the applicants have brought before the Court.

80. The Court points out that it has already indicated that, once identified, conflicts of case-law should, in principle, be settled by establishing the interpretation to be followed and harmonising the case-law, through mechanisms vested with such powers (see among many other authorities, *Beian (no. 1)*, cited above, §§ 37 and 39). It should be noted, however, that these principles were laid down in cases where the divergent interpretations the Court had to examine had come about within the same branch of the judicial system, in connection with legal provisions in respect of which a Supreme Court could exercise its unifying powers (see paragraph 59 above – see also, amongst other authorities, *Beian (no. 1)*, cited above, § 37, and *Schwarzkopf and Taussik*, cited above).

81. While such considerations obtain where the conflicting decisions arise within a hierarchical judicial structure, they cannot be transposed to the present case. The Court considers that in a domestic legal context characterised, as in the present case, by the existence of several Supreme Courts not subject to any common judicial hierarchy, it cannot demand the implementation of a vertical review mechanism of the approach those courts have chosen to take. To make such a demand would go beyond the requirements of a fair trial enshrined in Article 6 § 1 of the Convention.

82. What is more, the Court points out that the lack of a common regulatory authority shared by the Supreme Courts – in this case the Supreme Administrative Court and the Supreme Military Administrative Court – capable of establishing the interpretation these courts should follow, is not a specificity of the Turkish judicial system. Numerous European States whose judicial systems feature two or more Supreme Courts have no such authority (see paragraph 34 above). In itself, however, this cannot be considered to be in breach of the Convention.

83. The Court further considers that in a judicial system like that of Turkey, with several different branches of courts, and where several Supreme Courts exist side by side and are required to give interpretations of the law at the same time and in parallel, achieving consistency of the law may take time, and periods of conflicting case-law may therefore be tolerated without undermining legal certainty.

84. As case-law is not unchanging, but on the contrary, evolutive in essence, the Court considers that the principle of good administration of justice cannot be taken to impose a strict requirement of case-law consistency (see *Unédic*, cited above, § 73, and *Atanasovski*, cited above, § 38). However, it is the Court's duty to ensure that this principle is upheld when it considers that the fairness of the proceedings or the rule of law require it to

intervene to put a stop to the uncertainty created by conflicting judgments pronounced by different courts on one and the same question. The legal certainty it then aims to achieve must nevertheless be pursued with due respect for the decision-making autonomy and independence of the domestic courts, in keeping with the principle of subsidiarity at the basis of the Convention system.

85. In this connection, the Court reiterates that interpretation is inherent in the work of the judiciary. However clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation (see, amongst other authorities, *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 39, ECHR 1999-IV). Determining what law to apply and in what conditions is part of this individualised approach to the law.

86. This means that two courts, each with its own area of jurisdiction, examining different cases may very well arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances. It must be accepted that the divergences of approach that may thus arise between courts are merely the inevitable outcome of this process of interpreting legal provisions and adapting them to the material situations they are intended to cover.

87. These divergences may be tolerated when the domestic legal system is capable of accommodating them. In the instant case, the Court considers that the supreme courts in question – the Supreme Administrative Court and the Supreme Military Administrative Court – have the possibility of settling the divergences themselves, either by deciding to take the same approach, or by respecting the boundaries of their respective areas of jurisdiction and refraining from both intervening in the same area of the law.

88. Just as it is not for the Court to act as a court of third or fourth instance and review the choices of the domestic courts concerning the interpretation of legal provisions and the inconsistencies that may result, nor is it its role, it would like to emphasise, to intervene simply because there have been conflicting court decisions.

89. For the Court, where there is no evidence of arbitrariness, examining the existence and the impact of such conflicting decisions does not mean examining the wisdom of the approach the domestic courts have chosen to take (see *Vinčić and Others*, cited above, § 56; *Işık v. Turkey* (dec.), no. 35224/05, 16 June 2009; and *Ivanov and Dimitrov v. “the Former Yugoslav Republic of Macedonia”*, no. 46881/06, § 32, 21 October 2010). As stated above (see paragraph 50), its role in respect of Article 6 § 1 of the Convention is limited to cases where the impugned decision is manifestly arbitrary.

90. Therefore, even though the interpretation made by the Supreme Military Administrative Court of section 21 of Law no. 3713 was unfavourable to the applicants, that interpretation, however unjust it might appear to them compared with the solution adopted by the ordinary administrative courts, does not, in itself, constitute a violation of Article 6 of the Convention.

91. It should also be noted – in the light of the Jurisdiction Disputes Court’s finding (see paragraphs 31-32 above) that the Supreme Military Administrative Court was the body with jurisdiction to examine the type of dispute at issue here – that in the circumstances of the present case the decision of the 4th Chamber of the Ankara Administrative Court that it did not have jurisdiction in the applicants’ case was not at all arbitrary.

92. Nor can the applicants claim to have been denied justice as a result of the examination of their dispute by the Supreme Military Administrative Court, or the conclusion it reached. The decision adopted by the Supreme Military Administrative Court in the applicants’ case fell within the bounds of its jurisdiction and there is nothing in it that, in itself, would warrant the intervention of the Court.

93. It should be noted that the judgments concerning the applicants were duly reasoned, in terms of the facts and the law (see paragraphs 16 and 19 above), and that the interpretation made by the Supreme Military Administrative Court of the facts submitted to it for examination cannot be said to have been arbitrary, unreasonable or capable of affecting the fairness of the proceedings, but was simply a case of application of the domestic law.

94. In view of the above, the Court reiterates that it must avoid any unjustified interference in the exercise by the States of their judicial functions or in the organisation of their judicial systems. Responsibility for the consistency of their decisions lies primarily with the domestic courts and any intervention by the Court should remain exceptional.

95. In the present case the Court considers that the circumstances require no such intervention and that it is not its role to seek a solution to the impugned conflict of case-law *vis-à-vis* Article 6 § 1 of the Convention. In

any event, individual petition to the Court cannot be used as a means of dealing with or eliminating conflicts of case-law that may arise in domestic law or as a review mechanism for rectifying inconsistencies in the decisions of the different domestic courts.

96. Accordingly, the Court finds that there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

Holds, by ten votes to seven, that there has been no violation of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 October 2011.

Michael O'Boyle Nicolas Bratza
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Bratza, Casadevall, Vajić, Spielmann, Rozakis, Kovler and Mijović is annexed to this judgment.

N.B.

M.O.B.

**JOINT DISSENTING OPINION OF JUDGES BRATZA, CASADEVALL, VAJIĆ,
SPIELMANN, ROZAKIS, KOVLER AND MIJOVIĆ**

(Translation)

1. Unlike the majority, we believe that there was a violation of Article 6 of the Convention in this case.
2. To put things in perspective, we would make clear from the outset that at the heart of this case is not the fact that the Supreme Military Administrative Court's interpretation of Article 21 of Law no. 3713 was unfavourable to the applicants. Nor is the case concerned with whether or not the decision of the 4th Chamber of the Ankara Administrative Court that it did not have jurisdiction in the applicants' case was arbitrary, or whether the judgments concerning the applicants were duly reasoned in terms of the facts and the law (paragraphs 90-93 of the judgment). Nor, contrary to the suggestion in the judgment, does the case concern merely "the exercise by the States of their judicial functions or ... the organisation of their judicial systems" (paragraph 94); rather, it concerns, in our view, a "flagrant malfunctioning" of the Turkish judicial system, which resulted in a violation of Article 6 of the Convention.
3. In reality, the lack of an effective mechanism for harmonising the case-law not only caused but, worse, perpetuated conflicts of case-law between the ordinary and the military administrative courts which led, in the instant case, to results that gave an impression of "arbitrariness". In addition to that, conflicts of case-law continue to exist within the administrative court system.
4. We emphasise that, as is pointed out in paragraph 57 of the judgment, the right to a fair trial must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999 VII), which, *inter alia*, guarantees a certain stability in legal situations and contributes to public confidence in the courts (see, *mutatis mutandis*, *Ştefănică and Others*, no. 38155/02, § 38, 2 November 2010). The persistence of conflicting court decisions can, on the contrary, create a state of legal uncertainty likely to reduce public confidence in the judicial system, a confidence which is clearly one of the essential components of a State based on the rule of law (see *Păduraru v. Romania*, no. 63252/00, § 98, ECHR 2005-XII (extracts); *Vinčić and Others v. Serbia*, nos. 44698/06 and others, § 56, 1 December 2009; and *Ştefănică and Others*, cited above, § 38).
5. It is true that the principle of the independence of the courts relied on by the Government (paragraph 43 of the judgment) and the resulting autonomy enjoyed by the courts in their decision-making may explain why different interpretations can be made of the same texts at different levels of the court system. In our opinion, however, such interpretations must not have the effect of placing the public in a situation of legal uncertainty where the outcome of a case is dependent on a mechanism incapable of guaranteeing consistency in court decisions. The

ability of the domestic legal system to maintain stability in legal situations and consistency in court decisions is decisive in preserving public confidence in the administration of justice.

6. In the instant case the applicants were first faced with flagrant inconsistency within the same branch of the court system. We note in this regard that the applicants challenged the decision of the 4th Chamber of the Ankara Administrative Court that it did not have jurisdiction in their case when other chambers of that court had considered that they did have jurisdiction to examine similar cases (paragraph 42 of the judgment). Within the same administrative court structure the autonomy of the numerous judicial formations and the assignment of the cases to the different formations led to conflicting case-law in the form of two discordant interpretations concerning that court's jurisdiction.

7. Indeed, on three occasions – one of which was in the applicant's case – the 4th and 5th Chambers of the Ankara Administrative Court found that they did not have jurisdiction to examine cases concerning the rights regulated by Article 21 of Law no. 3713 (paragraph 14, 28 and 29 of the judgment), considering such cases to be a matter for the Supreme Military Administrative Court. This was not the approach adopted by other chambers of the same court, which in fourteen cases comparable to that of the applicants, had accepted to examine the applications submitted by the families of other servicemen who had died in the same accident on 16 May 2001, and found in their favour (paragraphs 25-27 of the judgment). This is a fundamental aspect of the case. There is no doubt that the case-law context in which the applicants' appeal was heard was marked by the variable approach of the different chambers of the Ankara Administrative Court to the question of jurisdiction in cases concerning military pension rights.

8. It is our opinion that this inconsistency of approach over the jurisdiction of the courts to examine substantially identical legal issues arising out of an identical event (in this case a plane crash in which a number of people died) is fundamentally problematic with respect to Article 6 of the Convention.

9. It is important to recall that the question of jurisdiction was decisive for the outcome of the case: most of the decisions of the ordinary administrative courts acknowledged a causal link between the plane crash and the fight against terrorism, so it is highly likely that if their action had not been redirected towards the Supreme Military Administrative Court, the applicants, like the families of some of the other occupants of the plane, would have succeeded in their claims. The manner in which the Supreme Military Administrative Court interpreted the circumstances of the plane crash of 16 May 2001 led to a difference of treatment of the applicants compared with others who had submitted claims similar to theirs. While the applicants had informed the military court of the position adopted by the ordinary administrative courts in similar cases (paragraphs 15 and 18 of the judgment), the military court completely ignored that position, without giving reasons and without taking any account of the risk of a divergence – even a synchronic one. Nor did it explain what factual differences distinguished the case in issue from those relied on by the applicants to support their claim (paragraphs 16 and 66). As a result, the same factual situation and the same legal provisions were interpreted differently by two types of court.

10. It is true that the Jurisdiction Disputes Court – established, *inter alia*, to settle conflicts of jurisdiction between the ordinary, administrative and military courts (paragraphs 22 and 24 of the judgment) – has had occasion to rule on the question of the areas of jurisdiction of the ordinary administrative courts and the Supreme Military Administrative Court and lay down the criteria for establishing the jurisdiction of the latter court (paragraphs 31-32). In so doing, the Jurisdiction Disputes Court ruled that the Supreme Military Administrative Court had jurisdiction in cases concerning military pensions or allowances (paragraphs 31-32). Indeed, when the 4th Chamber of the Ankara Administrative Court declared that the action brought by the applicants was outside its jurisdiction, and was rather a matter for the Supreme Military Administrative Court (paragraph 14 of the judgment), it referred to the Jurisdiction Disputes Court's judgment of 14 May 2001 (paragraph 31).

11. However, the resolution by the Jurisdiction Disputes Court of the conflict between the two courts was theoretical and illusory.

12. In spite of the intervention of the Jurisdiction Disputes Court and its ruling that the Supreme Military Administrative Court had jurisdiction in the type of case in question, the ordinary administrative courts continued to accept cases similar to that of the applicants and to rule on the merits (paragraphs 25-27). In this context the Government's explanations at the hearing before the Grand Chamber were particularly revealing as regards the

inefficacy of the conflict settlement process; they were based on a subtle distinction between judgments “of principle” and other judgments. Judgments “of principle” of the Jurisdiction Disputes Court concerning jurisdiction are apparently binding, while its other judgments merely have the value and authority of precedents meant to guide the domestic courts in their deliberations. We were also told that a judgment was a judgment “of principle” when it actually stated as much, and that the judgments of the Jurisdiction Disputes Court attributing jurisdiction to the Supreme Military Administrative Court (paragraphs 44-45 of the judgment) did not fall into this prestigious category.

13. As a mechanism for settling conflicts the Jurisdiction Disputes Court thus proved insufficient to either prevent or finally settle the legal uncertainty resulting from the variable interpretation by the ordinary administrative courts of their own jurisdiction in cases concerning the pension rights provided for in Law no. 3713 (paragraphs 28-29 and 76-77). The judgments of the Jurisdiction Disputes Court to which the Government referred have clearly failed to impose themselves on all the ordinary administrative courts by their sheer power of persuasion alone (paragraphs 25-27). This means that in spite of the intervention of the Jurisdiction Disputes Court, the uncertainty as to the distribution of jurisdiction between the ordinary administrative courts and the military administrative court seems to persist. The lack of a decision on jurisdiction binding on all the courts concerned can only serve to prolong the resulting conflict in the case-law and the corresponding uncertainty.

14. On the specific subject of inconsistency with respect to the merits of the case, the conflicting judicial decisions concerning the interpretation of section 21 of Law no. 3713 were the result of simultaneous intervention by the ordinary administrative courts and the Supreme Military Administrative Court in what were essentially similar cases (paragraphs 62-66). The conflict of jurisdiction between these two types of court which were called upon to give judgment, in parallel, on the same legal issue thus gave rise to legal uncertainty which the Turkish judicial system was unable to accommodate.

15. Consequently, we consider that a violation of the right to a fair hearing was caused by a malfunctioning of the machinery set in place to settle conflicts of jurisdiction, coupled with inconsistency in court decisions concerning cases having their origin in the same factual situation. The disagreement between the different chambers of the Ankara Administrative Court as to whether they had jurisdiction was compounded in the present case by the different line of reasoning adopted by the Supreme Military Administrative Court compared with the ordinary administrative courts concerning the conditions of application of section 21 of Law no. 3713.

16. While domestic legal systems may comprise a variety of judicial structures, these structures should not give any appearance of arbitrariness in the public eye; when taking legal action litigants should be able to make decisions with a sufficient degree of foreseeability and based on clear, common and stable criteria.

17. If justice is not to degenerate into a lottery, the scope of litigants’ rights should not depend simply on which court hears their case. The fact that litigants can receive diametrically opposite answers to the same legal question depending on which type of court examines their case can only undermine the credibility of the courts and weaken public confidence in the judicial system.

18. For all these reasons we believe that there has been a violation of Article 6 § 1 of the Convention.

ENDNOTES

1. As amended by Law no. 5532 of 18 July 2006, which replaced the reference to “public servants” in the first paragraph with “public employees”.
2. It appears that the proceedings are still pending.