



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

SECOND SECTION

CASE OF ÜREK AND ÜREK v. TURKEY

(Application no. 74845/12)

JUDGMENT

STRASBOURG

30 July 2019

FINAL

09/12/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ürek and Ürek v. Turkey,

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

Robert Spano, *President*,
Marko Bošnjak,
Julia Laffranque,
Egidijus Kūris,
Stéphanie Mourou-Vikström,
Arnfinn Bårdsen,
Saadet Yüksel, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 9 July 2019,

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

PROCEDURE

1. The case originated in an application (no. 74845/12) 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 Nezir Ürek and Mr Ahmet Ürek (“the applicants”), on 18 September 2012.

2. The applicants were represented by Ms A. Pamukçu Yörдем, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) were represented by their Agent

3. The applicants alleged that their criminal convictions had been in breach of their rights under Articles 9, 10 and 11 of the Convention. They also alleged under Article 6 §§ 1 and 3 of the Convention that they had been convicted despite the fact that they had not been involved in any violence; that the first-instance court had failed to conduct a proper enquiry regarding the events; that they had been deprived of the opportunity to question police officers whose statements had been taken in court in the applicants’ absence; and that the first-instance court had not taken their written and oral defence submissions into account.

4. On 8 January 2014 notice of the aforementioned complaints was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicants were born in 1960 and live in Şırnak.

A. Events of 5 December 2009, the applicants' arrest and detention pending trial

6. On 5 December 2009 a demonstration was held in Cizre to protest about the conditions of detention of Abdullah Öcalan, the leader of the PKK (Kurdish Workers' Party), an illegal terrorist organisation.

7. According to a report prepared on 7 December 2009 by Cizre police headquarters, the police had issued a warning, informing the crowd that the march and demonstration were illegal, and asked them to disperse. The demonstrators had not obeyed the warning. The police had then used tear gas to disperse the crowd. The demonstrations had continued in other streets.

8. The report went on to state that at around 1.30 p.m. a group of ten to fifteen people had gathered in a street close to the office of the DTP (Party for a Democratic Society). They had waved posters of the leader of the terrorist organisation and shouted slogans in support of him. Some of them had had their faces covered and had had stones and Molotov cocktails in their hands. They had then started marching. The police had asked them to disperse but they had not obeyed and had attacked the police officers with stones. When the police had intervened, the demonstrators had split into groups and had started running away. The applicants and four other people had been followed and arrested. At the place of the arrest of the applicants and the four other people the police had found a number of banners with slogans in support of the leader of the terrorist organisation, as well as wooden clubs and iron bars.

9. The report also contained thirty photographs of demonstrators. The second applicant, Ahmet Ürek, could be seen in four of them – in the first two photographs he was walking next to the demonstrators, in the third he was standing in the crowd and making a "V" sign, while in the fourth photograph he was talking to another man. The report did not include any photograph showing the first applicant.

10. According to the applicants' submissions, on 5 December 2009 they had arrived in Cizre from the Uludere district of Hakkari where they lived, in order to sell some items and do some shopping. They had found out that the shops were closed in Cizre as there was a demonstration in the town centre. They had then found themselves in the middle of the demonstration and had listened to the press statement made by Cizre's mayor and officials from the DTP. The police had later begun to use tear gas in order to disperse the demonstrators. The applicants had run away and had entered a garden, where they had been found and arrested.

11. On 5 December 2009 eight police officers, who had carried out the applicants' arrest, gave separate but identical statements. According to those statements, the applicants had been found in a shed in the garden of a house and had been arrested along with four other people. At that location the

police had found banners with slogans in Kurdish and Turkish, which constituted propaganda in favour of Abdullah Öcalan, as well as wooden clubs and iron bars.

12. The first applicant refused to make any statements to the police. During his questioning, the second applicant stated that he had not been involved in any illegal or reprehensible act. He contended that he had gone to Cizre in the same bus as the first applicant and two other people to do some shopping and that he had taken refuge in the garden where they had been arrested as he had tried to protect himself from the tear gas.

13. On 7 December 2009 the applicants were brought before the Cizre public prosecutor and the Cizre Magistrates' Court. They maintained that they had not participated in the demonstration and had no knowledge of the banners found in the shed. Nezir Ürek contended that he had taken refuge in the garden as children had thrown stones at the police, who had then used tear gas. Ahmet Ürek stated that he had not chanted illegal slogans. During his questioning by the court, Ahmet Ürek was asked about four photographs of him taken during the demonstration of 5 December 2009. He stated that he did not know whether the person in those photographs was him and added that he had not participated in the demonstration.

14. On the same day the judge at the Cizre Magistrates' Court decided to remand the applicants in custody.

B. Criminal proceedings brought against the applicants

15. On 23 December 2009 the Diyarbakır public prosecutor filed a bill of indictment with the Diyarbakır Assize Court against the applicants and two other persons. In the indictment, the applicants were charged with membership of an illegal organisation under Article 220 § 6 and Article 314 of the Criminal Code, carrying explosive materials under Article 174 of the Criminal Code, violating the Meetings and Demonstration Marches Act (Law no. 2911), and disseminating propaganda in favour of the PKK, under section 7(2) of the Prevention of Terrorism Act (Law no. 3713). Subsequently, a trial was commenced before the Diyarbakır Assize Court.

16. On 19 March 2010 a police officer, O.E., made statements regarding the matters in question to the Diyarbakır Assize Court, saying that he had not been present at the scene of the arrest and that he therefore had no knowledge of the impugned acts. The applicants contended once again that they had not been involved in any unlawful acts.

17. On 13 May 2010 a witness, Y.T., a jeweller, stated before the court that the first applicant, Nezir Ürek, had gone to Cizre in order to sell him some gold. According to Y.T., Nezir Ürek had called him prior to his arrival in Cizre and he had sent his son to meet him and buy the gold. Y.T. noted that the first applicant had not been able to go to his shop as shops in the centre of Cizre had been closed that day. At the end of the hearing the court

issued a summons requiring the police officers who had signed the arrest report to give evidence at the next hearing, which was to be held on 24 June 2010.

18. On 1 June 2010 eight police officers who had carried out the applicants' arrest spontaneously attended to give evidence before the first-instance court, without the attendance of the applicants or their lawyers. According to the transcript of the hearing, they stated that the day of the hearing had been notified to them as 1 June 2010. They contended that they would not be able to go back to the court on 24 June 2010 because they were stationed in Şırnak, which was far away, and they would be on duty on the day of the hearing. The Diyarbakır Assize Court took note of the reasons given by the police officers and accepted to obtain their statements in the presence of the public prosecutor, but in the absence of the applicants and their lawyers. In their statements, five of the officers stated that they had not seen the applicants or the other arrestees throwing stones or Molotov cocktails during the clashes. They noted that when they had carried out the arrest, some demonstrators had had lemons in their hands (in order to protect themselves against the tear gas) and that there had been banners and sheets of paper containing slogans in the shed. One officer submitted that he had not seen the arrestees throwing stones at the police, but that they had been carrying banners. Two police officers, A.A.K. and G.İ., on the other hand, contended that they had seen all six arrestees throwing stones and chanting illegal slogans during the demonstration, different than their statements made during the investigation stage.

19. During the hearing held on 24 June 2010, the arresting officers' statements were read out to the applicants, the other accused and their lawyers. The applicants objected to the police officers' statements, stating that they had been deprived of their right to cross-examine those witnesses. They asked the court to re-examine the police officers in their presence. The Assize Court did not take a decision on the applicants' request.

20. During a hearing held on 30 September 2010, the lawyer of one of the applicants' co-accused asked the court to order the police officers who had been examined by the court on 1 June 2010 to attend a hearing in the accused's presence. The lawyer requested that he be allowed to question the witnesses. At the end of the hearing the Assize Court dismissed the request without providing any reasons.

21. On 3 December 2010 the applicants made their defence submissions. The first applicant submitted that he was a retired public official and had been in Cizre in order to sell some gold. He stated that he had not been involved in the clashes between the demonstrators and the security forces and that he had not thrown stones at the police.

The second applicant stated that he had gone to Cizre to do some shopping and had found himself in the middle of the demonstration. He

noted that he was an old man and that he had gone to the shed in order to escape from the tear gas.

The applicants' lawyer contended that the arresting police officers who had given evidence against the applicants could have been mistaken about them. She stated that the telephone conversations between the first applicant and Y.T. had proved that he had been in Cizre to sell some gold. According to the lawyer, there was in any case no evidence in the case file demonstrating that the applicants had committed an offence on behalf of a terrorist organisation.

22. On the same day the Diyarbakır Assize Court rendered its judgment. It acquitted the applicants of the charge of carrying explosive materials, brought under Article 174 of the Criminal Code. However, the applicants were convicted of:

(a) disseminating propaganda in support of a terrorist organisation, contrary to section 7(2) of Law no. 3713, resulting in a sentence of ten months' imprisonment each;

(b) taking part in a demonstration while in possession of prohibited materials, contrary to section 33(1) of Law no. 2911, resulting in a sentence of five months of imprisonment each;

(c) resisting the security forces, who had had to use force to disperse the demonstrators, such resistance being contrary to section 32(1) of Law no. 2911, resulting in a sentence of six months' imprisonment each on that count;

(d) obstructing the security forces in the execution of their duties by way of resistance, contrary to Article 265 § 1 of the Criminal Code, and sentenced to seven months and fifteen days' imprisonment each; and

(e) membership of an illegal organisation, the PKK, contrary to Article 314 § 2 of the Criminal Code, on the basis of Article 220 § 6 and Article 314 § 3 of the same Code, resulting in a sentence of six years and three months' imprisonment each.

23. The Diyarbakır Assize Court decided to suspend the pronouncement of the sentences under sections 33(1) and 32(1) of Law no. 2911 and Article 265 § 1 of the Criminal Code on condition that the applicants did not commit another wilful offence for a period of five years, in accordance with Article 231 of the Code of Criminal Procedure (Law no. 5271) (see points (b), (c) and (d) in paragraph 22 above).

24. The court, however, decided that the applicants should serve the prison sentences arising from their convictions under section 7(2) of Law no. 3713 and Article 314 § 2 of the Criminal Code (see points (a) and (e) in paragraph 22 above) which amounted to six years and thirteen months' imprisonment in respect of each of them.

25. According to the Diyarbakır Assize Court's judgment, the following evidence was included in the case file:

- (a) the accused's statements given at the investigation stage and during the trial;
- (b) the arrest and confiscation report of 5 December 2009;
- (c) the arresting officers' statements made to other police officers on 5 December 2009;
- (d) the report prepared by Cizre police headquarters on 7 December 2009;
- (e) two police reports concerning the photographs of the banners found in the shed where the applicants had been arrested and photographs of the second applicant taken by the police during the demonstration;
- (f) O.E.'s statement to the court on 19 March 2010;
- (g) Y.T.'s statement to the court on 13 May 2010; and
- (h) the arresting officers' statements to the court on 1 June 2010.

26. The court established the facts of the case against the applicants and their co-accused in the light of the contents of the case file. According to the court, the applicants had been in a group of demonstrators who had attacked the police with stones and Molotov cocktails and they had themselves also attacked the police with stones. The trial court went on to hold that the applicants chanted slogans such as "Bastards of Atatürk", "Long live Öcalan", "The PKK is the people and the people are here" and "We would destroy a world without Öcalan" before the police had intervened.

27. On 6 December 2010 the applicants lodged an appeal with the Court of Cassation against the judgment of 3 December 2010.

28. On 13 December 2010 the Diyarbakır Assize Court's decision to suspend the pronouncement of the sentences under sections 33(1) and 32(1) of Law no. 2911 and Article 265 § 1 of the Criminal Code became final as the applicants had not objected to that decision (see points (b), (c) and (d) in paragraph 22 above).

29. On 11 April 2012 the Court of Cassation upheld the judgment of 3 December 2010.

In its decision, the Court of Cassation held that according to Article 231 of the Criminal Code it was not possible to lodge appeals against decisions by first-instance courts to suspend the pronouncement of sentences. It therefore considered that it was not required to examine the applicants' appeal concerning their convictions under sections 33(1) and 32(1) of Law no. 2911 and Article 265 § 1 of the Criminal Code.

On the other hand, the Court of Cassation found that the applicants' convictions under section 7(2) of Law no. 3713 and Article 314 § 2 of the Criminal Code, on the basis of Article 220 § 6 and Article 314 § 3 of the same Code, were in accordance with the law.

C. Subsequent developments

30. On 5 July 2012 Law no. 6352 amending various laws with a view to suspending proceedings and sentences given in cases concerning crimes committed through the press, media and similar expressions of opinions entered into force.

31. On an unspecified date the applicants asked the first-instance court to reduce the sentences they had been given in the judgment of 3 December 2010.

32. On 20 July 2012 the Diyarbakır Assize Court revised its judgment of 3 December 2010 in the light of the provisions of Law no. 6352. The court decided to suspend the pronouncement of the judgment on the applicants' conviction under section 7(2) of Law no. 3713 for a period of five years. It also reduced the sentence of six years and three months' imprisonment for their conviction under Article 220 § 6 and Article 314 of the Criminal Code to five years, two months and fifteen days each.

33. On 3 August 2012 the applicants lodged an objection against the decision of 20 July 2012.

34. On 9 August 2012 the Diyarbakır Assize Court dismissed their objection.

35. On an unspecified date in 2015 the applicants were released after serving their sentences.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. A description of the relevant domestic law and practice can be found in *Gülcü v. Turkey* (no. 17526/10, §§ 42-44, 51, 56-59 and 66-72, 19 January 2016) and *Balta and Demir v. Turkey* (no. 48628/12, § 26, 23 June 2015).

37. Article 188 § 1 of the Code of Criminal Procedure (Law no. 5271 of 4 December 2004) in force at the material time provides, in so far as relevant, as follows:

“The date on which a witness or an expert is to give evidence shall be notified to the public prosecutor, the victim and his or her representative, the accused and his or her defence counsel.”

THE LAW

I. ADMISSIBILITY

38. The Government submitted that the application should be rejected for non-compliance with the six-month time-limit as the applicants' representative had failed to submit an application until 6 November 2013.

39. The applicants replied that they had submitted an application form, along with authorisation forms and supporting documents, on 18 September 2012. They noted that in the application form the numbers of the cases lodged against the applicants had been wrong and that they had been asked by the Registry of the Court to correct those errors. They had then sent the corrected version of the application on 30 October 2013. They stated that they had lodged the application on 18 September 2012, within the six-month time-limit.

40. The Court observes that, indeed, the applicants lodged their application and sent an application form, authorisation forms and supporting documents on 18 September 2012. The Court also observes that by a letter dated 29 August 2013 the Registry informed the applicants' representative that on pages 4-9 of the application form, the case numbers and the length of the applicants' sentences were wrong. The letter asked the applicants' representative to check the application form and either send a revised version or make corrections to the one already sent to the Court. Subsequently, on 30 October 2013 the applicants' lawyer sent a new application form which was corrected according to the rules. The facts submitted by the applicants and the allegations of breaches of the Convention made in the application form of 18 September 2012 remained unchanged in the one sent on 30 October 2013. In those circumstances, the Court does not find any reason to accept the Government's objection and considers that 18 September 2012, the date of submission of the first application form, authorisation forms and supporting documents, should be taken as the date the present application was lodged.

41. The Court therefore rejects the Government's objection.

42. However, the Court observes that the decision of the Diyarbakır Assize Court to suspend the pronouncement of the judgment in respect of the applicants' convictions and sentences under sections 33(1) and 32(1) of Law no. 2911 and Article 265 § 1 of the Criminal Code became final on 13 December 2010 (see paragraph 28 above). The Court notes that, as was stated by the Court of Cassation (see paragraph 29 above), according to Article 231 of the Code of Criminal Procedure no appeal is possible against first-instance courts' decisions to suspend pronouncement of judgments. The time-limit set by Article 35 § 1 of the Convention therefore started to run on 13 December 2010, whereas the applicants lodged their application with the Court on 18 September 2012.

43. In those circumstances, the Court finds that the applicants' complaints under Articles 6, 9, 10 and 11 of the Convention, in so far as they concern their convictions for participation in a demonstration while in possession of prohibited materials, resisting the security forces and obstructing the security forces in the execution of their duties by way of resistance, were submitted too late. Accordingly, that part of the application

has been lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

44. The Court notes that the remainder of the application, namely the complaints under Articles 6, 9, 10 and 11 of the Convention concerning the applicants' criminal convictions pursuant to section 7(2) of Law no. 3713 and Article 314 § 2 of the Criminal Code, on the basis of Articles 220 § 6 and 314 § 3 of the same Code is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. MERITS

A. Alleged violation of Article 6 of the Convention

45. The applicants complained under Article 6 § 1 of the Convention that they had not had a fair trial because the Diyarbakır Assize Court had failed to grant them an opportunity to question the police officers whose statements had constituted the basis for their conviction.

The Court considers that this complaint should be examined under Article 6 §§ 1 and 3 (d) of the Convention, which read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

46. The Government contested that argument.

1. The parties' submissions

47. The applicants complained that they had been deprived of the opportunity to question the police officers as their statements had been taken at a hearing where the accused had not been present.

48. The Government submitted that on 1 June 2010 the first-instance court had taken the arresting police officers' statements in the absence of the applicants and their representatives because the officers would not have been able to attend the hearing scheduled for 24 June 2010. The Government also noted that the officers' statements had been read to the accused and their representatives during the hearing of 24 June 2010 and that as a result the applicants had been given the opportunity to submit their counterarguments. According to the Government, the arresting officers' statements had not been the sole or principal evidence for the applicants' conviction: the first-instance court had also taken the arrest and

identification reports, police photographs, the materials seized and the accused's statements into consideration when convicting the applicants.

2. *The Court's assessment*

(a) General principles

49. The Court reiterates at the outset the principles summarised and refined in its judgment of *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, ECHR 2011) and recapitulated in *Schatschaschwili v. Germany* ([GC], no. 9154/10, §§ 100-31, ECHR 2015) regarding the admission of untested incriminating witness evidence in criminal proceedings. In this regard, the Court stresses that the present case does not concern alleged procedural failings at the investigation stage but alleged irregularities at the trial stage. The Court will conduct its examination in the light of the principles regarding the admission of untested incriminating witness evidence in criminal proceedings, using the three steps of the *Al-Khawaja and Tahery* test.

(b) Application to the present case

50. The question arises whether police officers may be regarded as witnesses within the meaning of Article 6 § 3 (d) of the Convention. In that connection, the Court reiterates that the notion of a “witness” is an autonomous concept in the Convention system, irrespective of the classifications in domestic legal systems. As such, the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply to a deposition which may serve to a material degree as the basis for a conviction (see *Lucà v. Italy*, no. 33354/96, § 41, ECHR 2001-II). As the Court held in *Butkevich v. Russia* (no. 5865/07, § 98, 13 February 2018) there is no material difference between a deposition given by a “witness”, for instance, and a report issued by a police officer for the attention of his superior. In view of the above case-law, the Court considers that the police officers in the instant case should be considered as “witnesses”, particular regard being had to the fact that it was the trial court which summoned them to give evidence in their capacity as witnesses to the offences with which the applicants were charged in view of the conflicting accounts of the factual circumstances of the case (see *Mesesnel v. Slovenia*, no. 22163/08, § 37, 28 February 2013).

(i) *Whether there was a good reason for not obtaining the arresting police officers' statements in the presence of the applicants and their lawyers*

51. The Court will first examine whether, from the Diyarbakır Assize Court's point of view, there was a good reason for not obtaining the arresting police officers' oral statements in the presence of the applicants and their lawyers and, as a result, whether there was a good reason or justification for that court to admit those statements as evidence.

52. The Court observes that during the hearing held on 13 May 2010 the Diyarbakır Assize Court issued a summons requiring the arresting police officers who had signed the arrest report to appear in person to give evidence at the hearing which was to be held on 24 June 2010. However, the eight police officers arrived at the court on 1 June 2010. They stated that they had been notified that the date of the hearing was 1 June 2010 and that they would not be able to attend the hearing on 24 June 2010 given that they were stationed at Şırnak, which was far away, and would be on duty on that date. The Diyarbakır Assize Court decided to obtain their oral statements in the presence of the public prosecutor, but in the absence of the applicants and their lawyers (see *Mesesnel*, cited above, § 37).

53. The Court notes that the first-instance court did not give any reason for granting the police officers' requests. The Court further notes that, according to the material in its possession, the police officers did not submit any documentation in support of their contention that they had been notified that the date of the hearing was 1 June 2010. Moreover, neither the court nor the Government referred to any serious justification for the police officers not to testify before the trial court in the presence of the applicants and their lawyer, such as a fear of reprisal from the applicants or serious health issues (see *Schatschaschwili*, cited above, § 119). Thus, it appears that the police officers' request was granted automatically.

54. In addition, even assuming that all eight police officers were truly unable to comply with the summons to give evidence on 24 June 2010, the Court reiterates that the constraints of professional life are not in themselves sufficient to justify an absence from criminal proceedings in which the police officers were involved in their capacity as witnesses (see *Virgil Dan Vasile v. Romania*, no. 35517/11, § 66 *in fine*, 15 May 2018). In any event, there is nothing in the case file to show that the court gave consideration to other methods for securing their attendance at a hearing where the applicants and their lawyers could have put questions to them. For instance, the first-instance court could have asked the applicants' representative, who practises in Diyarbakır, to appear at the court on 1 June 2010, or it could have changed the date of the hearing from 24 June 2010.

55. In the light of the foregoing considerations, the Court finds that the first-instance court did not provide a good reason for failing to obtain the police officers' statements in the presence of the applicants and their lawyers.

(ii) Whether the evidence given by the arresting police officers was the sole or decisive basis for the applicants' conviction

56. In determining the weight given to the depositions of the arresting officers and, in particular, whether that evidence was the sole or decisive basis for the applicants' conviction, the Court will have regard in the first place to the domestic court's assessment of the evidence, if there is any, and

make its own assessment of the weight of the evidence in question if the domestic court did not indicate its position on that issue, or if its position is not clear (see *Schatschaschwili*, cited above, §124).

57. In that regard, the Court observes that the Diyarbakır Assize Court did not state an opinion on how much weight it gave to the evidence from the police. The Court will therefore conduct its own assessment of whether the evidence of the arresting police officers was the sole or decisive basis for convicting the applicants under section 7(2) of Law no. 3713 and Article 314 of the Criminal Code for disseminating propaganda in support of a terrorist organisation, and under Article 314 of the Criminal Code for membership of an illegal organisation, the PKK (see § 22 point (a) and (e), and also §§ 24, 29 and 42-43, above).

58. It appears for the Court that when the Diyarbakır Assize Court convicted the applicants of the charges just mentioned, this was to a large extent because the Assize Court found that the applicants had participated actively in the demonstration that took place in Cizre on 5 December 2009, in particular that the applicants had chanted slogans and thrown stones at the police. In that connection, the Court observes that all the evidence used by the Assize Court for concluding that the applicants had chanted slogans and thrown stones at the police came from police officers who had been on duty during the riots of 5 December 2009 and who had arrested the applicants (see *Butkevich*, cited above, § 94). More importantly, there is no tangible or corroborative evidence, beyond that of the police officers, capable of proving that the applicants had chanted slogans or thrown stones at the police (see *Butkevich*, cited above, § 99, and *Daştan v. Turkey*, no. 37272/08, § 27, 10 October 2017). This is because the remaining evidence in the case file, that is to say the statements of O.E. and Y.T., the photographs of the second applicant and the banners found in the shed where the applicants were arrested, are not sufficient to conclude that the applicants had chanted slogans or been involved in throwing stones. In particular, it appears that the only proof supporting the contention that the applicants had chanted slogans and threw stones at the police was the statements made by police officers A.A.K. and G.İ. Moreover, the second applicant is not shown throwing stones in any of the four photographs (see paragraph 9 above), and there is no photograph of the first applicant at all.

59. In view of the above, the Court concludes that the arresting police officers' statements incriminating the applicants, in particular those made by A.A.K. and G.İ. (see paragraph 18 above), were, if not the sole, then at least the decisive evidence against them (see *Al-Khawaja and Tahery*, cited above, § 160). The Court therefore cannot accept the Government's argument that the arresting officers' statements were not the principal evidence for the applicants' conviction.

(iii) *Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured*

60. The Court must further determine, in a third step, whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of the decisive evidence given by the arresting police officers. The following elements are relevant in this context: the trial court's approach to the untested evidence, the availability and strength of further incriminating evidence, and the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial (see *Schatschaschwili*, cited above, § 145).

61. The Court has already established that the evidence given by the police officers, in particular by A.A.K. and G.İ., carried a decisive weight in respect of the applicants' conviction and that the trial court failed to treat the evidence given by the police officers with caution on account of the discrepancies between the statements that they gave at various stages of the proceedings. Thus, it remains to be determined whether there were any procedural safeguards in place to remedy the applicants' inability to examine the police officers in person before the trial court.

62. The Court reiterates that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him (see *Barberà, Messegue and Jabardo v. Spain*, 6 December 1988, § 78, Series A no. 146). Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (*Sadak and Others v. Turkey* (no. 1), nos. 29900/96 and 3 others, ECHR 2001-VIII). This is so because Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument, which is a clear indication of the principle of immediacy in the criminal proceedings (see *Pereira Cruz and Others v. Portugal*, nos. 56396/12 and 3 others, § 177, 26 June 2018).

63. In that connection, the Court observes that the Diyarbakır Assize Court decided to hold a hearing on 1 June 2010 when the police officers had turned up of their own motion to give evidence which had otherwise been scheduled for the hearing on 24 June 2010. Nevertheless, the trial court did not summon the applicants or their lawyer with a view to providing them with an opportunity to exercise their defence rights, although it did inform the public prosecutor, thereby securing his appearance (compare *Papadakis v. the former Yugoslav Republic of Macedonia*, no. 50254/07, § 91, 26 February 2013). The Court observes that such a practice is contrary to the clear wording of Article 181 of the Code of Criminal Procedure, which stipulates that, *inter alios*, the accused and his or her lawyer must be

notified of the date on which a witness is to be examined. The Government did not comment on this point. In the Court's view, the Diyarbakır Assize Court's approach raises a conspicuous procedural shortcoming in relation to the principle of equality of arms as it prevented one of the parties to a criminal case, the applicants who were facing heavy prison sentences, from being present to effectively challenge the decisive evidence given by the police officers in their capacity as witnesses.

64. It must further be considered whether the domestic courts took any steps to provide the applicants with an opportunity to have the police officers examined in their presence in the course of the ensuing criminal proceedings. However, it appears that neither the trial court nor the Court of Cassation attempted to remedy the above-mentioned procedural shortcoming at any stage of the criminal proceedings against the applicants. It is true that according to the transcript of the hearing held on 24 June 2010, the police officers' statements were read out and the applicants had the opportunity to question their veracity. However, on that day the Diyarbakır Assize Court took no decision on the request of the applicants and their co-accused to reissue a summons for the police officers to give evidence in their presence (see paragraph 19 above). What is more, when the lawyer of one of the applicants' co-accused reiterated that request during the hearing of 30 September 2010, the first-instance court dismissed it without providing any reason for its decision (see paragraph 20 above).

65. In the Court's view, the aforementioned circumstances are such as to warrant the conclusion that the trial court's approach deprived the applicants of the guarantees of equality of arms.

66. While the trial court itself heard the arresting officers in the presence of the public prosecutor and hence had the opportunity to form its own impression of their reliability (compare *Balta and Demir*, cited above, § 57), this cannot be regarded as decisive for the Court's examination under Article 6 § 3 (d) of the Convention. To hold otherwise would be tantamount to replacing the rule, that is the "production and examination of all evidence against the accused in his or her presence at a public hearing with a view to adversarial argument", with the exception, that is the examination of such evidence in the absence of the accused while respecting the defence rights and if need be with the operation of the relevant procedural safeguards.

It therefore transpires that the right laid down in Article 6 § 3 (d) of the Convention would be devoid of substance if the taking of impugned statements of a witness in the presence of, and under the supervision of, a trial judge in the absence of the applicant and his or her lawyer can in itself be regarded as a substitute for the applicant's right to confront that witness in person and question him directly (see *Dimović and Others v. Serbia*, no. 7203/12, § 61, 11 December 2018, where the examination of witnesses by investigating judge was not of itself considered as a sufficient counterbalancing factor by the Court in its examination under Article 6

§ 3 (d) of the Convention). Having said that, it cannot be excluded that in certain, albeit exceptional, cases such a possibility may be regarded as a procedural safeguard under Article 6 § 3 (d) of the Convention.

67. However, the Court does not discern any circumstances in the instant case capable of warranting this conclusion, for the following reasons.

68. Firstly, when the Diyarbakır Assize Court took the arresting officers' statements on 1 June 2010, it did not attempt to resolve the contradictions between the statements made by six officers during the investigation stage and those made before the court. Nor did the Assize Court question the arresting officers with regard to the inconsistencies between those six officers' statements and the statements of A.A.K. and G.İ.

69. In the Court's view, the first-instance court should have addressed the aforementioned inconsistencies or explained why it had not carried out such an assessment. The Court further observes that the statements of the arresting officers to their colleagues on 5 December 2009 regarding the applicants' arrest are the same, word for word (see paragraph 11 above). However, that fact did not spur the Diyarbakır Assize Court to put any questions to those officers regarding the identical terms of their statements of 5 December 2009. The Diyarbakır Assize Court thus failed to provide adequate reasons why it considered the witness statements of the police officers to be more objective and reliable than those of the applicants (see *Huseynli and Others v. Azerbaijan*, nos. 67360/11 and 2 others, § 121, 11 February 2016).

70. Against that background, while acknowledging that during the trial the applicants were given the opportunity to give their own version of the events of 5 December 2009, the Court considers that that was not a sufficient counterbalance where the untested statements of the police officers were the decisive evidence against the applicants.

(iv) Conclusion

71. In the light of the foregoing and examining the fairness of the proceedings as a whole, the Court considers that there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the use of the statements of the arresting police officers, in particular those of A.A.K. and G.İ., by the trial court. The Court therefore concludes that the absence of reasoning in the Diyarbakır Assize Court's judgment as to why it had not allowed the applicants to examine or have examined the arresting police officers at any stage of the proceedings, coupled with the court's failure to address the inconsistencies between the witness statements, rendered the trial as a whole unfair.

72. There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

B. Other alleged violations of the Convention

73. Relying on Articles 6, 9, 10 and 11 of the Convention, the applicants complained about their convictions under section 7(2) of Law no. 3713 and Article 314 § 2 of the Criminal Code on the basis of Articles 220 § 6 and 314 § 3 of the same Code and of the allegedly disproportionate sentences imposed on them. They submitted under Article 6 § 1 of the Convention that they had been convicted despite the fact that they had not been involved in any violence and that the first-instance court had failed to conduct a proper enquiry regarding the events or to take their defence submissions into consideration. They also complained under Articles 9, 10 and 11 of the Convention that their conviction had been in breach of their rights to freedom of thought, expression and assembly.

74. Having regard to its conclusion under Article 6 of the Convention, the Court considers that it is not necessary to examine separately the remaining complaints raised under Articles 6, 9, 10 and 11 of the Convention (see *Sadak and Others v. Turkey (no. 1)*, cited above, § 73, and *Balta and Demir*, cited above, § 65).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

76. The applicants claimed 40,000 Turkish liras (TRY – approximately 13,915 euros (EUR)) and TRY 50,000 (approximately EUR 17,390) in respect of pecuniary and non-pecuniary damage. As regards the amount claimed for pecuniary damage, the applicants submitted that if they had not been imprisoned they would have earned TRY 30,000 as farmers. They also stated that they had spent TRY 10,000 on their subsistence while in prison and for their families’ visits to prison, without providing any documents.

77. The Government considered that the applicant’s claims were unsubstantiated and excessive.

78. The Court does not discern any causal link between the violation found and the pecuniary damage alleged for loss of income. In addition, the applicants did not substantiate their claim that they spent TRY 10,000 while in prison. The Court therefore rejects the claim for pecuniary damage. However, ruling on an equitable basis, it awards the applicants EUR 5,000 each in respect of non-pecuniary damage.

79. Lastly, the Court notes that Article 311 § 1 (f) of the Code of Criminal Procedure provides the applicants with the opportunity to request the reopening of criminal proceedings within one year of a final judgment by the Court finding a violation (see *Balta and Demir*, cited above § 70; *Gökbulut v. Turkey*, no. 7459/04, § 82, 29 March 2016; and *Abdulgafur Batmaz v. Turkey*, no. 44023/09, § 58, 24 May 2016).

B. Costs and expenses

80. The applicants claimed TRY 10,000 (approximately EUR 3,480) each for their lawyer's fees incurred before the domestic courts. They also claimed TRY 455.75 (approximately EUR 160) for postage and fax expenses and translation costs. In support of their claims the applicants submitted legal services' agreements concluded with their lawyer on 26 April 2010, which stated that they would pay TRY 10,000 each for their representation during the criminal proceedings against them. They also submitted receipts for postal and translation costs incurred before the Court.

81. The Government claimed that the applicant's claims under this head were not substantiated.

82. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants, jointly, the sum of EUR 3,500 covering costs under all heads.

C. Default interest

83. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Articles 6, 9, 10 and 11 of the Convention concerning the applicants' criminal convictions pursuant to section 7 (2) of Law no. 3713 and Article 314 § 2 of the Criminal Code, on the basis of Articles 220 § 6 and 314 § 3 of the same Code, admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *Holds* that there is no need to examine the merits of the remaining complaints under Article 6 § 1, or those under Articles 9, 10 and 11 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,500 (three thousand five hundred euros) jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 30 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President