



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

SECOND SECTION

CASE OF PARMAK AND BAKIR v. TURKEY

(Applications nos. 22429/07 and 25195/07)

JUDGMENT

Art 7 • *Nullum crimen sine lege* • Foreseeability • Expansive judicial interpretation inconsistent with domestic case-law and essence of offence as defined by law • Infringement of reasonable limits of acceptable judicial clarification • Retroactive application of more lenient intervening substantive law

Art 8 • Private life • Travel ban on accused non-resident maintained automatically over four years, pending the duration of criminal proceedings

STRASBOURG

3 December 2019

FINAL

3/03/2020

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

In the case of Parmak and Bakır 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,

Ivana Jelić,

Darian Pavli,

Saadet Yüksel, *judges*,

and Hasan Bakırcı, *Deputy Section Registrar*,

Having deliberated in private on 5 November 2019,

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

PROCEDURE

1. The case originated in two applications (nos. 22429/07 and 25195/07) 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 Şerafettin Parmak and Mr Mehmet Bakır (“the applicants”), on 18 May 2007 and 4 June 2007 respectively.

2. The first applicant was represented by Mr Ç. Bingölbali, a lawyer practising in İzmir. The second applicant was represented by Mrs E. Yıldız, another lawyer practising in İzmir. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants complained under Articles 7, 10 and 11 of the Convention that their conviction lacked a basis in law, as the domestic courts’ extensive interpretation of the relevant provisions of the Prevention of Terrorism Act (Law no. 3713) ran contrary to the principle of *nullum crimen sine lege*, and thus had infringed their right to freedom of expression and association. The second applicant complained under Article 8 of the Convention that a travel ban imposed on him during the course of the proceedings had been disproportionate and had contravened his right to respect for private life.

4. On 3 October 2016 the complaints concerning Articles 7, 8, 10 and 11 of the Convention were communicated to the Government and the remainder of the applications were 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 1955 and 1963 respectively and live in Denizli, Turkey and Berlin, Germany.

6. On various dates between 30 January and 5 July 2002, with no particular frequency, flyers with the hammer and sickle emblem were found distributed in some neighbourhoods in İzmir, featuring slogans in Turkish and Kurdish such as “No to Racism and Chauvinism, Yes to People’s Solidarity”, “Organise against Capitalism, Unionise”, “Only Socialism Can Stop Exploitation”, “Long live the Kurdish People’s Right to Self-Determination”, “Down with the Turkish Fascist State, All Massacres Will be Brought to Justice by Revolution”, “Equal Pay for the Same Work, Wages for Female Workers Must Increase”, and a written declaration to commemorate the 1993 Sivas Massacre, certain passages of which described the Turkish State and its practices against Kurdish people, left-leaning students, hunger striking prisoners in F-type prisons, and socialist journalists as a continuation of fascist practices borrowed from the Ottoman Empire. The same written declaration also invited people to leave their differences arising from national, ethnic and religious backgrounds aside and unite against the “Fascist Turkish State” in a common class struggle. The above-mentioned flyers sometimes had the “Bolshevik Party” (*Bolşevik Parti*) or the “Bolshevik Party of North Kurdistan/Turkey” (*Bolşevik Parti - Kuzey Kürdistan/Türkiye*, hereinafter “the BPKK/T”) written in their borders. Police reports were prepared for each of those anonymous distributions and the flyers were collected from the streets. The local police districts sent these reports to the anti-terrorism branch of the İzmir Security Directorate for information.

7. On 28 June 2002 the İzmir Chief Public Prosecutor’s Office ordered the anti-terrorism branch of the İzmir Security Directorate to investigate the matter and to arrest the perpetrators.

8. On 9 July 2002 the second applicant was taken into police custody while he was travelling in İzmir with a certain M.D. According to the arrest report, a search warrant had been issued by the anti-terrorism branch of the İzmir Security Directorate in respect of the car in which the applicant was travelling. Nothing other than a camera, several CDs, and audio cassettes were discovered in the car. In their examination of those items, the police considered that no elements of a crime were detected.

9. On 11 July 2002 Ö.G. and E.Y., who had been taken into police custody as suspects in the course of the same investigation, identified the second applicant as having been introduced to them by a different name by another suspect.

10. On 12 July 2002 the first applicant was taken into custody by police officers from the anti-terrorist branch of the Denizli police headquarters and a search was carried out in his apartment, where a number of documents were seized, including flyers with “BPKK/T” written in the border, wrapped in a plastic bag, certain editions of the periodicals *Çağrı*, *Güney* and *Açılım*, and a laptop computer belonging to the first applicant.

11. During an identification parade organised by the police, M.K., a suspect who had been arrested in the course of the same investigation, identified the first applicant as an active member of the organisation BPKK/T. He stated that the first applicant used the code name “Kemal-Nihat”. M.K. later retracted his statements during the proceedings, alleging that they had been obtained under torture.

12. On 12 July 2002 the anti-terrorist police chief drew up a report summarising the investigation into the alleged activities of the first applicant and other members of the BPKK/T. He noted that there had been flyers containing the organisation’s propaganda scattered throughout various places in İzmir, and that the aim of the organisation was to undermine the constitutional order and replace it with a communist regime. As regards the alleged involvement of the first applicant in the activities of the organisation, he stated that the testimonies of the other suspects, the examination of the documents containing propagandist content found at the first applicant’s and M.K.’s apartment, and the applicants’ silence during their interrogation, which was typical of those involved in illegal organisations, had revealed the first applicant’s involvement with the organisation.

13. The applicants were subsequently released after their police interrogation. The first applicant was arrested and detained again on 17 July 2002. An arrest warrant for the second applicant was issued on 16 July 2002, and he was taken into police custody on 1 August 2007 at the airport when he was about to leave for Germany, where he resided.

14. On 6 September 2002 the public prosecutor at the İzmir State Security Court filed an indictment with that court accusing the applicants, *inter alia*, of membership of an illegal organisation, an offence under Article 168 § 2 of the former Criminal Code.

15. On 16 September 2002 the İzmir State Security Court requested confidential information from the General Security Directorate with respect to the organisation BPKK/T.

16. On 1 October 2002, the General Security Directorate sent a file to the İzmir Security Court, explaining that the BPKK/T was a terrorist organisation whose ultimate purpose was to bring about a Marxist-Leninist revolution in Turkey. After briefly describing the genesis of the organisation and its separation from the Marxist-Leninist Turkish Communist Party (hereinafter “the TKP/ML”) in 1981, the General Security Directorate noted, without referring to a source or an event, that the illegal organisation

had adopted armed revolution as its method of resistance. It also identified certain legal and illegal periodicals such as *Çağrı* and *Güney* as the organisation's publications. Under the heading "Acts committed by the BPKK/T", eight acts were listed, all of which were indicated as having taken place on various dates between January 2002 and July 2002. Seven of these acts had been the distribution of anonymous flyers and written declarations in the streets of İzmir (see paragraph 6 above) and of Bursa. The last act described was the arrest of six suspects in connection with the investigation and their possession of some eighty-eight books containing left-wing content.

17. During the course of the proceedings the applicants denied being involved in the organisation known as the BPKK/T. The first applicant submitted that the documents and the flyers found in his apartment wrapped in a bag did not belong to him, and that he had not engaged in any type of propaganda on behalf of the organisation as alleged by the prosecution. The second applicant submitted that he was residing and working in Germany as a journalist, and that he had come to Turkey for a holiday, during which time he had met the first applicant and his co-accused, M.D. He further submitted that there was no evidence which suggested his involvement with the organisation or that he had done anything contrary to the law. The applicants also denied that they had exercised their right to remain silent during the police interrogation, and maintained that they had in fact cooperated with the authorities from the beginning of the investigation.

18. At the third hearing on 21 January 2003 the İzmir State Security Court ordered the applicants' release from detention and imposed a preventive measure prohibiting them from leaving Turkey. The reasons provided by the court were as follows:

"Having regard to the nature of the charge against the accused but also to the possibility that the charge could be modified, and to the fact that most of the evidence in the case-file has been collected, the court decides to release the accused from detention on the condition that they are prohibited from leaving the country."

19. At the fifth hearing on 21 May 2003 the public prosecutor submitted his opinion on the merits of the case. He maintained that the flyers found in the first applicant's apartment, as well as other publications with propagandist content, and the fact that the first applicant had used code names in his communications with the co-accused, confirmed the allegation that he had been a member of the BPKK/T. As regards the second applicant, the public prosecutor considered that the fact that he had used a code name in his dealings with the co-accused confirmed his affiliation with the organisation. The public prosecutor therefore asked the court to convict and sentence the applicants under section 7(1) of Law no. 3713.

20. On 15 July 2003 section 1 of Law no. 3713 was amended so that terrorism would henceforth be confined to acts that were "criminal" and committed "by using violence and coercion".

21. At the sixth hearing on 24 July 2003 the İzmir State Security Court found the applicants guilty of being founding members of the organisation in question, and sentenced them to four years and two months' imprisonment under the first sentence of section 7(1) of Law no. 3713. It also upheld the travel ban in respect of the second applicant.

22. The applicants appealed against that decision, *inter alia* on the grounds that the first-instance court had not offered evidence to prove that they had been involved in acts that could be qualified as terrorist offences which could lead to the conclusion that the BPKK/T was a terrorist organisation. Moreover, there was nothing in the case file that suggested the organisation's involvement in acts of violence. In a modern democratic society, it was inconceivable to call an organisation a terrorist organisation solely on the basis of its name. The impugned flyers did not have any incriminating statements in them, and in any event they were nothing more than a legitimate exercise of their freedom of thought and expression. The applicants also referred to the new amendments made to Law no. 3713 and submitted that there was a clear tendency on the part of the legislature to exclude non-violent political discourse from being prosecuted on charges of terrorism.

23. On 8 April 2004 the Court of Cassation quashed the judgment, holding that the first-instance court should have taken into account the recent amendments made to Law no. 3713 in order to determine whether the organisation in question could be qualified as a terrorist organisation within the meaning of the amended section 1.

24. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, State Security Courts were abolished. The case against the applicants was therefore transferred to the İzmir Assize Court.

25. The new public prosecutor in charge of the case submitted his observations on the merits of the case and requested that the applicants and the co-accused be acquitted on the grounds that the organisation in question did not correspond to the definition of a terrorist organisation under sections 1 and 7 of Law no. 3713.

26. On 12 October 2004 the İzmir Assize Court convicted the applicants of membership of a terrorist organisation, this time under the second sentence of section 7(1) of Law no. 3713. It sentenced them to two years and six months' imprisonment and a fine of 1,666 Turkish liras (TRY).

27. The applicants appealed against that decision. While the appeal was ongoing before the Court of Cassation, in 2005 new legislation amending the Code of Criminal Procedure came into force. On 10 November 2005 on the basis of these changes the Chief Public Prosecutor at the Court of Cassation sent the case file back to the first-instance court and requested that the latter reconsider the case in the light of the allegedly more favourable provisions applicable to the applicants' case as provided for by the amendments made to the Code of Criminal Procedure.

28. On 16 March 2006 the İzmir Assize Court convicted the applicants of being members of a terrorist organisation and sentenced them to two years and six months' imprisonment under the second sentence of section 7(1) of Law no. 3713. The court firstly gave a summary of the applicants' defence submissions, the public prosecutor's observations on the merits of the case, and the evidence in the case file. That evidence included the flyers that had been found in İzmir, as well as the documents, books and periodicals found in the apartments of the first applicant and the other co-accused. The court also listed as evidence the organisation's alleged manifesto (*tüzük*), which had been discovered in the apartment of a co-accused. Having considered the structure, methods, purpose and activities of the organisation in question, the court concluded that it was a terrorist organisation, contrary to the submissions of the accused and the public prosecutor in charge of the investigation. The court found that the amendments made to section 1 of Law no. 3713, namely the inclusion of the term "using violence and coercion" in the definition of a terrorist organisation, did not exclude situations where an unarmed organisation adopted violence and coercion as its aim, even when its acts only amounted to "moral coercion" (*manevi cebir*). A contrary interpretation of the provision would render its application to unarmed terrorist organisations impossible. The court noted that even though the members of the organisation had not resorted to physical violence, they had used "moral coercion" – such as issuing threats, as was apparent from the confiscated documents – in order to achieve their aims. The court stressed that the organisation's manifesto and some of the flyers contained statements which were of sufficient gravity to coerce people morally. The relevant parts of the judgment read:

"It was understood that after the year 1980 the illegal organisation, TKP/ML, started to experience clashes of opinion among its members, as a result of which a new organisation identifying itself as the Bolsheviks came into existence by having its first congress in 1981 in Germany. After convening in five other congresses, namely in 1982, 1986, 1990, 1994, [and] in their final and last congress of 1996, they named themselves the Bolshevik Party of North Kurdistan/Turkey and declared that their aim was to bring about an armed revolution in Turkey for the leadership of the working class, and for this reason they have engaged in the acts of distributing leaflets and declarations.

The accused have participated in realising the organisation's aims by holding meetings at the organisation's base and preparing documents to be distributed in İzmir. Moreover, they have distributed and sold the publications *Çağrı* and *Güney* – which can be considered the organisation's legal publications – in order to support the organisation financially.

The accused have denied the accusations, in particular the existence of the organisation, and in any event have stated that their acts could not be considered crimes ... since no armed acts had been committed on behalf of the organisation ... The public prosecutor submitted that the organisation in question no longer

corresponded to the definition provided for by law, in the light of the recent amendments made to Law no. 3713, and requested that the accused be acquitted.

Therefore, what is at issue in the present case is whether the acts of the accused correspond to the amended definition of membership of a terrorist organisation ... In considering whether an organisation qualifies as a terrorist organisation, its structure, working methods, purpose and acts must be taken into account. The amended section 1 of Law no. 3713 requires [the use of] force and violence as an element of terror. It is sufficient for an organisation to adopt force and violence as its purpose to bring [the organisation] within the scope of the Prevention of Terrorism Act. Coercion may just as well present itself as moral coercion. Terror is any criminal act committed for the purpose of achieving the ultimate goals listed in section 1 of Law no. 3713. 'Purpose' as worded in this section subsumes the purpose of using violence and force, and therefore envisages [the provision being applied] to unarmed organisations. Any conclusion that is contrary to this reasoning will render the application of the Prevention of Terrorism Act to unarmed organisations impossible, which will pave the way for them to work freely towards their goal of overthrowing democracy and the Turkish Republic. In democracies, people may be given all freedoms except for the freedom to destroy democracy. Since the legislature cannot be presumed to have given licence to organisations whose purpose is to ruin and divide the State, it necessarily follows that unarmed organisations fall within the scope of the law in question.

Everyone has a right to freely declare their thoughts and opinions in the public sphere. However, when people establish an organisation to impose their ideas on others with the aim of changing the Constitution and bringing about the cessation of the State through violence and coercion, it can be considered that the constituent element of the crime, namely moral coercion, is presumed. In the light of this general overview, it can be considered that the acts of the accused are those of disseminating propaganda for an already existing organisation by means of distributing leaflets and thereby encouraging membership. [This] evidence obtained during the investigation has clearly revealed the aim which the accused have pursued. The ultimate purpose of the accused is to change the regime of the country by overthrowing the democracy and the Republic through a popular revolution [...] thereby introducing a totalitarian regime based on Marxist and Leninist ideology. [...] On pages 19, 20 and 21 of the organisation's manifesto ... the Turkish Republic was insulted. [The manifesto] states that Turkey occupies lands that belong to Kurdistan and Armenia, and that the Kurdish people lead a justified resistance movement in North Kurdistan against the unjust and dirty war led by the fascist Turkish Republic. The dead terrorist İbrahim Kaypakkaya is mentioned ... On the following pages, Marxist and Leninist practices are praised and the quasi-feudal capitalist system is mentioned. The last chapter contains the party's disciplinary procedures ... In a declaration which carries the emblem of the Bolshevik Party of North Kurdistan/Turkey, it is stated 'the history of the Ottoman Empire reeks of massacres and crimes ... 1.5 million Armenians were massacred ... and the fascist Turkish army is merely a continuation of the Ottoman Empire ... the real enemy is the fascist Turkish Republic ... unite under the red flag of the Bolshevik party in order to overthrow the fascist Turkish Republic with a democratic people's revolution, and wave the red flag of Bolshevism in cities, castles, farms and mountains so that we can finally throw the fascist Turkish State into the gutters of history ...'

There are many more statements like the ones quoted above. There are many documents which incite people to revolt against the regime and the State and wage war on the Government by taking to the mountains. However, it is not possible to

quote all of them in the judgment. They have been identified individually in the present judgment under the category of written evidence. In the light of this examination, it appears that the aim of the Bolshevik Party is to change the regime and bring about the secession of part of the national territory of Northern Kurdistan. It is considered that the organisation has started working towards these aims but has not yet engaged in armed attacks. [However,] the mere existence of such discourse in the organisation's manifesto and declaration is sufficient to coerce people morally."

29. Having regard to the arrest and seizure report, the report based on the identification parade concerning all the accused, the documentary evidence found in the possession of the first applicant and the distribution and possession of the periodicals *Çağrı* and *Güneş* – identified by the court as legal publications of the organisation – and the illegal periodical *Açılım*, the court found it established that the applicants were members of a terrorist organisation. The court did not deliberate as to which members had committed which acts, but found it established that the accused had been in contact with each other and that they had held meetings and had carried out acts on behalf of the organisation, and had therefore worked together. In its decision the court further decided to continue the travel ban in respect of the applicants until their conviction became final.

30. The applicants appealed against that judgment and raised the same grounds of appeal as they had done in their previous appeal (see paragraph 22 above). They further submitted that the trial court's examination had been insufficient because it had relied solely on the information note provided by the General Security Directorate which classified the organisation as a terrorist organisation without referring to an act of terror committed by the organisation. In that respect, they referred to the judgment of the Plenary Court of Cassation (Criminal Divisions) of 11 March 2003 (see paragraph 45 below) and requested that the definition of both terror acts and terrorist organisations as detailed in that judgment be taken into account.

31. In the meantime, relying on the fact that his entire life prior to his arrest had been spent in Germany and that he had no income, place of residence or medical insurance in Turkey to sustain himself, the second applicant had made repeated applications for the measure preventing him from leaving Turkey to be lifted and another measure, such as bail, to be put in place if necessary. He had also submitted in that connection that the measure had become a punishment in itself, having regard to the fact that the duration of the travel ban in question could not be deducted from a prison sentence if he were later convicted. The domestic courts had rejected those applications on 21 May 2003, 24 July 2003, 21 July 2004, 21 September 2004, 12 October 2004 and 16 March 2006, having regard to the stage the proceedings were at and without providing specific reasons with respect to the applicant's submissions or as regards the need for the prolongation of the travel ban. A similar application by the applicant on 3 March 2004 had gone unanswered by the Court of Cassation.

32. On 29 June 2006 section 7(1) of Law no. 3713 was amended by Law no. 5532 so that the requirement of the intention to commit a crime, the means of committing it by the use of force and violence, and the methods of pressure fear, intimidation or threats were included in the definition of the offence of founding, managing or membership of a terrorist organisations. Moreover, the penalties for these offences were increased, making them subject to Article 314 of the new Criminal Code.

33. On 5 October 2006 the Chief Public Prosecutor submitted his observations and asked the Court of Cassation to quash the first-instance court's judgment on the grounds that the legal status of the applicants and the other accused should be reconsidered in view of the amendments made to section 7(1) of Law no. 3713 on 29 June 2006.

34. On 25 December 2006, on appeal, the Court of Cassation considered that there had been no change favourable to the applicants in respect of the constituent elements of the offence defined under section 7 of Law no. 3713. It remarked that the penalty corresponding to these offences had now become more severe than that set out in the previous version of the provision. Therefore, it upheld the İzmir Assize Court's judgment of 16 March 2006.

35. On 24 June 2009 the travel ban was lifted in respect of the second applicant, having regard to the fact that his sentence had been enforced.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant Legislation

1. *The Criminal Code*

36. The relevant provisions of the Criminal Code (Law no. 765) at the material time provided:

Article 168

"It shall be an offence punishable by at least fifteen years' imprisonment to form an armed gang or organisation or to assume control or special responsibility within such a gang or organisation with the intention of committing any of the offences referred to in Articles 125 ...

It shall be an offence punishable by five to fifteen years' imprisonment to belong to such an organisation."

Article 125

"It shall be an offence punishable by imprisonment for life without possibility of parole to commit any act aimed at subjecting the State or part of the State to domination by a foreign State, diminishing the State's independence, breaking its unity or removing part of the national territory from the State's control."

37. The relevant provisions of the new Criminal Code (Law no. 5237) at the material time provided:

Article 314

“(1) Anyone who forms an armed organisation to commit the crimes listed in the fourth and fifth sections of this chapter, or commands such an organisation, shall be liable to a term of imprisonment of ten to fifteen years.

(2) Anyone who becomes a member of an (armed) organisation mentioned in the first paragraph of this Article shall be liable to a term of imprisonment of five to ten years.

(3) Other provisions relating to the crime of forming an organisation for the purpose of criminal activity are also applicable to this crime.”

38. Under Article 7 § 2 of the Criminal Code (Article 2 § 2 in the former Criminal Code), in the event of there being a difference between the legal provisions in force on the date an offence was committed and those in force after that date, the provision which is more favourable is applied to the offender.

2. The Prevention of Terrorism Act

39. The relevant provisions of the Prevention of Terrorism Act (Law no. 3713) provided as follows:

Section 1

(before amendment by Law no. 4928 of 15 July 2003)

“(1) Terrorism is any kind of act committed by one or more persons belonging to an organisation with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, undermining fundamental rights and freedoms or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat.

For the purposes of this law an organisation is the association of two or more persons to pursue a common goal.”

Section 1

(as amended by Law no. 4928 of 15 July 2003)

“Terrorism is any kind of criminal act committed by one or more persons belonging to an organisation with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, undermining fundamental rights and freedoms or damaging the internal and external security of the State, public order or general health by using force and violence and methods of pressure, terror, intimidation, oppression or threat.

For the purposes of this law, an organisation is the association of two or more persons in order to commit a terrorist offence as described in paragraph 1 above.”

Section 3

“Offences defined in Articles ... 168 ... of the Turkish Criminal Code are terrorist offences.”

Section 7 (1)

(before amendment by Law no. 5532 of 29 June 2006)

“Without prejudice to sections 3 and 4 of this Law and the Articles 168 ... of the Criminal Code, those who establish, manage or organise the activities of an organisation as defined under section 1 of this Law shall be punished by a term of imprisonment of five to ten years and a judicial fine of two hundred million to five hundred million liras. Those who become members of such organisations shall be punished by a term of imprisonment of three to five years and a judicial fine of one hundred million to three hundred million liras. Those who aid and abet members of such organisations and spread propaganda on their behalf shall be punished by a term of imprisonment of one to five years, even if the act in question constitutes a separate offence.”

Section 7 (1)

(as amended by Law no. 5532 of 29 June 2006)

“Those who establish, manage or become members of a terrorist organisation in order to commit crime to carry out the purposes set out under section 1, by using force and violence, and by means of exerting pressure, fear, intimidation or threats, shall be punished in accordance with the provisions of Article 314 of the Turkish Criminal Code. Those who organise the activities of the organisation shall also be punished as managers of the organisation.”

40. Section 7(2) of Law no. 3713, as in force at the time of commission of the offence, provided that any person who disseminated propaganda in favour of a terrorist organisation would be liable to a term of imprisonment of one to five years. Between 7 August 2003 and 18 July 2006, section 7(2) of Law no. 3713 read as follows:

“Any person who assists members of the aforementioned organisations [terrorist organisations] or who disseminates propaganda inciting others to violence or other methods of terrorism shall be liable to a term of imprisonment of one to five years and a judicial fine of five million liras to one billion liras ...”

3. *The Passport Act*

41. The relevant provision of the Passport Act (Law no. 5682) at the material time provided as follows:

Section 22

“... no passport or other travel document shall be issued to any person prohibited from leaving the national territory by virtue of a judicial decision ...”

B. Relevant judicial practice

1. Examples of domestic case-law submitted by the Government

(a) Judgment of the İzmir State Security Court of 25 July 2002 E. 2001/421, K. 2002/207, upheld by the Court of Cassation.

42. In a case brought against five accused in relation to an allegation that they were members of an anarchist terrorist organisation, namely the Youth Anarchist Federation (AGF), within the meaning of section 7(1) of Law no. 3713, and where the events which had given rise to the accusation had been the spray-painting of anarchic comments on public walls and the distribution of flyers with slogans such as “No to Capitalism and War”, the İzmir State Security Court acquitted the accused of the charges. In doing so, the court held that there had been no official information as to the existence of an organisation called AGF, and that the flyers allegedly distributed by the accused had not borne AGF’s letterhead. The court further commented that in order for an organisation to be classified as illegal, some conditions had to be fulfilled. Firstly, the organisation would have to adopt an illegal purpose and an action plan in order to realise its purpose. Secondly, there would have to be information or documentary evidence relating to its action plan and purpose. Lastly, in order for an organisation to qualify as a terrorist organisation within the meaning of Law no. 3713, its action plan as such would have to contain plans or reference to acts to be committed using the methods of pressure, coercion and violence, fear, intimidation and threats. On the basis of the above criteria, it found that the accused had only come together to form a group in order to cultivate their interest in anarchy, but they had neither committed acts by means of the methods described above nor had a purpose that was clearly articulated.

(b) Judgment of the Court of Cassation of 13 February 2006 E. 2005/6870, K. 2006/713

43. In a case brought against six accused in respect of an allegation that they were members of the Hizb-ut Tahrir terrorist organisation, the Court of Cassation quashed an acquittal decision of the first-instance court on the grounds that the latter had not adequately taken into account an information note prepared by the relevant Security Directorate which had considered that the organisation was a terrorist organisation within the meaning of section 1 of Law no. 3713, in view of its purpose, membership structure, strategy and activities.

(c) Judgment of the Court of Cassation of 9 October 2013 E. 2003/9110, K. 2013/12351

44. In a case known as “the sledgehammer” (*Balyoz*), a number of high-ranking army officials were charged with conspiracy against the State

on the basis of Article 147 of the former Criminal Code, an offence which, at the relevant time, also qualified as a crime of terrorism and included violence (*cebren iskat*) as its essential component. Following an appeal by the accused, the Court of Cassation held that the violence component in respect of the crime in question was not restricted to physical violence, and could be broadly interpreted to include moral coercion so as to take into account the nature of the perverseness of the motive of those members of such an organisation, and the potential use of physical force in order to realise an organisation's illegal purpose. Having regard to the evidence in question, consisting of CDs, audio cassettes and documents which demonstrated the organisation's intention to orchestrate attacks and bombings in order to foment unrest in the country and raise tensions with a neighbouring country, the Court of Cassation held that the accused in question had formed a conspiracy in order to carry out a military "*coup d'état*", and had come up with an elaborate action plan setting out the steps in detail, and a comprehensive membership structure to facilitate its ultimate purpose of overthrowing the government.

2. Other relevant practice

Judgment of the Plenary Court of Cassation (Criminal Divisions) of 11 March 2003 E. 2003/9-39, K. 2003/32

45. In a case brought against the owner and the editor of a publication in respect of an allegation that they had published the declarations of a terrorist organisation, namely the Kurdistan Socialist Party, within the meaning of section 6(2) of Law no. 3713, the Court of Cassation, sitting in plenary, quashed the first-instance criminal court's judgment. In doing so, the court held that the impugned judgment's sole basis for qualifying the organisation as a terrorist organisation had been an information note prepared by the Security Directorate which had loosely categorised the organisation as another Marxist-Leninist organisation seeking to bring about an armed revolution with respect to the Kurdish situation, and the judgment did not point to specific actions committed by the organisation for the purposes alleged. The Court of Cassation further noted in that connection that there was no judicial precedent assessing whether the organisation could be qualified as a terrorist organisation within the meaning of sections 1 and 7 of Law no. 3713. It therefore held that the first-instance court should have expanded the scope of the investigation in order to assess whether the organisation in question had adopted terrorism as its *modus operandi* or committed acts that could be qualified as terror acts in the light of the purposes and methods listed in section 1 of Law no. 3713.

Judgment of the Constitutional Court of Turkey

46. The Constitutional Court of Turkey in the context of an individual application reviewed the compatibility of the proceedings in the above mentioned sledgehammer case (see paragraph 43) with Article 6 § 1 of the Convention. In finding a violation of that article, it held, *inter alia*, that the domestic courts had not provided sufficient and adequate reasons in convicting the applicants on the basis of the digital evidence for which the applicants had submitted expert reports challenging their authenticity.

III. RELEVANT INTERNATIONAL MATERIALS

47. The Council of Europe Convention on the Prevention of Terrorism, which entered into force on 1 June 2007, signed and ratified by Turkey (entry into force on 1 July 2012), does not contain a definition of terrorism but refers to the definitions of terrorists offences contained in the eleven international treaties that are listed in its appendix.

The Council of Europe Convention's provisions that are relevant to the present case provide as follows:

Article 5 – Public provocation to commit a terrorist offence

“1. For the purposes of this Convention, ‘public provocation to commit a terrorist offence’ means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.”

Article 6 – Recruitment for terrorism

“1. For the purposes of this Convention, "recruitment for terrorism" means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.

2. Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.”

Article 9 – Ancillary offences

“1. Each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law: ...

(b) organising or directing others to commit an offence as set forth in Articles 5 to 7 of this Convention;

(c) contributing to the commission of one or more offences as set forth in Articles 5 to 7 of this Convention by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in Articles 5 to 7 of this Convention; or

(ii) be made in the knowledge of the intention of the group to commit an offence as set forth in Articles 5 to 7 of this Convention.

...”

Article 12 – Conditions and safeguards

“1. Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

2. The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.”

48. At its 83rd plenary session, held on 4 June 2010, the Venice Commission adopted a report on counter-terrorism measures and human rights (CDL-AD(2010)022), the relevant parts of which provide as follows:

“A. Terrorist offences and principle of legality

29. The core of the rule of law in criminal law is the principle of the legality of penal prohibition and punishment (*nullum crimen, nulla poena sine lege*), laid down in Article 7 ECHR. The latter is a non-derogable clause.

30. In several countries the relevant counter-terrorism legislation prohibits a series of acts without giving an overall definition of terrorism. The offences are often vaguely and/or broadly defined such as “being concerned with terrorism” or “belonging to a proscribed organisation”. In other countries, the definition of terrorism in national laws may be so broad that it encompasses a wide range of acts of differing gravity. This carries a risk that certain crimes or offences are incorporated in the category of terrorist act that, by nature, do not belong there. Or that a crime or an offence committed in a political context be considered as a terrorist act.

31. During the last years, some States have also been drawing up official lists of groups deemed to be terrorists. Belonging to or collaborating with a so-called terrorist group becomes a crime, *ipso facto*. “Blacklisting” of terrorist suspects or groups involves major problems for their legal security and several of their human rights ... As it operates to criminalize activities in support of a given violent (terrorist) political movement, there is a considerable risk that it may have an overspill effect on non-violent movements which have the same political goals as the target group, but which

do not advocate (terrorist) violence in obtaining these goals. This may lead to infringements of the freedom of association and freedom of speech of the persons concerned.

32. Furthermore, expanding the criminal liability to mere expressions of adherence to terrorist ideologies conflicts with the principle that only acts may be punished, and not also declarations of thought, intention or sympathy, as long as the latter do not amount to speech by the person him- or herself that amounts to incitement to violence or hatred ... Article 7 ECHR links the principle of legality to the commission of an act or an omission; a crime should thus consist in a material behaviour. The rights of the accused, notably the right of defence, would be nullified if the suspected person could be charged on the basis of mere expressions of terrorist ideology or support for terrorism and terrorist criminal acts: no defence is possible if the charge does not relate to facts, actions or behaviour.”

49. The Security Council of the United Nations (“the Security Council”) adopted Resolution 1566 (2004) at its 5053rd meeting on 8 October 2004. Its relevant parts provide as follows:

“*Acting* under Chapter VII of the Charter of the United Nations,

...

2. *Calls upon* States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens;

3. *Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;”

50. The relevant parts of the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin on his mission to Turkey (UN Human Rights Council, A/HRC/4/26/Add.2, 16 November 2006) are worded as follows:

“14. The Anti-Terror Act is drafted in a way that allows for an overly broad application of the term terrorism. Article 1, paragraph 1, defines “terrorism” mainly with regard to its aims. It appears to criminalize the aims as such since it does not require any act to have been committed in pursuing the listed aims, which include the aim to change the “political, legal, social, secular and economic system” of Turkey and the aim of “weakening ... the authority of the State”. The clause is therefore not restricted to tactics employed in the furtherance of these aims that amount to deadly or

otherwise grave violence against persons. Instead, the provision is applicable to any kind of act that entails “pressure, force and violence, terror, intimidation, oppression or threat”(emphasis added).

26. Proscribing organizations which resort to violence and/or commit terrorist acts is part of counter-terrorism measures in many States. Also Turkish authorities referred commonly to organizations they called “terrorist, unlawful or prohibited”. The Special Rapporteur was informed that there are between 30 and 50 terrorist organizations active in Turkey. The authorities group them in four categories: (a) ideological terrorist organization, e.g. DHKP/C, the Communist Party of Turkey (Marxist-Leninist) (TKP/ML) and the Marxist Leninist Communist Party of Turkey (MLKP); (b) separatist terrorist organizations, namely PKK/Kongra-Gel (People’s Congress of Kurdistan); (c) fundamentalist religious organizations (e.g. Hizbollah); and (d) international terrorist organizations which also target Turkey (Al-Qaeda)[...]

27. Despite repeated inquiries, the procedure, the criteria, the responsible bodies, and the consequences of being categorized as a terrorist organization remained unclear. Many officials indicated that it is “common knowledge” which groups are terrorist and which are not. A number of interlocutors referred to a list of terrorist organizations, claiming that its authors were the Ministry of the Interior, the National Intelligence Service, the National Security Council and the Jandarma. However, none of the above bodies confirmed that such a list existed and judicial authorities did underline that such a listing would not be binding in a court of law...”

51. The relevant parts of the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (UN Human Rights Council, A/HRC/16/51, 22 December 2010) provide as follows:

“27. In the absence of a universally agreed upon, comprehensive and concise definition of terrorism, counter-terrorism laws and policies must be limited to the countering of offences that correspond to the characteristics of conduct to be suppressed in the fight against international terrorism, as identified by the Security Council in its resolution 1566 (2004), paragraph 3. While the international community is concerned with international terrorism, individual States affected by purely domestic forms of terrorism may also legitimately include in their terrorism definitions conduct that corresponds to all elements of a serious crime as defined by the national law, when combined with the other cumulative characteristics of resolution 1566 (2004)...

28. The Special Rapporteur takes the view that a definition of terrorism that goes beyond the following would be problematic from a human rights perspective, and therefore formulates the definition of terrorism below as a best practice in the fight against terrorism.

Practice 7: Model definition of terrorism

Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or

- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;
- and
- 2. The action is done or attempted with the intention of:
 - (a) Provoking a state of terror in the general public or a segment of it; or
 - (b) Compelling a Government or international organization to do or abstain from doing something;
- and
- (3) The action corresponds to:
 - (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
 - (b) All elements of a serious crime defined by national law.”

THE LAW

I. JOINDER OF THE APPLICATIONS

52. Given their similar factual and legal backgrounds, the Court decides that the two applications should be joined, in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

53. The applicants complained that the relevant provisions of Law no. 3713 had been extensively applied to secure their conviction, and that the domestic courts had based their finding as to the applicants’ criminal responsibility on an interpretation – by analogy, in particular – that violence, which is an essential component of terrorist offences, could be taken to include moral coercion. They relied on Article 7 of the Convention, which reads as follows:

Article 7

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

A. Admissibility

54. The Court notes that this complaint 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.

B. Merits

1. Submissions by the parties

55. The applicants maintained their arguments.

56. The Government submitted that the applicants had in essence complained that the courts had convicted them under the relevant provisions of Law no. 3713 without taking into account the amendments made to the relevant sections of Law no. 3713, which, according to the applicants, had restricted the definition of terrorism to acts committed only by using force and violence. In that connection, the Government pointed out that the Assize Court had carried out a necessary examination of whether the amended version of sections 1 and 7 of Law no. 3713 included situations where an organisation had not yet resorted to violence, but had adopted violence and coercion as its purpose. That court had concluded that the acts of which the applicants stood accused, namely forming an organisation with the aim of encouraging people to revolt against the Turkish State and distributing flyers, had included the element of violence required under those provisions. According to the Government, the domestic court's use of the concept of moral coercion had been in accordance with the law and had been sufficiently foreseeable for the applicants, who had in any event committed the acts before the relevant amendments to the law in question had been made. Accordingly, at the time of the commission of offences, terrorism had been defined in a broader sense.

2. The Court's assessment

(a) General principles

57. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013).

58. Article 7 § 1 of the Convention goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It

also sets out, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where an individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him or her criminally liable (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28 June 2018). When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see *Kasymakhunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, § 77, 14 March 2013 and the cases cited therein).

59. The Court has acknowledged in its case-law that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 141, ECHR 2008). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (*ibid.*, with further references).

60. The Court also reiterates that, in principle, it is not its task to take the place of the domestic jurisdictions. Its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with errors of fact or law allegedly committed by a domestic court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is arbitrary or manifestly unreasonable (see, *inter alia*, *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, § 83, 11 July 2017 and *Alparslan Altan v. Turkey*, no. 12778/17, § 110, 16 April 2019).

61. However, the Court's powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for an applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention. To accord a lesser power of review to this Court would render Article 7 devoid of purpose (see *Kononov v. Latvia* [GC], no. 36376/04, § 189, ECHR 2010 and *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 52, ECHR 2015).

(b) Application to the present case

62. The Court notes that the main question in the present case concerns an element of novel judicial interpretation, namely whether the applicants' conviction for membership of a terrorist organisation on the grounds that their acts constituted moral coercion was consistent with the essence of that offence and could reasonably have been foreseen by the applicants at the time of their participation in the events of 2002. In that connection, the parties disagree as to whether moral coercion – a concept which does not exist in the text of the applicable law – can nevertheless be regarded as subsumed by the requirement of “violence and force”, which is a constituent element of a terrorist offence under the amended versions of sections 1 and 7 of Law no. 3713.

63. The applicants were convicted under the original version of section 7(1) of Law no. 3713 of membership of a terrorist organisation. The Court observes that at the relevant time Law no. 3713 did not contain a separate definition of a terrorist organisation. Rather, the definitions of terrorism and terrorist organisation were intertwined as formulated in section 1 of the same law. In its original version, terrorism was described as any act committed by means of pressure, force and violence, terror, intimidation, oppression or threat, with one or more of the political or ideological aims listed under that section, while an organisation was simply defined as any type of association of two or more people to pursue a common goal. In the amended 2003 version of section 1, it appears that the term “using force and violence” is referred separately from the methods of terrorism. The emphasis is put on the commission of an act through the use of force and violence and a further element – namely the impugned acts committed by members of such an organisation being criminal in nature – has been introduced. Moreover, it is no longer possible to call an association of two or more people a terrorist organisation unless their purpose of coming together is to pursue the commission of a terrorist offence.

64. The Government have made the argument that the applicants' conviction was foreseeable in accordance with the original versions of sections 1 and 7 of Law no. 3713 – in force at the time the offences were

committed – given that those provisions had in any event defined terrorism in a broader sense. The Court is unable to agree with that argument on the basis of the following observations. First, the principle that more lenient provisions of criminal law must be applied retrospectively is implicitly guaranteed by Article 7 of the Convention. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (see, *mutatis mutandis*, *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 109, 17 September 2009, and *Koprivnikar v. Slovenia*, no. 67503/13, § 49, 24 January 2017). The Court also notes in that connection that in Turkish criminal law, courts are required to comply with Article 7 § 2 of the Criminal Code, in accordance with which the provisions most favourable to the offender shall be applied (see also *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 51, ECHR 1999-IV).

65. Secondly, although the applicants were convicted under section 7(1) of Law no. 3713 before its amendment by Law no. 5532, the domestic court's final decision convicting the applicants under that provision took into account the amended 2003 version of section 1 of Law no. 3713 with respect to the definition of terrorism. Accordingly, the domestic courts reached the conclusion that the element of "force and violence" had been satisfied in the light of the finding that the applicants' activities had constituted moral coercion since they had adopted force and violence as their goal. Furthermore, the Court notes that the domestic courts in convicting the applicants discussed at length whether the amendments made to Law no. 3713 had restricted or broadened the term "force and violence" by limiting it to armed or physical acts of violence and force. Having concluded that a restrictive interpretation would run contrary to the purpose of the law, the domestic courts held that the term "force and violence" should be interpreted broadly and include situations where violence, although not used in the ordinary physical sense, was nevertheless adopted as a goal of an organisation. Since the domestic courts themselves applied the amended version of section 1 in conjunction with the original version of section 7 to the applicants, the Court will confine its examination of the lawfulness of the applicants' conviction to those versions and not to those in force at the time of commission of the offence. In that respect, the Court will examine whether the domestic courts' broad interpretation of the text of the law in convicting the applicants was reasonably foreseeable for the purposes of Article 7 § 1 of the Convention. In so doing, the Court will have regard to whether the interpretation in question was the resultant development of a perceptible line of case-law or its application in broader circumstances was nevertheless consistent with the essence of the offence (see, *inter alia*, *S.W. v. the United Kingdom*, 22 November 1995, §§ 36,

Series A no. 335-B, and *Jorgic v. Germany*, no. 74613/01, §§ 101-107, ECHR 2007-III).

66. The Court observes in that connection that the Government did not present the Court with a comparable case in which an association was deemed to be a terrorist organisation on the sole basis of the nature of its written declarations and despite the absence of violent acts attributable to that organisation. It further notes that the Government did not present the Court with examples of domestic case-law that made use of the concept of “moral coercion” in the context of terrorist offences. The only example that mentions moral coercion in the context of offences against the integrity of the State post-dates the applicants’ conviction and in any event cannot be deemed authoritative since it was struck down by the Constitutional Court of Turkey for being incompatible with Article 6 § 1 of the Convention on fact-specific grounds (see paragraph 46 above).

67. Having thus determined that the previous interpretations of sections 1 and 7 of Law no. 3713 by the domestic courts did not provide a basis for the use of the concept of “moral coercion”, the Court will next examine whether the wording of the above-mentioned sections could nevertheless be said to reasonably imply this concept. In so doing, the Court has to satisfy itself that the impugned concept is compatible with the essence of the offence, that is to say, invoking it in the circumstances of the case could be considered as reasonable irrespective of whether it was invoked by the domestic courts the first time.

68. The Court has to therefore verify first the essence of the offence of membership of a terrorist organisation in the context of the relevant domestic framework. The Court notes in that connection that the July 2003 legislative amendments to the provisions of Law no. 3713 narrowed down the definition of “terrorism” and “terrorist organisation”. Accordingly, the domestic law included several cumulative conditions for an association to be treated as a terrorist organisation. Those conditions are, *inter alia*: the intent to commit criminal acts; through the use of force and violence; and additional methods of pressure, terror, intimidation, oppression or threat; for one of the listed ideological or political motives. The wording of the relevant provisions of Law no. 3713 suggests that the essence of the offence of membership of a terrorist organisation is to join an association whose goal and mode of operation is to resort to the criminal use of force, violence and mass intimidation in order to advance certain political or ideological causes. The fact that the law-makers chose to single out the use of violence as a necessary means to commit terrorism in the 2003 version of section 1 of Law no. 3713 lends support to the conclusion that actual violence or the intent to use such violence is central to the definition of the offence.

69. The Court must next ascertain whether the violence component of the offence as described above can be said to reasonably imply “moral coercion”; in deciding that question the Court must consider whether

invoking this concept in the circumstances of the case could be considered as reasonable. The Court's inquiry should focus on the facts of the case as they have been established by the domestic courts and how the latter have applied the concept of "moral coercion" to the applicants' conduct and whether this interpretation fulfilled the requirements of foreseeability and clarity of the law.

70. In that connection, the Court notes that the applicants were convicted for membership of a terrorist organisation for having meetings with each other, disseminating flyers, possessing legal and illegal periodicals and a manifesto – the contents of which were found by the trial court to amount to moral coercion (namely, intimidation) of the public. It is also undisputed that there was no evidence that the organisation in question had engaged in any violent acts or that it had intended to pursue its aims through the use of force and violence or other terrorist methods. Finally, it was the first time that the domestic courts were called to determine whether the organisation could be proscribed as a terrorist organisation since there existed no judicial precedents concerning the same organisation. The Court therefore has to assess against this background whether the invocation of the concept of "moral coercion" was compatible with the essence of the offence of membership of a terrorist organisation.

71. The Court observes that, in the Turkish legal system, conviction for membership of a terrorist organisation is not made conditional on the existence of a prior judicial decision declaring the same organisation terrorist. More generally, there appear to be no clear rules or administrative practices for designating an organisation as a terrorist organisation (see paragraph 50 above). Nevertheless, the Court finds relevant the case-law of the Court of Cassation that, where domestic courts are confronted with the task of assessing for the first time whether an organisation can be classified as terrorist, they must carry out a thorough investigation and examine the nature of the organisation by scrutinising its purpose, whether it has adopted an action plan or similar operational measures, and whether it has resorted to violence or a credible threat to use violence in pursuing that action plan (see paragraphs 42 and 45 above).

72. The Court notes that in the framework of the present case this was the first time that a court had to determine whether the organisation in question could be proscribed from the standpoint of sections 1 and 7(1) of Law no. 3713. It follows that the domestic courts had to establish first and foremost whether the organisation in question possessed all the characteristics of a terrorist organisation as defined by Law no. 3713. In that respect, the domestic courts relied on the information note prepared by the Security Directorate, which considered the organisation in question a Marxist-Leninist illegal organisation whose ultimate aim was to bring about an armed revolution in Turkey. The domestic courts also relied on the flyers distributed in the streets of İzmir, as well as the organisation's manifesto

discovered in a co-accused's apartment, and found that the views expressed therein, because of their objectionable character, amounted to moral coercion of the public, therefore fulfilling the requirement of force and violence for the purposes of sections 1 and 7 of Law no. 3713.

73. On the basis of the facts as established by the domestic courts, the Court observes that the cumulative elements of the offence of membership of a terrorist organisation, as construed by the Court of Cassation (see paragraphs 42 and 45 above), were not demonstrated by the domestic courts to be present in the applicants' cases. In that respect, while the domestic courts held that the organisation in question had not engaged in any armed attacks, they did not address the question whether the organisation had adopted an action plan or similar operational measures for such a purpose. In this connection, the Court notes that there is no indication in the case-file that the organisation in question, beyond the mere proclamation of certain goals, had adopted any concrete preparatory steps or indeed any form of action with a view to carrying out violent acts. Neither can the information note provided by the Security Directorate to the domestic courts be regarded as relevant in this respect since the acts attributed to the organisation in that note consisted only of the distribution of flyers and texts and the possession of books by the suspects.

74. It is therefore clear that the domestic courts convicted the applicants on membership of a terrorist organisation because of the political ideas and aspirations expressed in some of the documents found to be the product of the organisation. The Court notes in this respect that the applicants were not prosecuted for any specific speech offences, such as incitement to violence or hostility, but under the separate heading of membership of a terrorist organisation.

75. Furthermore, according to the wording of amended section 1 of Law no. 3713, the act of subscribing to a form of ideology, sharing ideas or combining with others to cultivate an interest in an ideology is not sufficient to qualify as terrorism. It is necessary for the organisation to intend to commit crimes by the use of force and violence, which ultimately implies a degree of material coercion. The Court notes that the domestic courts did not explain how the concept of moral coercion relates to the constitutive elements of the offence, including with respect to the degree of coercion and the severity it must attain to warrant the conclusion that it amounts to terrorism.

76. The domestic courts therefore chose to exercise their judicial discretion in an expansive manner by adopting an interpretation that was inconsistent with both prevailing national jurisprudence and the essence of the offence as defined by the national law. In the circumstances of the present case, they therefore infringed the reasonable limits of acceptable judicial clarification contrary to the guarantees of Article 7 of the Convention.

77. The Court does not lose sight of the difficulties associated with the fight against terrorism and the challenges States face in the light of the changing methods and tactics used in the commission of terrorist offences. The Court is also mindful of the absence of a universally accepted definition of terrorism. However, this does not mean that the fundamental safeguards enshrined in Article 7 of the Convention, which include reasonable limits on novel or expansive judicial interpretations in the area of criminal law, stop applying when it comes to prosecution and punishment of terrorist offences. The domestic courts must exercise special diligence to clarify the elements of an offence in terms that make it foreseeable and compatible with its essence.

In the circumstances of the present case, the domestic courts unjustifiably extended the reach of the criminal law to the applicants' case in contravention of the guarantees of Article 7 of the Convention.

There has accordingly been a violation of that provision in respect of both applicants.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

78. The applicants complained under Articles 10 and 11 of the Convention that their conviction had violated their right to share ideas and impart information.

79. The Government argued that the applicants had not only been convicted of preparing and distributing documents which called for violence, but also of being active members of an organisation using code names, organising clandestine meetings and recruiting new members, and that their conviction had therefore been secured on the cumulative basis of those acts. The Government relied on *Benli v. Turkey* (no. 65715/01, 20 February 2007), and argued that, in the instant case, the applicants' conviction could not be viewed as an interference with their rights under Article 10 of the Convention.

80. The Court considers that these complaints are admissible, but having regard to its finding of a violation of Article 7, it is not necessary to examine whether there has also been a violation of those provisions because they are absorbed by the complaints already examined under Article 7 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

81. The second applicant complained that the travel ban imposed on him while the criminal proceedings had been ongoing had been unjustified, and that the resulting interference with his private life had been disproportionate. He relied on Article 8 of the Convention, the relevant parts of which read:

“1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... public safety or ... for the prevention of disorder or crime ...”

A. Admissibility

82. The Government raised two preliminary objections in their observations. Firstly, they argued that the second applicant’s complaint with respect to the travel ban in question related to freedom of movement, a right that was governed by Article 2 of Protocol No. 4, to which Turkey was not a party. They therefore asked the Court to declare this part of the second applicant’s complaint inadmissible.

83. Secondly, the Government argued that the second applicant had failed to substantiate any disadvantage he had allegedly suffered as a result of the alleged violation, and therefore asked the Court to declare this complaint inadmissible under Article 35 §§ 3 (b) and 4 of the Convention.

84. The Court reiterates that the fact that “freedom of movement” is guaranteed as such under Article 2 of Protocol No. 4, which Turkey has signed but not ratified, is irrelevant, given that one and the same fact may fall foul of more than one provision of the Convention and its Protocols (see *Poiss v. Austria*, 23 April 1987, § 66, Series A no. 117). Moreover, the Court has examined similar complaints under Article 8 of the Convention by having regard to the fact that freedom of movement, particularly across borders, is considered essential to the full development of a person’s private life, especially when he or she has family, professional and economic ties in several countries (see *İletmiş v. Turkey*, no. 29871/96, § 50, ECHR 2005-XII; *Paşaoğlu v. Turkey*, no. 8932/03, §§ 42-43, 8 July 2008; see also, *mutatis mutandis*, *Riener v. Bulgaria*, no. 46343/99, § 134, 23 May 2006, and *Pfeifer v. Bulgaria*, no. 24733/04, §§ 59-62, 17 February 2011). In that connection, submitting the necessary documents to that effect, the second applicant has substantiated before the domestic authorities as well as the Court that he was a lawful resident of Germany, and that he worked as a freelance journalist. Lastly, with regard to the Government’s objection concerning the alleged lack of a significant disadvantage, the Court notes that the parties do not dispute the fact that the applicant was a non-resident at the material time and that his life prior to his arrest in Turkey was based in Germany. In that respect the Court considers that the effects of the travel ban on the applicant’s private life in so far as it prevented him from returning to his place of residence cannot be underestimated. The Court also considers that it cannot be excluded that the travel ban had pecuniary implications for the applicant. Accordingly, there are no grounds for concluding that the applicant has suffered no significant disadvantage.

85. Accordingly, the Court rejects the Government's preliminary objections and notes that the second applicant's complaint under Article 8 of the Convention 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.

B. Merits

86. The second applicant maintained his arguments.

87. The Government argued that the travel ban had been necessary in order to prevent the second applicant from absconding, especially considering the fact that he had been arrested when he had been about to leave Turkey. They further submitted that the measure in question, which was less severe than detention, had been proportionate in view of the gravity of the offences of which the applicant had stood accused. Finally, they argued that the period to be taken into account in respect of the travel ban should only be the duration when the applicant had the status of the accused, that is between 21 January and 24 July 2003 and between 8 April 2004 and 16 March 2006, in total approximately 2 years and 5 months.

88. The Court considers that the travel ban imposed on the second applicant by the criminal court amounted to an interference with the exercise of his right to respect for his private life. The applicant had sufficiently close personal and professional ties to his country of residence for there to have been a risk that they would be seriously affected by the measure in question (see, *mutatis mutandis*, *İletmiş*, cited above, § 42).

89. The Court reiterates that such interference will give rise to a breach of Article 8 of the Convention unless it can be shown that it was "in accordance with law", pursued one or more legitimate aims as defined in the second paragraph and was "necessary in a democratic society" to achieve those aims.

90. As regards the question of the "lawfulness" of the measure within the meaning of Article 8 of the Convention, the Court notes that section 22 of the Passport Act constitutes the legal provision on the basis of which the travel ban was issued against the second applicant. Accordingly, it concludes that the impugned measure had a basis in domestic law.

91. With regard to the "legitimate aim", the Court accepts that such a measure may have served the aim of preventing the second applicant from fleeing abroad, and thus of ensuring his presence during the criminal proceedings and the possibility of enforcing any resultant sentence. It is therefore satisfied that the interference with the second applicant's rights under Article 8 of the Convention pursued the legitimate aim of securing his availability for trial, and hence the prevention of disorder and crime.

92. As regards the proportionality of the measure in question, the Court does not lose sight of the fact that the second applicant was the subject of

criminal proceedings. In that respect, the Court reiterates that it is not in itself questionable that the State may apply various preventive measures restricting the liberty of an accused in order to ensure the efficient conduct of a criminal prosecution; such measures may include deprivation of liberty (see, for example, *Makedonski v. Bulgaria*, no. 36036/04, § 39, 20 January 2011). In principle, a ban on leaving the country is a minimally intrusive measure involving a restriction of one's liberty. However, it is evident that a travel ban imposed on a non-resident of the country where the proceedings take place has more serious consequences on the effective enjoyment of the right to respect for private and family life than that imposed on a resident. While a resident can go on about his daily life and resume social and professional activities without significant difficulties during the period the travel ban is enforced, a non-resident whose life has been established elsewhere will suffer a major disruption in their private and professional lives. Therefore, it is all the more necessary for such measure to be justified on the basis of an individualised approach from the outset and throughout its duration. Accordingly, the domestic authorities reviewing the measure should take account of all the factors involved by means of a periodic and individual assessment (see, *mutatis mutandis*, *Riener*, cited above, § 124). An automatic blanket ban imposed on an individual without an assessment of the fair balance test falls foul of the procedural obligations of the State inherent in Article 8 of the Convention.

93. In the present case, the Court notes that the travel ban was imposed on the second applicant after he was released from pre-trial detention, that is on 21 January 2003, as a preventive measure in lieu of detention. On that date he was prohibited from leaving Turkey until 25 December 2006, when his conviction for membership of a terrorist organisation became final. The travel ban was lifted on 24 June 2009 on his request, after he had served his sentence. During the proceedings, the second applicant made seven applications to the domestic courts requesting that the ban be lifted, explaining each time that the measure in question prevented him from maintaining his personal and professional ties to Germany, where he resided, and asking the courts to put in place a more appropriate measure, such as bail. The courts either failed to examine them or replied to those applications each time by merely referring to the stage the proceedings were at, without making any assessment as to whether the continuing restriction, after a certain lapse of time, was still a proportionate measure in the individual circumstances of the case (see paragraph 31 above). Since the domestic courts' decisions contain no consideration in relation to the applicant's non-resident status and the profound implications of the travel ban on his private and professional life, it cannot be said that they weighed up the competing interests at stake. They therefore failed to provide sufficient justification for the continued ban on the applicant's travelling abroad which, the Court recalls, lasted almost four years.

94. In this respect, the Court reiterates that even where a restriction on an individual's freedom of movement was initially warranted, maintaining it automatically over a lengthy period of time may become a disproportionate measure, violating the individual's rights (see *Pfeifer*, cited above, § 56). In the instant case, the domestic courts failed to reassess the justification of the travel ban in question, despite the second applicant's repeated applications, and upheld the impugned measure in an automatic manner.

Consequently, there has been a violation of Article 8 of the Convention in respect of the second applicant.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

95. 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. Pecuniary damage

96. The first applicant claimed 16,898 Turkish liras (TRY - approximately 4,320 euros (EUR)) in respect of pecuniary damage, in compensation for the loss of earnings resulting from the fact that he had been imprisoned. In support of his claims, he submitted a table representing the official production costs of barley, chickpeas, wheat and corn for the second half of 2016. He estimated his loss of earnings for the period in which he had served his sentence based on this data, and on the basis of 60 decares of land which he allegedly owned.

97. The second applicant claimed EUR 46,800 in compensation for loss of income, an amount representing the average income he would have earned as a freelance journalist in Germany during the period when he had been detained and incarcerated. In support of that claim, he submitted the average fee scales and adjustment tables for journalists working in Germany for the years 2016-2018. He further claimed TRY 1,666 (approximately EUR 760 at the material time), an amount representing the fine imposed on him as a criminal penalty.

98. The Government contested the above claims as unsubstantiated and excessive.

99. The Court's case-law establishes that there must be a clear causal connection between the damage claimed by applicants and a violation of the Convention. In appropriate cases, this may include compensation in respect of loss of earnings (see, among other authorities, *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 81, ECHR 2012 (extracts) and the cases cited therein).

100. The Court considers that there is a causal link between the violation found and the pecuniary damage alleged by the second applicant in respect of the fine imposed on him as a criminal penalty. It therefore considers that this amount should be reimbursed in its entirety. As regards the applicants' remaining claims, the Court does not consider that the speculative evidence submitted lends itself to a precise calculation of their loss of earnings resulting from their unlawful conviction and incarceration. In particular, it has no reliable information on the applicants' actual income at the time when criminal proceedings were launched against them. Consequently, it cannot make an award for the loss of earnings claimed by the applicants. It therefore only awards the second applicant EUR 760 in respect of pecuniary damage.

B. Non-pecuniary damage

101. The first applicant requested EUR 50,000 in compensation for the suffering caused by his conviction and incarceration.

102. The second applicant claimed EUR 100,000 in compensation for the damage which he had suffered as a result of the criminal proceedings, his conviction, his imprisonment and the travel ban that had remained in force during the course of the domestic proceedings.

103. The Government contested the claims on the grounds that they were excessive and did not reflect the case-law of the Court.

104. The Court considers that both applicants must have suffered a certain amount of distress which cannot be compensated for solely by the Court's findings of violations. The Court, having regard to the nature of the violations found in the present case and deciding on an equitable basis, awards the first applicant EUR 7,500 and the second applicant EUR 9,750 under the head of non-pecuniary damage.

C. Costs and expenses

105. The first applicant claimed EUR 831 for costs and expenses incurred before the Court, of which EUR 128 represented translation costs and EUR 703 lawyer's fees. He submitted a fee agreement in respect of those claims.

106. The second applicant claimed TRY 500 for translation costs and postal expenses, without submitting documents to that effect, and TRY 2,750 in legal representation fees incurred before the Court. In support of the latter claim, he only referred to the İzmir Bar Association's scale of fees.

107. The Government contested these claims.

108. In accordance with the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown

that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court allows the first applicant's claim in full and awards him EUR 831 for costs and expenses. As regards the second applicant, the Court notes that he merely referred to the İzmir Bar Association's scale of fees and failed to submit any supporting documents in respect of his claims. In those circumstances, and bearing in mind the terms of Rule 60 § 2 and 3 of its Rules, the Court makes no award in respect of the costs and expenses claimed by the second applicant (see, *inter alia*, *Hasan Döner v. Turkey*, no. 53546/99, §§ 59-61, 20 November 2007, and *Yılmaz Yıldız and Others v. Turkey*, no. 4524/06, § 57, 14 October 2014).

D. Default interest

109. 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. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 7 of the Convention as regards both applicants;
4. *Holds* that there is no need to examine the complaints under Articles 10 and 11 of the Convention;
5. *Holds* that there has been a violation of Article 8 of the Convention as regards the second applicant;
6. *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) to the second applicant, EUR 760 (seven hundred and sixty euros), plus any tax that may be chargeable, in respect of pecuniary damage;
- (ii) to the first applicant, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (iii) to the second applicant, EUR 9,750 (nine thousand seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (iv) to the first applicant, EUR 831 (eight hundred and thirty-one euros), plus any tax that may be chargeable to the applicant, 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;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

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

Hasan Bakırcı
Deputy Registrar

Robert Spano
President