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

SECOND SECTION

CASE OF CANGI AND OTHERS v. TÜRKİYE

(Application no. 48173/18)

JUDGMENT

Art 6 § 1 (civil) • Applicants' participation in administrative proceedings on an environmental impact assessment decision concerning the extraction of gold using cyanide leaching at a mine • Art 6 § 1 applicable only in respect of applicants who lived or owned a property in close proximity to the goldmine as outcome of proceedings directly decisive for their right to live in a healthy environment • Incompatibility *ratione materiae* in respect of remaining applicants not living in the mine's vicinity and not personally and directly affected by its operation • Applicants' "public watchdog" role or informal movement they created in relation to environmental implications of gold mines insufficient to consider proceedings directly decisive for their civil rights and obligations
Art 6 § 1 (civil) • Adversarial trial • Inability of applicants to put questions to court-appointed experts, not a breach of their right to participate effectively in proceedings • Issue accentuated before trial court concentrated on specialised and technical area of law and not a particular aspect of applicants' personal rights at stake
Art 6 § 1 (civil) • Non-communication of documents assessed and relied on to a large extent by court-appointed experts, impaired applicants' right to adversarial proceedings • Opportunity to consult a case file not, of itself, a sufficient safeguard

STRASBOURG

14 November 2023

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

In the case of Cangı and Others v. Türkiye,

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

Arnfinn Bårdsen, *President*,
Egidijus Kūris,
Pauliine Koskelo,
Saadet Yüksel,
Lorraine Schembri Orland,
Frédéric Krenc,
Diana Sârcu, *judges*,
and Dorothee von Arnim, *Deputy Section Registrar*,

Having regard to:

the application (no. 48173/18) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Turkish nationals ("the applicants") indicated in the appended table, on 17 September 2018;

the decision to give notice to the Turkish Government ("the Government") of the complaint concerning Article 6 § 1 of the Convention, and to declare inadmissible the remainder of the application;

the observations submitted by the Government and the observations in reply submitted by the applicants;

the comments submitted by the International Commission of Jurists, which was granted leave to intervene by the President of the Section;

Having deliberated in private on 10 October 2023,

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

INTRODUCTION

1. The case concerns the applicants' complaint under Article 6 § 1 of the Convention that in the administrative proceedings they had lodged, they had not been allowed to participate effectively in the court-appointed expert examination procedure.

THE FACTS

2. The applicants, whose details are set out in the appendix, were represented by Mr A. Cangı, the first applicant and a lawyer practising in İzmir.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye.

4. The facts of the case, as submitted by the parties and as can be seen from the documents submitted by them, may be summarised as follows.

5. On 27 June 2003 the Ministry of the Environment and Natural Resources ("the Ministry") issued a private commercial company ("the developer") with a decision approving the environmental impact assessment report ("the EIA report") concerning the extraction of gold using cyanide leaching at a mine situated in Gümüşkol-Ulubey in the city of Uşak ("the Kışladağ mine").

6. On 14 April 2004 the applicants applied to the Manisa Administrative Court for the annulment of the Ministry's decision. At the time of the proceedings, the developer had been granted a test permit. The developer also intervened in the administrative court proceedings on behalf of the Ministry.

7. During the course of the proceedings, the Manisa Administrative Court appointed an expert panel and conducted an on-site inspection in the presence of the parties. In their report of 19 October 2005, the experts pointed out, among other risks, the likelihood of acid mine drainage as a result of the formation of a large open pit lake after the cessation of mining activities and the consequent contamination of ground water, without indicating the extent of the contamination. In response to the Manisa Administrative Court's request for an additional report from the panel regarding that point, the experts submitted, by a majority, that the open pit would not be very deep – at most a one or two-metre deep pool of water. The experts also noted that the measurements in the EIA report were accurate in that respect.

8. On 9 October 2006 the Manisa Administrative Court dismissed the case on the basis of the findings in the additional expert report.

9. On an appeal by the applicants, on 6 February 2008 the Supreme Administrative Court set aside the decision of the Manisa Administrative Court, noting that the expert opinion on the basis of which that court had delivered its decision was neither compatible in form with the principles set out in the relevant legislation nor did it contain sufficient technical assessments which would allow the court to reach a positive or negative opinion about the EIA report in question. The Supreme Administrative Court further held that the dispute should be reassessed after seeking the opinion of another expert panel which should consist of experts in the fields of the environment, mining and geology. It therefore remitted the case to the Manisa Administrative Court for a fresh examination.

10. On remittal, the Manisa Administrative Court ordered a fresh expert report to be drawn up by both a specialist in the field of chemistry and a new panel of experts consisting of three specialists in the fields of the environment, mining and geology.

11. On 8 October 2009 the Manisa Administrative Court held an on-site inspection in the presence of the experts and the parties. According to the minutes of the on-site inspection, the parties had no objections in respect of the competence and neutrality of the experts, and they agreed that they would submit their observations on the expert report when it was communicated to them. The same day the applicants submitted to the Manisa Administrative

Court the list of questions they wanted the experts to address in addition to the questions that would be directed to them by the court. Their questions, of which there were twenty-three in total, can be grouped under four major headings:

(a) Questions relating to ground water, the water consumption of the project and whether the calculations in this respect in the EIA report were accurate in the light of the major aquifer in the area and the latest tests conducted on site, in particular:

– the source and quantity of the water that would be used annually in the application of lime to the process of the agglomeration of the ore in order to attain a 5% humidity level, and whether that was reflected in the mathematical modelling;

– the source and quantity of the water that would be used daily in maintaining hygiene and staff facilities as well as washing the dust off of the roads, and whether – given the large area the plant covered – the figures in the EIA report were realistic in the light of the expected daily operations of the mine;

– whether the modelling in the EIA report with respect to the major aquifer in the area reflected its current geological position and heterogenic characteristics; whether the fact that the modelling was based on geological data dating back more than twenty-five years could be taken as a basis for the water levels; and whether in this respect the EIA report had presented the aquifer as much bigger than it actually was.

(b) Questions relating to water quality, in particular, the applicants requested that the source of the water to be used by the process and by the workers on the project be identified separately and tested by way of samples taken from different parts of plant, including the waste water, and compared to the estimates in the EIA report.

(c) Questions relating to waste, in particular whether the gravel chosen to prevent the potential acid drainage from the mine was an appropriate engineering method; whether the toxicity of the waste ore (stockpiling of the tailings) that would be stacked had been accurately classified, including the length of time it would remain toxic; and whether the precautions set out in the EIA report were adequate, including the positioning of the leach in the light of possible erosion, in particular:

– in so far as the EIA report itself had identified acid drainage as a potential risk, whether the method of placing rocks which were less likely to create acid drainage underneath and around the edges of the stacked waste ore was efficient and specifically how the developer would determine which rocks in the waste ore would be less likely to produce acid drainage.

(d) Questions relating to the cyanide process, with respect to the amount of cyanide currently stocked in the facilities, the pH value of the cyanide solution in the heap leach process – since the EIA report referred to different pH values in different parts of the report – how much of the 40,000 tonnes of

sodium cyanide would dissipate into the air and turn into hydrogen cyanide, whether the 11 mg/m3 indicated in the report was safe, and also:

– the amount of residual cyanide left behind in the heap leach, how much of it was expected to remain in the lake and how much of it would be attached to solids; the reason the EIA report did not contain any information in this respect;

– given that there was a cyanide action plan annexed to the EIA report, whether the surrounding villages had been informed of the steps they needed to take in the event of being exposed to unsafe levels of hydrogen cyanide;

– identification by the experts of the location of air monitoring and sampling stations. In addition, how much cyanide could be expected to remain in the waste ore and under what conditions was it expected to seep into the air or water, and whether the fact that there had been no assessment or undertaking in this respect in the EIA report was a major shortcoming. Lastly, they wanted to know whether the cyanide poisoning that had recently been observed in certain villages, the death and sickness of livestock, and the loss of bees could be related to cyanide use in the facilities.

12. The applicants' list of questions was not given to the experts as the court instructed the experts to respond to the subjects it had prepared itself. In particular, the court requested from the panel of experts the following: (a) a summary of the EIA report and the subjects discussed therein; (b) whether the mining area actually conformed to the way that area was described in the EIA report with respect to the area's topography and its flora and fauna; (c) what kind of production process and method were envisaged in the light of the type of ore in the area; (d) whether the EIA report contained the generally accepted global standards applicable to similar gold mines and ore enrichment processes; (e) an explanation of the method chosen by the developer for the ore enrichment process and an assessment of its environmental impact by determining whether the precautionary measures to eliminate or minimise the environmental effects chosen were adequate; (f) an explanation of the alternative methods used in the industry for the extraction of gold ore and a discussion of whether the cyanide heap leaching method to be used in this project was being considered out of convenience or necessity, and whether the harm to the environment had been factored into the choice of this method; (g) whether there existed any other chemical alternative to cyanide in the recovery of gold and whether there were reasons that necessitated the use of cyanide for this mine in particular; (h) the nature of the modelling performed on the exploitation of open pits with respect to atmospheric events such as rain, and the reason why alternative mining methods such as block cave mining had not been considered; (i) identification of the potential consequences of overburdening the water resources and whether the EIA report contained appropriate assessments and solutions in this respect; (j) the manner in which the duration of the mining project had been calculated and whether the criteria used were based on maximising

productivity or on the characteristics of the project area, such as sustainability of water resources, threshold of acid drainage, and capacity for acid neutralisation; (k) the type of tailings disposal, if any, that had been envisaged in the EIA report as well as the types of lakes where chemical solutions would be contained and whether the necessary precautions had been foreseen with a view to preventing contamination of the environment and in particular wildlife; (l) the nature of the plans envisaged in the EIA report for water management in the project, whether they were compatible with the principle of sustainability in respect of the aquifer in the region and whether the EIA report provided for adequate alternative solutions in the event of an accident or emergency; (m) whether the ore subject to enrichment in the region contained any other metals and if so whether any of them contained arsenic, as well as a comparison of the average individual value of arsenic before and after the leaching of the ore with cyanide, and how the consequences of the tailings disposal and waste had been evaluated in the EIA report and whether the evaluation had been adequate; (n) whether the closure and post-closure plans envisaged in the EIA report were appropriate in the light of the region's characteristics; (o) whether the size and the negative consequences of the open pit during the construction, operation and closure phases of the operation had been adequately determined and assessed in the EIA report; and (p) whether there was any intensive agricultural activity within a 3 km radius beyond the health safety zone of the project area.

13. As regards the chemistry expert, the Manisa Administrative Court gave him a list of eleven questions, some of which concerned general questions relating to cyanide, its health risks, cyanide-related accidents in mines, and others which related to the cyanide management plan set out in the EIA report, namely whether it had been prepared on the basis of a worst-case or best-case scenario; the quantity of cyanide that was going to be transported to the mine and under what conditions it was to be stored, and whether the EIA report contained relevant precautions in respect of those operations; whether precautions outlined in the EIA report with regard to the risk of earthquakes and heavy rainfall were sufficient; and, finally, whether the precautions as to the impermeability of the heap leach installation and the criteria to determine the thickness of the impermeable pad had been sufficient.

14. On 28 December 2009 the experts submitted their reports to the Manisa Administrative Court. Responding to the questions addressed to them by the Manisa Administrative Court, the panel of three experts noted the following: the EIA report had accurately taken into account the project area's natural characteristics and topography, and the open-pit cyanide heap leaching method chosen by the developer was appropriate given the high tonnage, low-grade ore found in the area. They further concluded that the method preferred by the developer was the most economical, and the least energy and water consuming beneficiation method, which was preferred

globally. The EIA report contained the necessary heading and subjects that would normally be expected from such reports. The experts outlined the negative risks to the environment in this type of mining process during the construction and operation phases of the mine as follows: dust and gas emissions, solid waste, loss of habitat, noise, potential contamination of surface and ground water, loss of flora and fauna, acid rock drainage, and destruction of the aesthetics of the area. In terms of dust emissions and air pollution, the experts noted that the precautions listed were adequate, and the testing performed in the Ovacık meteorology station as well as in the five nearby villages since February 2005 showed that the emissions were below the levels authorised by the relevant regulations. Similarly, the experts concluded that the noise levels, which had been monitored at regular intervals in the project area as well as in the nearby villages, remained within the permissible legal limits. With respect to water management and potential negative effects on water resources, the experts noted that the risk of acid rock drainage had been well studied in the EIA report and the precautions listed in that respect were adequate, and that the developer had undertaken to conduct more geological and hydrogeological tests during the later phases of the mine. During the working life of the mine, water collected in the mine would be reused in the process, and during the closure of the mine the tailings ponds would be filled with 100,000 tonnes of limestone in order to neutralise acid rock drainage. The experts also found the precautions listed in the EIA report with respect to flora, fauna and reclamation methods in those respects to be adequate. They noted that the high concentration of arsenic already present in the earth originated from the volcanic nature of the earth, which was not unusual, and that the precautions in the EIA report with a view to preventing contamination were adequate. The experts also considered that the covering of the ponds containing cyanide with shade balls and the construction of those ponds with two layers of impermeable liners and the addition of a separate barren pond would be sufficient to prevent the toxic contents of the ponds from interacting with the environment (air, water resources and wildlife). In terms of water use, the experts noted that the developer had been issued with a permit to use underground water resources for the mining operations, and the calculations with respect to the process for the duration of operation of the mine were within sustainable limits. The average arsenic concentration found in the ores corresponded to 190 ppm and the developer had taken all the necessary precautions to prevent it from contaminating ground and surface water. In conclusion, the experts considered that the operation and post-closure state of the mine would not pose health risks to the local population. They further noted that there was no intensive agricultural activity in the vicinity of the mine. In their findings, the experts referred to or quoted from assessments prepared by other experts with respect to the Kışladağ mine. Although the experts indicated that those

assessments were in the case file, there is no information as to whether they were forwarded to the parties in the proceedings.

15. In his separate report submitted to the Manisa Administrative Court, the chemistry expert answered the questions related to cyanide. In sum, he noted that open-pit cyanide heap leaching was the most appropriate method for the type of ore found in the area, which was low grade and bulk tonnage gold ore. He further noted that the developer had been carrying out the operation since 2006 in compliance with the undertakings it had made in the EIA report. Cyanide, which was toxic for living beings, interfered with oxygen utilisation. He noted that almost all cyanide-related casualties in gold mines were as a result of a spill from a tailings pond, which in turn contaminated surface and ground water. He went on to add that the EIA report in question had taken into account, discussed and conducted relevant modelling of how the tailings pond would react in the event of heavy rainfall or a strong earthquake and that the developer had undertaken to take the precautions mentioned in the report. The expert noted that the mine would be operated on a zero discharge of hydrogen cyanide model, that is, waste cyanide would be washed and then evaporated in pools. On the basis of those findings and on condition that the undertakings and precautions outlined in the EIA report were adhered to by the developer, he considered that the cyanide heap leaching method would not cause any risks or negative effects beyond those that were acceptable. The expert noted that cyanide levels were being closely monitored by the authorities, that samples were tested on a regular basis at the university and that so far, all levels had been below those permitted. Similar to the expert panel's report, the chemistry expert's report referred to or quoted from assessments prepared by other experts with respect to the Kışladağ mine.

16. Both expert opinions were forwarded to the parties for their comments.

17. On 13 January 2010 the applicants submitted their objections to the Manisa Administrative Court. They argued, *inter alia*, that the experts had formed their opinions on the basis of best-case scenarios and drawn on other expert reports, which had been prepared on the developer's initiative. They noted that those other reports had not been forwarded to them, that they had had no opportunity to examine them, and that there had also been no concrete assessment by the experts on the following points which had been outlined as concerns in the initial expert report ordered in the first set of proceedings (see paragraph 7 above):

– no predictions had been made on the extent of the effects of the acid mine drainage on ground water;

– the characteristics of the soil on which the heap leach solutions pond and gold recovery plant would be constructed;

– the EIA report did not indicate the precautionary steps to be taken in the closure and post-closure phases of the plant and it did not include a concrete plan for the closure of the plant;

– it was not clear how the overburden and waste rock would be treated during the operation and closure phases of the plant;

– the predictions as to water consumption had been based on incomplete data and there was a risk of depletion of ground water from overuse;

– in the calculation of foreseen particulate-matter levels, the models did not take into account dust from the dirt roads during the construction phase of the plant, process gases that would be emitted from the hydrometallurgical units, and the lead taken into account in those models did not factor in silica and arsenopyrite interactions, which could be expected given the geological characteristics of the ore; and

– no figures had been provided for the foreseen loss of livestock herding.

18. On 13 October 2010 the Manisa Administrative Court dismissed the applicants' cases on the basis of the findings of the experts, after summarising the main points in their reports (see paragraphs 14-15 above). The court further noted that the EIA report had been prepared in accordance with globally recognised standards and contained the necessary components and risk assessments with respect to potential environmental impacts during the construction and operation of the project. The protective and emergency measures envisaged were adequate, which was supported by the analyses undertaken by a monitoring commission after the preparation of the report. The court further noted that it was satisfied with respect to the measures to be taken in the closure and post-closure phases. Lastly, the court rejected, without providing any reasoning, the applicants' objections to the experts and their reports.

19. The Supreme Administrative Court rejected the applicants' subsequent appeals on 4 November 2011 and 13 November 2013.

20. On 28 February 2014 the applicants lodged an application with the Constitutional Court, arguing that their rights under Article 2, Article 6 § 1 and Article 8 of the Convention had been violated on account of the proceedings before the Manisa Administrative Court. In respect of their grievances under Article 6 § 1, they submitted, *inter alia*, that they had not been able to put their own questions to the experts; that the experts had relied on other reports which had not been communicated to them; that their objections with respect to the expert reports had been ignored by the trial court; and that, moreover, the Supreme Administrative Court had rejected their appeals without giving reasons. Under Articles 2 and 8 of the Convention, the applicants argued, *inter alia*, that cyanide posed a danger to their health and their environment and that the operation of the mine was not safe. In that connection, they submitted that heavy metals, including high levels of arsenic, had been detected in one of the wells of the nearby village. They submitted five analyses of water samples, along with blood tests of

certain residents demonstrating a worrying level of arsenic in their blood. They further submitted written exchanges with official authorities concerning the death of livestock, which they believed to be related to the presence of arsenic.

21. In a decision of 24 January 2018, the Constitutional Court decided to examine the applicants' complaints solely under the right to respect for their private lives and homes as provided in Article 8 of the Convention, and as such it only declared the applicant Mustafa Sakaryalı's application admissible on account of the fact that he resided in a village near the mine and was a farmer. As for the rest of the applicants, the Constitutional Court declared their application inadmissible *ratione personae* on account of the fact that none of them lived or owned homes near the mine. As for the merits of Mustafa Sakaryalı's complaint, the Constitutional Court considered that the procedural obligations inherent in Article 8 of the Convention had been observed in so far as the expert reports and the court's reasoning had responded adequately to the applicant's grievances in respect of the operation of the mine. In terms of the substantive merits, the court noted that the documentary evidence submitted by the applicant was inconclusive, as the reliability of the tests in respect of the standards employed and the conditions under which samples had been taken were open to doubt. The court further noted that the tests conducted during the on-site inspection by the Manisa Administrative Court and the experts' findings did not support the allegations of the applicant.

RELEVANT LAW

I. DOMESTIC LAW

A. Right to a healthy environment and EIA regulations

22. The relevant legal framework can be found in *Taşkın and Others v. Turkey* (no. 46117/99, §§ 90-97, ECHR 2004-X) and *Okyay and Others v. Turkey* (no. 36220/97, §§ 46-59, ECHR 2005-VII).

23. In accordance with the relevant provisions of the Regulation on Environmental Impact Assessments, published in Official Gazette no. 26939 on 17 July 2008, which was in force at the relevant time, no project involving industrial activity requiring an EIA could go ahead in the absence of a decision by the Ministry to approve the EIA report submitted by the developer. The EIA process began when a developer submitted an application file for that purpose. An EIA commission within the Ministry consisting of Ministry officials, representatives of the developer and other representatives of public institutions evaluated the application form and, if it found it to be complete, announced the project to the public. A meeting was organised for the public to express its views and those views were included in the EIA

report; during that period, the EIA commission decided whether a special format was necessary for the EIA report. Once that process had been completed, the developer submitted the EIA report to the commission and the commission began its review. When the final EIA report was submitted to the commission, the report was also published for comments to be received within ten days. At the end of that period the commission evaluated the EIA report in the light of the comments received by the public and issued a decision to approve or reject the project.

B. Codes of Administrative and Civil Procedure

24. Article 31 § 1 of the Code of Administrative Procedure (Law no. 2577) refers to the Code of Civil Procedure for matters relating to experts, on-site inspections, and evidence. The relevant provisions of the Code of Civil Procedure (Law no. 6100) provide as follows:

Article 266 – expert evidence

"Where the examination of the case requires technical or expert knowledge, the court shall of its own motion or at the request of a party appoint an expert. No expert shall be heard in respect of matters which are within the general and legal competence of a judge."

Article 273 § 1 – mandate of the expert

"The court shall, after consulting with the parties, include the following in its decision appointing an expert:

(a) a clear and conclusive determination of the subject matter to be assessed;

(b) questions to be answered by the expert;

(c) deadline by when the report is to be submitted."

Article 278 § 1 – expert's duties

"The expert shall carry out his or her duties under the direction and supervision of the court."

II. COUNCIL OF EUROPE MATERIALS

25. On 27 June 2003 the Parliamentary Assembly of the Council of Europe adopted Recommendation Rec(2003)1614 on environment and human rights. The relevant part of this recommendation states as follows:

"9. The Assembly recommends that the governments of member states:

...

9.3. safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention;"

26. The relevant parts of the European Commission for the Efficiency of Justice's Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States (CEPEJ(2014)14) state as follows:

> **"4.10 Instructions of the court and of the parties**
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> 76. Specific instructions given by the court concerning the production of the expert opinion, that include instructions concerning the content, the procedure and the report of the expert, have to be obeyed. Parties may ask questions on the report for clarification before the matter comes to trial.
>
> 77. The court or the administrative body of the court that appointed the expert must have the opportunity to give instructions concerning the specific production of the expert opinion (of the assessment/report).
>
> 78. The parties to the lawsuit or trial need to be extensively informed about the instructions of the court that are given to the expert. The general principle of the right to be heard must be adhered to.
>
> 79. The court may also ask the expert to draw up a preliminary report, to be submitted to the parties prior to the submission of his/her final report. This practice lessens the risks of omissions or mistakes during the expert appraisal and clarifies the expert's position on a given matter, thereby also decreasing the risk of subsequent litigation over the expert opinion.
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> ...
>
> **8.1 Binding effect of the expert opinion**
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> 134. The expert opinion is not binding on the court or on the parties. The court evaluates it freely. The court must verify and determine whether the expert opinion is objectively convincing. In so doing, the court has to consider all objections that have been made against the expert opinion by the parties.
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> 135. The expert opinion is introduced into the judicial proceedings by written submission or by verbal explanation during the lawsuit. The parties and the court must have the right to ask the expert questions. The expert is obligated to give his opinion in the matter and may have to report an additional expert opinion. Discussion of the content of the expert opinion with the expert can be actuated by introducing and opposing it to private expert opinions already available or still to be obtained.
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> 136. However, the way to question the expert is different from a real cross-examination that can only be conducted with witnesses. The right to question the expert solely refers to an understanding in terms of content and to the control of scientific correctness of the expert's statements."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicants complained that their right to a fair trial had been violated on account of the fact that (i) they had not been given an opportunity to put their own questions to the experts, (ii) the expert opinions had not been

forwarded to them for comments, and (iii) the domestic courts had not responded to their objections to the conclusions of the experts. They relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. *Compatibility* ratione personae *and* ratione materiae

(a) The parties' submissions

28. The Government first contested the applicants' victim status, arguing that the proceedings before the Manisa Administrative Court had not related to direct and personal rights of the applicants and that their action had taken the form of an *actio popularis*, which fell outside the scope of the Convention guarantees. They submitted in that connection that, in accordance with the practice of the Turkish administrative courts, an action for annulment could be lodged by anyone with a sufficient interest with the purpose of challenging the alleged unlawfulness of an administrative act and without having to prove that his or her rights were directly affected by it. However, the applicants had neither argued that they had suffered actual harm from the operation of the plant nor established that they lived sufficiently close to the location of the mine to be significantly affected. In that connection the Government submitted that except for Mustafa Sakaryalı, all the applicants had lived some 200 km away from the plant. Lastly, the Government argued that the applicants had failed to present reasonable and persuasive evidence as to the possibility of a violation affecting them personally.

29. The Government argued, secondly, that the applicants' complaints did not concern "civil rights and obligations" within the meaning of Article 6 § 1 of the Convention. In that connection, the Government noted that while the applicants had relied before the domestic courts on their constitutional right to live in a healthy environment, they had failed to demonstrate any imminent harm affecting them personally from the operation of the plant. In the Government's view, the applicants' action had been intended to dispute the very principle of gold mining itself and as such the dispute did not relate to the applicants' civil rights. On the contrary, the applicants' action had concerned solely with the defence of collective environmental interests and the connection between the right they had invoked and the impugned decision of the Ministry was too tenuous and remote. The Government considered that the applicants' complaint should be assessed in the light of the Court's findings in *Balmer-Schafroth and Others v. Switzerland* (26 August 1997, § 40, *Reports of Judgments and Decisions* 1997-IV) and *Athanassoglou and Others v. Switzerland* ([GC], no. 27644/95, ECHR 2000-IV) rather than *Okyay and Others v. Turkey* (no. 36220/97, ECHR 2005-VII).

30. The applicants first submitted that, in addition to Mustafa Sakaryalı, the applicant Muammer Sakaryalı had immovable property within the 16 km radius of the plant and for that reason, he was directly affected by the operation of the plant. As for the remaining applicants, they noted that they were concerned citizens, living in İzmir, who had come together as part of a movement called *ELELE*, studying and assessing the legal, social and environmental implications of gold mines in the Aegean region, which comprised the city of Uşak as well.

(b) Submissions of the third-party intervener

31. The International Commission of Jurists made submissions regarding the applicability of Article 6 § 1 of the Convention in the specific context of environmental litigation in Türkiye. They noted that among the two available legal remedies in the Turkish administrative law context, an action for a full remedy could only be lodged by persons whose subjective rights had been affected by administrative acts, whereas annulment actions could be lodged by anyone whose interests had been affected by an administrative act. They noted that up until 2011, the Supreme Administrative Court had interpreted the concept of interest broadly by recognising and giving standing to all citizens as interested parties in issues regarding the protection of environmental, cultural and historical values.[1] The relatively expansive approach to legal standing started to change in 2011, when, for example, the Supreme Administrative Court concluded that Bar associations had no legal interest to lodge an application against environment-related projects.[2] The intervener went on to add that in a decision of 2016 concerning the environmental impact of an ore enrichment facility, the Supreme Administrative Court had denied standing to environmental activists, noting that they did not have direct links to the area.[3] The court required that complainants either had to own property, have residence or have been born in the relevant area to have an interest in requesting the cancellation of the project. The intervener noted that as a result of recent developments in the determination of standing, the administrative courts sought a connection between the individual and the place where the environment-related projects, such as mining and energy, were taking place.

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[1] The intervener referred to the following decisions of the Supreme Administrative Court: decisions nos. 2011/1374E and 2011/796K of 21 September 2011 of the 14th Chamber, and decisions nos. 2001/415E and 2001/737K of 19 October 2001 of the General Assembly of Administrative Proceedings Divisions.

[2] Decisions nos. 2011/13296E and 2011/450K of 15 July 2011 of the 14th Chamber; decisions nos. 2010/1097E and 2012/3815K of 27 June 2012 of the 6th Chamber; and decisions nos. 2016/4786E and 2017/2860K of 28 September 2017 of the General Assembly of Administrative Proceedings Divisions.

[3] Decisions nos. E.2015/1575 and K.2016/124 of 25 January 2016 of the 6th Chamber.

Concerning the Constitutional Court's approach with respect to victim status concerning environment-related rights, the intervener submitted that only those constitutional rights that were also within the scope of the Convention could be raised in individual applications. In applications relating to the protection of life, health, family and private life, physical integrity and private property of persons, the Constitutional Court required the applicants to demonstrate that they were directly and personally affected by the administration's acts, the concept of legal interest as understood in Turkish administrative law or being granted standing in courts not being sufficient for this assessment.[4] However, the intervener submitted examples from the Constitutional Court's case-law in which that court, while declaring the applicants' Article 2, Article 8 or Article 1 of Protocol No. 1 complaints inadmissible for lack of victim status, did not examine separately the admissibility or merits of Article 6 complaints despite the fact that those applicants had been granted standing in annulment actions before the administrative courts.[5]

32. The intervener argued that irrespective of those developments, the right to a healthy environment remained a constitutional guarantee in Türkiye and whether an individual had a legal interest in an annulment action could only be decided through a fair hearing conducted in line with the constitutional and Convention standards. Given that the civil nature of the right to a healthy environment had remained unaltered since the judgment in *Okyay and Others* (cited above), they asked the Court to find that any dispute relating to this right be considered to fall within the scope of Article 6 § 1. They further made a link with *Chiarra Sacchi et al. v. Türkiye* (UN doc. CRC/C/88/D/108/2019), a climate change case brought by sixteen non-national children against five States, including Türkiye, in which the Turkish Government had submitted, *inter alia*, that the complainants had failed to exhaust domestic remedies. In that respect, referring to the right of individual application before the Constitutional Court, the Government noted that on the basis of the right to a healthy environment as protected under Article 53 of the Constitution, the complainants could have lodged an application before the Constitutional Court (paragraph 4.4) and as for the other possible avenues for redress, those whose interests had been violated could initiate administrative proceedings. They noted that "violation of interests" had a much wider scope than "violation of rights" and that the Supreme

[4] The intervener referred to decision no. 2013/6260 of 13 April 2016 of the Constitutional Court in *Ayşe Sevtap Uzun*, in which that applicant's access to a court complaint about a mining permit in the city in which she resided had been declared inadmissible on account of the lack of victim status.

[5] In particular, the intervener referred to decision no. 2014/5809 of 10 December 2014 in *Tezcan Karakuş Candan and Others*; judgment no. 2014/1767 of 6 December 2017 in *Arif Ali Cangı and Others*; and decision no. 2015/19256 of 8 May 2019 in *Adnan Ayan and Others*.

Administrative Court had interpreted the concept of "violation of interests" quite broadly. In accordance with the law on the environment, the Government noted that anyone who had been harmed or who was aware of an activity that polluted or degraded the environment could request the necessary measures to be taken or the cessation of any activity (paragraph 4.5).

(c) The Court's assessment

33. The Court notes that the applicants were party to the proceedings before the Manisa Administrative Court, and as such they were directly affected by the alleged shortcomings complained of in those proceedings. Therefore, their application under Article 6 § 1 of the Convention cannot be rejected on *ratione personae* grounds.

34. As for the compatibility *ratione materiae* of the applicants' complaint with Article 6 § 1 of the Convention, the Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, as a recent authority, *Grzęda v. Poland* [GC], no. 43572/18, § 257, 15 March 2022; and also, *Balmer-Schafroth and Others*, cited above, § 32; and *Athanassoglou and Others*, cited above, § 43, in the context of environment litigation).

35. The Court notes that there is no dispute between the parties that the proceedings before the Manisa Administrative Court concerned a genuine and serious dispute with respect to the lawfulness of the Ministry's decision to approve the EIA of the Kışladağ mine, which is supported by the fact that the Manisa Administrative Court examined the case on the merits. The Government also agreed that the right relied on by the applicants in the domestic proceedings was the applicants' constitutional right to live in a healthy environment. The Court has regarded that right as "civil" for the purposes of Article 6 § 1 (see *Okyay and Others*, cited above; *Taşkın and Others v. Turkey*, no. 46117/99, § 133, ECHR 2004-X; *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 91, 2 December 2010; and *Bursa Barosu Başkanlığı and Others v. Turkey*, no. 25680/05, §§ 126-28, 19 June 2018).

36. The Court further notes that the applicants Mustafa and Muammer Sakaryalı live or own property in close proximity to the mine. It therefore considers that the outcome of the proceedings in question were directly decisive for their right to live in a healthy environment. The remaining applicants did not claim to be personally and directly affected by the operation of the mine but argued that they had been involved in the dispute

as “public watchdogs” for the protection of the environment, having studied scientific, medical and legal effects of environment-related projects and coming under the initiative *ELELE* for this purpose. Drawing a parallel with the findings of the Court in the case of *Cangı v. Turkey* (no. 24973/15, § 35, 29 January 2019) where the Court had considered that applicant (who is coincidentally the first applicant in the present case) had exercised his role as a public watchdog in the context of Article 10 of the Convention in his individual capacity as a member of a group initiative, which comprised of individuals and several non-governmental organisations coming together for the prevention of the destruction of the ancient site of Allianoi (ibid., 6, § 32 and § 35), the applicants considered that their present application should be warranted similar protection under Article 6 § 1.

37. The Court notes that the first four applicants do not live in the vicinity of the mine and accept that the mine’s operations do not directly and personally affect them. Accordingly, their situation differs from that of the applicants in *Okyay and Others* (cited above), which concerned the operation of three thermal power plants on account of the damage that they had caused to the environment and the risk they posed for the life and health of the region’s population, to which the applicants belonged. Contrary to the current case, in *Okyay and Others*, the contested matter therefore brought into play the applicants’ own right to protection of their physical integrity (ibid., §§ 65 and 66). Moreover, the situation of the first four applicants *vis-à-vis* the outcome of the domestic proceedings is distinguishable from the one in *Okyay and Others*. In finding Article 6 § 1 applicable in that case, the Court relied, *inter alia*, on the fact that the applicants, despite not living close to the thermal power plants, had nevertheless been affected by their emissions, the extent of that potential pollution having been established during the course of the domestic proceedings and courts ruling in their favour (ibid., §§ 66-67, compare with *Ivan Atanasov v. Bulgaria* (cited above, § 93)). Lastly, neither the fact that the first four applicants considered themselves as “public watchdogs” nor the informal movement they have created is sufficient for the Court to consider the proceedings to have been directly decisive for their civil rights and obligations.

38. It therefore follows that the application in so far as brought by the first four applicants is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. Other grounds of inadmissibility

39. The Government further submitted that the applicants’ complaints were manifestly ill-founded and should therefore be declared inadmissible.

40. The Court is of the opinion that the fifth and sixth applicants’ complaints raise sufficiently complex issues of fact and law, so that they cannot be rejected as manifestly ill-founded within the meaning of Article 35

§ 3 (a) of the Convention. It is further satisfied that they are not inadmissible on any other ground. They must therefore be declared admissible.

B. Merits

1. *Inability to put questions to the experts and the non-communication of documents assessed by the experts to the applicants*

(a) The parties' submissions

41. The applicants submitted that the administrative court had not included their questions on the list of questions given to the experts during the on-site inspection. They further argued that the experts' conclusions had largely been based on other expert assessments, which had been prepared at the request of the developer, and that they had not been forwarded to them for their examination and comments in the proceedings.

42. With respect to the inability of the applicants to put questions to the experts in the course of the proceedings, the Government considered this complaint manifestly ill-founded since, in their view, the questions put to the experts by the administrative court comprised in general the same issues the applicants wanted the experts to answer. With respect to the applicants' allegation concerning the non-communication of the expert reports to them, the Government noted that the actual reports of the experts had been communicated to them but that the applicants' allegation concerned certain information and other reports relied on by the experts in their reports that had not been communicated to them and that this, in itself, was not in contravention of the principle of adversarial proceedings in so far as the applicants could have had access to those reports by consulting the case file.

(b) The Court's assessment

(i) General principles

43. The Court reiterates that while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; *Perić v. Croatia*, no. 34499/06, § 17, 27 March 2008; and *Carmel Saliba v. Malta*, no. 24221/13, § 63, 29 November 2016). Moreover, Article 6 § 1 of the Convention does not bar the national courts from relying on expert opinions drawn up by specialised bodies to resolve the disputes before them when this is required by the nature of the issues under consideration (see *Letinčić v. Croatia*, no. 7183/11, § 61, 3 May 2016, and *Devinar v. Slovenia*, no. 28621/15, § 47, 22 May 2018).

44. The Court reiterates in this connection that the opinion of an expert who has been appointed by the competent court to address issues arising in

the case is likely to carry significant weight in that court's assessment of those issues. For example, the Court has already held that an opinion of a medical expert, as it falls outside judges' probable area of expertise, is likely to have a dominant influence on the assessment of the facts and to be considered an essential piece of evidence (see *Feldbrugge v. the Netherlands*, 29 May 1986, § 44, Series A no. 99; *Mantovanelli v. France*, 18 March 1997, § 36, *Reports* 1997-II; and *Augusto v. France*, no. 71665/01, § 51, 11 January 2007).

45. The Court further underlines that just like observance of the other procedural safeguards enshrined in Article 6 para. 1 (art. 6-1), compliance with the adversarial principle relates to proceedings in a "tribunal"; no general, abstract principle may therefore be inferred from this provision that, where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or to be shown the documents he has taken into account (see *Mantovanelli*, § 33, and more recently, *Test-Achats v. Belgium*, no. 77039/12, § 20, 13 December 2022). What is essential is that the parties should be able to participate properly in the proceedings before the "tribunal". Thus, the procedural position occupied by the experts throughout the proceedings, the manner in which they perform their functions and the way the judges assess their opinions are relevant factors to be taken into account in assessing whether the principles of equality of arms and adversarial proceedings have been complied with (see *Letinčić*, cited above, § 50; *Devinar*, cited above, § 47; and *Hamzagić v. Croatia*, no. 68437/13, § 43, 19 December 2021).

46. The Court further reiterates that the right to adversarial proceedings entails the parties' right to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see, among other authorities, *K.D.B. v. the Netherlands*, 27 March 1998, § 44, *Reports* 1998-II; *Kress v. France* [GC], no. 39594/98, § 65, ECHR 2001-VI; *Ferreira Alves v. Portugal (no. 3)*, no. 25053/05, § 37, 21 June 2007; and *Andersena v. Latvia*, no. 79441/17, § 87, 19 September 2019).

47. This means that parties to proceedings must have the opportunity to familiarise themselves with the evidence before the court, as well as the opportunity to comment on its existence, content and authenticity in an appropriate form and within an appropriate time, if need be, in writing and in advance (see *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 42, 3 March 2000, and *Colloredo Mannsfeld v. the Czech Republic*, nos. 15275/11 and 76058/12, § 33, 15 December 2016). What is particularly at stake is applicants' confidence in the workings of justice, which is based on, *inter alia*, the assumption that they are afforded the opportunity to express their views on every document in the case file (see *Pellegrini v. Italy*, no. 30882/96, § 45, ECHR 2001-VIII; *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, § 203, 12 December 2013; and *Juričić v. Croatia*, no. 58222/09, § 75, 26 July 2011). This requirement applies equally to non-

binding advisory opinions intended to assist the court (see, for example, *K.D.B. v. the Netherlands*, cited above, § 43, and *McMichael v. the United Kingdom*, 24 February 1995, § 80, Series A no. 307-B), as well as information and opinions obtained by the court on its own initiative in order to reach an informed decision (see, for example, *Zagrebačka banka d.d.*, § 201, and *Juričić*, § 74, both cited above). Parties have a legitimate interest in receiving copies of written observations containing reasoned opinions on the merits, and it is for them alone to judge whether or not a particular document calls for their comments (see *Ferreira Alves*, cited above, § 41).

(ii) Application to the present case

(α) Inability to put questions to the experts

48. The Court notes that in order to determine whether the Ministry's decision to approve the developer's mining project had been lawful, the Manisa Administrative Court decided to seek of its own motion two expert opinions in order to investigate the compliance of the EIA report with environmental regulations. The determination of this issue pertained to a highly technical field that was clearly not within that court's knowledge. Thus, although the administrative court was not in law bound by the experts' findings, the reports were likely to have a preponderant influence on the assessment of the facts by that court and therefore the procedure of obtaining the expert evidence would have needed to comply with the adversarial principle. While no issue arises in respect of the way domestic rules of procedure give the courts the sole discretion to give instructions to the experts, and in this respect adversarial proceedings cannot be interpreted as giving parties the right to put questions to experts if this is not permitted by domestic law, the Court nevertheless considers that the courts should respect the parties' right to participate effectively in the expert examination procedure to the extent required by the circumstances of the case.

49. Turning to the present case, the Court notes that it is the applicants' position that the fact that they could not put their own questions to the experts rendered the proceedings unfair. The Government, on the other hand, considered this to be a manifestly ill-founded argument, contending that the questions prepared by the domestic court comprised more or less all the issues raised in the proceedings.

50. The Court would begin by noting that it cannot assume a fact-finding role by attempting to determine which of the applicants' questions were different from the ones prepared by the domestic court and whether, because of their degree of specificity, they should have been included in the list of questions to be put to the experts. The Court notes in this respect that the applicants did not argue before the Court that their questions could have been decisive for the outcome of the domestic proceedings or that they had concerned a key issue that was left unassessed by the domestic court (see,

mutatis mutandis, *Erdinç Kurt and Others v. Turkey*, no. 50772/11, § 63, 6 June 2017).

51. The Court further reiterates that the question of whether the extent of judicial review afforded in administrative-law disputes was "sufficient" may depend not only on the discretionary or technical nature of the subject-matter of the decision appealed against and the particular issue that the applicant wishes to ventilate before the courts as being the central issue for him or her, but also, more generally, on the nature of the "civil rights and obligations" at stake and the nature of the policy objective pursued by the underlying domestic law (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 180, 6 November 2018 with further references). The Court finds it important to note in this respect that the dispute at the domestic level related to the question of compatibility of a gold mine with EIA regulations, involving a specialised and technical area of law, and the issue accentuated before the trial court being concentrated on this very aspect rather than a particular aspect of the applicants' personal rights at stake. For this reason, the Court does not consider that any issue arises under Article 6 § 1 of the Convention on account of the way in which the trial courts excluded the applicants' questions.

Having regard to the foregoing, the Court concludes that there has not been a violation of Article 6 § 1 and the applicants' right to participate effectively in the proceedings were not breached.

(β) The non-communication of documents assessed by the experts to the applicants

52. The Court notes that there is no dispute between the parties regarding the fact that the experts relied on different expert assessments which had been prepared on the developer's initiative nor the fact that those expert assessments were not forwarded to the applicants in the course of the proceedings. The Court further notes that those expert assessments were not general information or academic sources that could be considered as falling within public knowledge.

53. The Court further notes that the expert reports of 28 December 2009 relied on or quoted directly to a large extent the conclusions made in those assessments (see paragraphs 14-15 above). Moreover, those assessments were included in the case file and appear to have been made available to the experts by the Manisa Administrative Court, attesting to their being admitted as evidence in support of the developer's submissions.

54. In these circumstances, the Court reiterates that the right to adversarial proceedings entails the parties' right to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see paragraph 46 above). Accordingly, given that the applicants in the instant case did not have the opportunity to fully acquaint themselves with the evidence in the case file which the main experts had

relied on, the Court concludes that there has been a violation of Article 6 § 1 in this respect.

55. Lastly, in relation to the Government's argument that the applicants could have consulted the case file on their own, the Court reiterates that the opportunity to consult a case file is not, of itself, a sufficient safeguard to ensure an applicant's right to adversarial proceedings (see *Göç v. Turkey* [GC], no. 36590/97, § 57, ECHR 2002-V, and *Milatová and Others*, cited above, § 61).

2. The domestic courts' failure to respond to the applicants' objections to the conclusions reached by the experts

56. Having regard to its conclusions under Article 6 of the Convention, the Court considers that it is not necessary to examine separately the remaining complaint raised under Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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."

58. In their observations the applicants requested fair compensation for the breaches in the proceedings complained of and for the damage sustained and costs and expenses incurred by them. That being so, they did not specify the amount of just satisfaction.

59. The Government argued that the applicants had failed to comply with the requirements of Rule 60 of the Rules of Court, and urged the Court not to make any award.

60. The Court reiterates that an applicant who wishes to obtain an award of just satisfaction must make a specific claim to that effect (Rule 60 § 1 of the Rules of Court). While the Court is, even in the absence of a properly submitted claim, empowered to afford just satisfaction, this is only on account of non-pecuniary damage and in exceptional circumstances (see *Nagmetov v. Russia* [GC], no. 35589/08, §§ 74-82, 30 March 2017). It finds that such exceptional circumstances do not exist in the present case. It therefore rejects the applicants' claim for just satisfaction.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaints in so far as brought by the applicants Muammer and Mustafa Sakaryalı concerning the inability to put questions to the experts, the non-communication of documents in the case

file to the applicants and the domestic courts' failure to respond to the applicants' objections admissible and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention on account of inability to put questions to the experts;

3. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of the non-communication of documents in the case-file;

4. *Holds*, unanimously, that there is no need to examine the merits of the applicants' other complaint under Article 6 § 1 of the Convention;

5. *Dismisses*, unanimously, the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 November 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Arnfinn Bårdsen President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Krenc is annexed to this judgment.

A.R.B.
D.V.A.

PARTLY DISSENTING OPINION OF JUDGE KRENC

1. While agreeing with the finding of a violation of Article 6 § 1 of the Convention in respect of the two last applicants, much to my regret I am unable to follow the majority's finding that the first four applicants' complaint under Article 6 § 1 of the Convention is inadmissible as incompatible *ratione materiae* with this provision. I will briefly explain my point of view.

2. At the outset, I would like to reiterate the well-established case-law of the Court, according to which:

> "Article 6 § 1 does not guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B, and *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X). The starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A, and *Roche*, cited above, § 120). This Court would need strong reasons to differ from the conclusions reached by the superior national courts by finding, contrary to their view, that there was arguably a right recognised by domestic law (ibid.)." (See *Boulois v. Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012.)

Two important elements flow from this statement.

Article 6 § 1 is only a procedural support for the domestic civil rights

3. The first is that Article 6 § 1 of the Convention has no substantive content. It does not contain any material requirement. All it does is provide for the fairness of judicial proceedings which includes, *inter alia*, the principles of adversarial proceedings and equality of arms in favour of the parties involved in a national dispute.

Article 6 differs from the other provisions of the Convention, in particular from Article 8 which requires there to have been an "interference" with private life, family life or the home in order to be applicable. This means that the nuisance caused by an activity must attain a minimum level of severity to trigger the applicability of Article 8. With regard to Article 6, no threshold is required. For Article 6 § 1 in its civil limb to be applicable, there must be a "dispute" concerning a "civil right" and the outcome of the proceedings in issue must be directly decisive for the right in question (see *Grzęda v. Poland* [GC], no. 43572/18, § 257, 15 March 2022).

What matters is what the national courts said when interpreting and applying the domestic law

4. The second element is that, as regards Article 6 § 1 of the Convention, "the Court must take as a starting-point the provisions of the domestic law and their interpretation by the domestic courts" (see *Károly Nagy v. Hungary* [GC], no. 56665/09, § 65, 14 September 2017). In other words, what matters under Article 6 § 1 is what the national courts said when interpreting the domestic law.

5. In the present case, the national courts granted standing to all the applicants and examined their claims on the merits. They did not raise any objections regarding whether the applicants could rely on the constitutional right to live in a healthy environment[1], despite some of them not living in the vicinity of the mine concerned.

A questionable approach

6. However, the present judgment makes the applicability of Article 6 conditional on the applicants demonstrating an interference in their daily life or, at least, on the existence of a proximity link with the activity concerned. This seems problematic to me.

First, it fosters confusion between Article 6 (procedural right) and Article 8 (substantive right) of the Convention (see paragraph 3 above).

Secondly, it overlooks that, more and more, the doors of the national courts in environmental cases are now open to associations and even individuals without it being necessary to demonstrate the existence of personal prejudice. It is up to the national authorities to define the conditions for access to environmental justice.

Thirdly, the Court is an international court. In this regard, I truly wonder how the Court can itself determine which applicant is directly affected or not by the civil right at stake. How can the Court determine this impact from Strasbourg and contradict the domestic courts? What are the criteria used by the Court for so ruling? Is it (only) the vicinity to the activities or the site concerned? At what distance will the Court draw the line between being affected and not being affected?

Taking subsidiarity seriously

7. The Convention system is based on the principle of subsidiarity. It is of utmost importance that the Court take this principle seriously and give it its full meaning. This principle concretely implies that when a national court has

[1] Article 56 of the Constitution provides: "Everyone has the right to live in a healthy, balanced environment."

ruled that applicants can invoke a civil right under domestic law before it, the Court cannot contradict this finding under Article 6 of the Convention.

Protection should not be less in Strasbourg than under the domestic system

8. In the field of Article 6 which is – I do insist – a procedural right with no substantive content, the Court cannot reduce the protection afforded at national level.

In *Okyay and Others v. Turkey* (no. 36220/97, § 68, ECHR 2005-VII), which also concerned a dispute about environmental protection at the domestic level, the Court expressly held that "the concept of a 'civil right' under Article 6 § 1 [could not] be construed as limiting an enforceable right in domestic law within the meaning of Article 53 of the Convention".

More generally, the Court has confirmed that "[t]hrough its system of collective enforcement of the rights it establishes, the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level (see *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 28, *Reports of Judgments and Decisions* 1998-I), in accordance with Article 53" (see *Vera Fernández-Huidobro v. Spain*, no. 74181/01, § 112, 6 January 2010).

This means that subsidiarity is aimed at reinforcing the national level of protection, not at diminishing it.

Due attention to environmental justice

9. "In today's society the protection of the environment is an increasingly important consideration" (see *Fredin v. Sweden (no. 1)*, 18 February 1991, § 48, Series A no. 192). This statement was expressed by the Court over thirty years ago. Since then, the ever-growing importance attached to the right to live in a healthy environment at both national and international level is a reality that nobody can ignore.

Moreover, we cannot lose sight of the fact that this right is taking on an increasingly collective and global dimension, in particular concerning access to information and environmental impact assessments. The possibility of invoking the right to live in a healthy environment is not necessarily linked under domestic law to a strict geographical criterion.

A contrast with the existing case-law

10. The Court has already stated that it has to be "flexible" – the Court used the word "*souplesse*" in French – concerning the applicability of Article 6 §1 of the Convention when it comes to environmental issues in cases brought by associations.

In *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox v. France* ((dec.), no. 75218/01, 28 March 2006), the Court concluded that, while the purpose of the proceedings in issue had fundamentally been to protect the general interest, the "dispute" raised by the applicant association also had a sufficient link with a "right" to which it could claim to be entitled as a legal entity. The Court considered that the issue of the public's right to be informed and to participate in the decision-making process where an activity involving a risk to health or the environment was concerned lay at the heart of the applicant association's claims and on that basis it found Article 6 § 1 applicable.

The judgment in *Association Burestop 55 and Others v. France* (nos. 56176/18 and 5 others, §§ 53-60, 1 July 2021) confirmed this case-law.

11. The *Okyay* judgment (cited above) deserves special attention as it concerned individuals, like the present case, and related to Turkish law. In *Okyay* the applicants' exposure to the risks posed by three thermal powerplants (the applicants lived around 250 kilometres away from them) was clearly not a decisive factor for determining the applicability of Article 6 § 1 of the Convention. I refer to paragraphs 65-68 of the *Okyay* judgment, which constituted a significant evolution of the case-law compared to the judgment delivered a long time ago in *Balmer-Schafroth and Others v. Switzerland* (26 August 1997, §§ 39-40, *Reports* 1997-IV).

I regret that the present judgment departs from the approach in *Okyay*.

A troubling consequence

12. Ultimately, the majority's approach leads to a rather surprising outcome. All six applicants were parties to the *same* national proceedings and were able to rely on the *same* constitutional right. Nonetheless, the majority consider that only the last two applicants have the right to a fair hearing, while the first four applicants are not entitled to such a right.

This means that those applicants, who were involved in lengthy proceedings (2004-18) in which they were able to invoke their constitutional right to live in a healthy environment, could be deprived of all the fundamental guarantees (independence and impartiality of the tribunal, right to a reasoned decision, principles of adversarial proceedings and equality of arms, and so on), without the Court finding it wrong from the perspective of Article 6 § 1 of the Convention.

With all due respect for my esteemed colleagues, I must confess that this troubles me.

*

13. In conclusion, and to be clear, I do not consider that the applicability conditions of Article 6 § 1 of the Convention should be disregarded when

environmental issues are at stake. That is not the point I am making. My concern relates to the fact that the Court cannot deny the right to a fair hearing under Article 6 § 1 to parties to national proceedings in which they were allowed to rely on their constitutional right to live in a healthy environment. Where such a right has been recognised by the national courts, a fair hearing must be afforded.

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth/registration	Nationality	Place of residence
1.	Arif Ali CANGI	1964	Turkish	İzmir
2.	Ertuğrul BARKA	1950	Turkish	İzmir
3.	Ömer Turgut ERLAT	1958	Turkish	İzmir
4.	Oya OTYILDIZ	1958	Turkish	İzmir
5.	Muammer SAKARYALI	1957	Turkish	İzmir
6.	Mustafa SAKARYALI	1939	Turkish	Uşak