



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

SECOND SECTION

CASE OF BALLIKTAŞ BİNGÖLLÜ v. TURKEY

(Application no. 76730/12)

JUDGMENT

Art 6 § 1 (civil) • Fair hearing • Dismissal of request to remove statutory restrictions on certain rights on account of past conviction • Fair assessment by domestic courts • No error in calculation of eligibility for conditional release and final release date

Art 8 • Private life • Ratione materiae • Application of consequence-based approach in prospective employment context • Applicant's opportunities for establishing and maintaining professional life not affected to extent required • Requisite threshold of severity not attained

STRASBOURG

22 June 2021

FINAL

22/09/2021

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

In the case of Ballıktaş Bingöllü v. Turkey,

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

Jon Fridrik Kjølbro, *President*,

Carlo Ranzoni,

Aleš Pejchal,

Egidijus Kūris,

Branko Lubarda,

Marko Bošnjak,

Saadet Yüksel, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to:

the application (no. 76730/12) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mrs Burcu Ballıktaş Bingöllü (“the applicant”), on 25 September 2012;

the decision to give notice to the Turkish Government (“the Government”) of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

Having deliberated in private on 1 June 2021,

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

INTRODUCTION

1. The case concerns a specific type of proceedings in which the applicant’s request for the removal of statutory restrictions resulting from a past conviction were rejected. The applicant complained that she had been denied access to a court on account of the domestic courts’ excessively formalistic examination of her request, which in turn had had significant negative consequences for her private and professional life.

THE FACTS

2. The applicant was born in 1978 and lives in Istanbul. She was represented by Mr M. B. Mısır, a lawyer practising in Ankara.

3. The Government were represented by their Agent.

I. THE CIRCUMSTANCES OF THE CASE

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

A. Background

5. On 6 March 2000 the applicant was arrested by a gendarmerie officer. She was held in police custody until 9 March 2000, when her pre-trial detention was ordered by the Edirne Magistrates' Court.

6. On 9 October 2001 the Istanbul State Security Court found the applicant guilty of the offence of membership of an illegal organisation under Article 168 of the Criminal Code and section 5 of the Prevention of Terrorism Act, and sentenced her to twelve years and six months' imprisonment. The court further ruled that she should be permanently prohibited from holding a civil service position. Her conviction became final on appeal on 8 July 2002. The circumstances of the applicant's police custody and the fairness of the proceedings before the Istanbul State Security Court were the subject of a previous application under the Convention in which the Court found that there had been a breach of Articles 3 and 6 § 1 of the Convention (see *Ballıktaş v. Turkey*, no. 7070/03, 20 October 2009).

7. A writ of execution (*müddetname*) issued by the public prosecutor's office on 18 October 2002 concerning the execution of the applicant's sentence stated that the applicant's term of imprisonment had commenced on 9 March 2000 and that her conditional release was scheduled for 3 September 2007, which date took account of the three days she had already spent in police custody. The writ of execution ("first writ of execution") stated 2 September 2012 as the date of the full completion of her sentence ("final release date").

8. Following the publication of the new Criminal Code (Law no. 5237) in the Official Gazette on 12 October 2004, but before its entry into force, the applicant applied to the Istanbul Assize Court, requesting that the date of her conditional release be revised in accordance with the more lenient provisions of the new Criminal Code. She argued in her application that the minimum penalty for the offence of membership of an illegal organisation in the new Criminal Code was set at five years' imprisonment, and if the new Criminal Code – as the more lenient law – were to be applied to the circumstances of her case, she would be sentenced to six years at the most. As a result she would be entitled to conditional release after serving 4 years and 6 months of her sentence. She therefore requested the suspension of the execution of her sentence in anticipation of the entry into force of the new Code, adding that she had already served 4 years and 7 months of her sentence.

9. In its opinion submitted to the Istanbul Assize Court, the Istanbul Chief Public Prosecutor's Office noted that when the new Criminal Code came into force it would have to be applied to the applicant's case as the more lenient law, and that it would therefore be appropriate to suspend the execution of her sentence, having regard to the fact that the length of her

detention already corresponded to the period for which she would be eligible for conditional release under the new Code.

10. On 5 November 2004 the Istanbul Assize Court ordered the suspension of the applicant's sentence in accordance with Article 402 of the Code of Criminal Procedure, noting that the conditional release period had been satisfied in the light of the provisions of Law no. 5237. By the time she was released pursuant to that decision she had completed 1705 days of her sentence.

11. On 1 June 2005 the new Criminal Code and Law no. 5252, setting out the rules and procedures for the application of the new Criminal Code, entered into force.

12. On 5 June 2008, in the framework of adaptation proceedings, the Istanbul Assize Court reduced the applicant's sentence to six years and three months' imprisonment, finding generally that the new Criminal Code set out more favourable provisions applicable to her case. It also ruled in that connection that the restriction on the applicant's civil and political rights should be governed by Article 53 of the new Criminal Code.

13. On an unspecified date the applicant lodged an appeal against the decision of 5 June 2008, which she later withdrew. As a result, the decision of 5 June 2008 became final before the Court of Cassation on 11 October 2011.

B. Events complained of in the present case

14. In the meantime, that is to say after she was released from prison by decision of the criminal court of 5 November 2004 (see paragraph 10 above), the applicant graduated from a university in 2010 and subsequently participated in an examination to be appointed to available posts in the civil service as a research assistant. Having succeeded in the exam, she applied for a specific post in a public university in Ankara.

15. On 4 October 2011 the university informed the applicant that she could not be appointed to the said post in so far as her conviction for an offence against the constitutional order of the State barred her from employment in the civil service under section 48 of the Law on Civil Servants (Law no. 657).

16. The following events surrounding the applicant's second incarceration are partly disputed between the parties.

17. According to the applicant's account, on 13 December 2011 she went to the Beşiktaş court house in Istanbul to obtain a copy of the writ of execution in which the details of the execution of her sentence were indicated for the purpose of lodging an application for the restoration of her civil and political rights. According to the applicant, she was informed by an officer in charge of the execution of criminal court judgments in that court house that an error had occurred in the calculation of her sentence

when she had been granted conditional release in 2004 and that she had five more days of her sentence left to serve.

18. The applicant submitted that she was immediately taken to a prison where she was incarcerated for five days before being released on 18 December 2011.

19. The Government contended that the applicant's second incarceration had not been the result of a mistake. According to them, the decision of 5 November 2004 had been taken in order to suspend the serving of the applicant's sentence pending the entry into force of the new Criminal Code. In support of their argument, they relied on the court rulings mentioned in paragraphs 8 and 10 above. They explained that after the entry into force of the new Criminal Code, and on the basis of the applicant's request, the adaptation proceedings had taken place before the Istanbul Assize Court, which had decided on 5 June 2008 that the new Criminal Code should be applied to the applicant's case on account of its more lenient provisions. Relying on the calculations made by that court, the applicant's sentence was reset at six years and three months, during which time the prohibition on entry into civil service would be applied. Only when that decision had become final on 11 October 2011 could a new writ of execution be drawn up, pursuant to which the applicant had to serve five more days in order to be eligible for conditional release. This was the reason why she had had to be incarcerated a second time. Thus, the Government appeared to suggest that the applicant had only become eligible for conditional release on 18 December 2011, once the additional five days had been served, and that the date of the lawful release had been calculated as of that date, and would be reached on 11 July 2013. In support of their argument, they relied on the second writ of execution drawn up by the authorities. In that writ of execution, the following dates and information were indicated: 13 December 2011 as the date of imprisonment, 1705 days of previous incarceration to be deducted from the three-quarters of her sentence, leaving 18 December 2011 as the date of conditional release, and the remainder of the term of imprisonment (one year, six months and twenty-five days) being completed on 11 July 2013.

20. The subsequent events are not disputed between the parties.

21. On 16 February 2012 the applicant lodged an application with the Ankara Assize Court and requested the restoration of her civil rights pursuant to section 13/A of Law no. 5352. She submitted that for the purposes of that provision her conditional release date should be taken as 5 November 2004 and not 18 December 2011, in so far as the error committed by the authorities should not be remedied at her expense.

22. On 19 March 2012 the 12th Chamber of the Ankara Assize Court dismissed the applicant's request, holding that her sentence had not yet been fully executed. In that regard the court, referring to the second writ of execution, held that the applicant had been conditionally released on

18 December 2011 and that her sentence would therefore be officially deemed to have been executed on 11 July 2013.

23. The applicant lodged an objection against this decision with the 11th Chamber of the Ankara Assize Court and argued that the date taken as the conditional release date by the first-instance court had disregarded the fact that she had in fact been released seven years ago on 5 November 2004. She submitted that the fact that the Ankara Assize Court considered her conditional release date and the final execution date of her sentence to be 18 December 2011 and 11 July 2013 respectively, without taking into account the mistake committed by the relevant authority and the period of seven years between her initial release date and the date of her second incarceration, had grave consequences for her, such as the prolongation of the period in which she would be further prevented from exercising her civil and political rights. She therefore requested that that court rectify the second writ of execution. Pointing out that she had been first incarcerated on 6 March 2000, and her conviction had entailed imprisonment of six years and three months, she requested that the final execution date that appeared on the writ execution be corrected to 6 June 2006 and that a formal decision stating that her rights were restored be granted to her.

24. On 9 April 2012 the 11th Chamber of the Ankara Assize Court dismissed the applicant's objections, upholding the reasoning of the 12th Chamber of the Ankara Assize Court. It was indicated that the decision was final.

25. The applicant's similar applications to the Istanbul Assize Court were dismissed on 5 July 2012 and 31 August 2012 respectively. Those courts reiterated that 11 July 2013 would be the date when her sentence would be officially deemed to have been executed, and that after that date the restriction on her civil rights would be *ipso facto* lifted in accordance with section 53 of Law no. 5237.

II. DEVELOPMENTS AFTER THE INTRODUCTION OF THE APPLICATION

A. Proceedings before the administrative courts and the individual application to the Constitutional Court

26. On 2 December 2011 the applicant lodged an action before the Ankara Administrative Court, challenging the university's decision of 4 October 2011 not to appoint her as a research assistant. In her application she argued, *inter alia*, that the new Criminal Code had rejected the idea that there could be additional consequences or restrictions resulting from a criminal conviction that had continued long after the completion of the sentencing process. For this reason she contended that the rejection, on the basis of her past conviction, of her application for a post as a research

assistant had been contrary to the relevant legal provisions and the reform of the criminal system as envisaged by the Criminal Code.

27. On 16 July 2012 the Ankara Administrative Court dismissed the case on the basis of section 48(A)(5) of Law no. 657 on Civil Servants, noting that the applicant's conviction of an offence against State security had prevented her from taking up employment in the civil service and that the university's decision of 4 October 2011 had therefore been lawful.

28. On 22 June 2018, following an appeal by the applicant, the Supreme Administrative Court upheld the decision of 16 July 2012. The applicant's rectification request was also rejected by the Supreme Administrative Court on 27 December 2018.

29. The applicant applied to the Constitutional Court against the decision of the Ankara Administrative Court, alleging, *inter alia*, a violation of her rights under Article 8 of the Convention on account of the failure to appoint her to the position of research assistant because of her conviction.

30. The applicant subsequently informed the Court that the Constitutional Court had declared her application inadmissible on 22 April 2019 as being manifestly ill-founded.

B. Restoration of the applicant's rights

31. On 25 April 2014 the applicant again applied to the Istanbul Assize Court for the restoration of her rights, submitting that the sentence term had expired.

32. On 9 May 2014 the Istanbul Assize Court granted the request and removed the restriction on her right to employment in the civil service.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT PROVISIONS ON THE EXECUTION OF SENTENCES

33. Article 402 of the previous Code of Criminal Procedure (Law no. 1412), in force at the time when the applicant's sentence was suspended on 5 November 2004, provided, in so far as relevant, as follows:

"A request may be lodged before a court in the event where there is doubt on the interpretation of a conviction judgment or the calculation of a sentence, or when it is alleged that the execution of the sentence in whole or in part may not be necessary.

...

Such a request does not stop the execution of a sentence unless the court decides to postpone or suspend the execution of a sentence or a judgment."

34. Under Article 7 § 2 of the Criminal Code (Article 2 § 2 of 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. According to Article 7 § 3, however, provisions on the execution of sentences, save for those concerning postponement, conditional release and recidivism, are applied immediately, that is to say, without having regard to the principle of the applicability of more favourable provisions.

35. According to section 19 of Law no. 647 on the execution of sentences, in force until 1 June 2005, prisoners sentenced to a term of imprisonment could be conditionally released from prison for good behaviour after having served half of their sentence. On the other hand, prisoners who were sentenced to a term of imprisonment within the scope of the Law no. 3713 on the Prevention of Terrorism, would need to serve three-quarters of their sentence in order to be eligible for conditional release (section 17 of Law no. 3713).

36. Section 107 of Law no. 5275 on the execution of sentences and preventive measures, as in force at the time, provided as follows:

“Conditional Release

...

(2) ... an offender who has served two thirds of his determinate sentence of imprisonment may be conditionally released.

...

(4) When conviction is for founding or managing an illegal organisation for the purpose of committing crime or for committing a crime for such an organisation ... an offender who has served ... three quarters of his determinate sentence of imprisonment may be conditionally released...

(6) An offender who has been conditionally released shall be subject to a period of supervision for half of the period equal to which he or she must serve before being released. However, this period shall not exceed the date when the sentence is deemed to be fully executed.

...

(14) The sentence shall be deemed to be executed if the offender has complied with the conditions of release and is of good behaviour during the period of supervision.”

II. STATUTORY CONSEQUENCES OF CONVICTION AND DEPRIVATION OF CERTAIN RIGHTS

A. Criminal Code

37. The relevant provisions of Article 53 of the Criminal Code (Law no. 5237) provide as follows:

“(1) As the statutory consequence of imposition of a prison sentence for an offence committed intentionally, the [convicted] person shall be deprived of the following [rights]:

a) undertaking of permanent or temporary public duties, including membership of the Turkish National Assembly and all civil service and other duties which are offered through election or appointment by the State, city councils, town councils, village councils, or organisations controlled or supervised by them;

b) voting, standing for election and enjoying all other political rights;

c) exercising custodial rights as a parent; performing duties as a guardian or a trustee;

d) chairing or auditing foundations, associations, unions, companies, cooperatives and political parties;

e) carrying out a self-employed profession which is subject to regulation by public organisations or by chambers of commerce which have public status.

(2) The person cannot enjoy the [above-mentioned] rights until the prison term to which he or she has been sentenced as a consequence of the commission of the offence has been served.

(3) The provisions above which relate to the exercise of custodial rights as a parent and duties as a guardian or a trustee shall not be applicable to a convicted person whose prison sentence is suspended or who is conditionally released from prison. A decision may [also] be taken not to apply subsection 1 (e) above to a convict whose prison sentence is suspended.

...”

38. According to the Explanatory Report of the Criminal Code, the rationale behind section 53 of the Criminal Code is as follows:

“Society’s trust in the person is damaged on account of the offence committed by him or her. For that reason the convicted person is prevented from exercising certain rights which necessitate a relationship of trust ... This deprivation cannot be indefinite. Since the rationale behind punishment is to ensure that the criminal comes to regret committing the offence and that he or she is reintroduced into society, deprivations imposed for the commission of the offence shall continue until the end of the execution of the punishment. Thus, the person will be behaving in accordance with the needs of the execution of his punishment and, when he has done so, he will be declaring to society that he has once again become a trustworthy person ...”

B. Other statutes

39. A conviction for an offence carrying a prison sentence of one year or more automatically entails the restriction of the civil rights of the convicted person (Article 407 of the Civil Code), and a legal guardian is appointed to him or her for the duration of the imprisonment (Article 471 of the Civil Code). Conviction for certain types of offences entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. These restrictions concern the right to found or join political parties (Law no. 2820, section 11 § 2-5), the eligibility criteria for election to Parliament, to the post of Mayor, or to the City Council (Article 76 of the Turkish Constitution, section 11 of Law no. 2839 and section 9 of Law no. 2972), and eligibility for employment in the civil

service (section 48 (A) of Law no. 657 on Civil Servants) or other regulated professions (cf. section 5 of the Lawyers Act).

40. Section 48(A)(5) of Law no. 657 on Civil Servants reads, in so far as relevant, as follows:

“Persons who become civil servants must satisfy the following general and specific conditions:

A) General conditions:

...

4. Not to have been prohibited from [exercising] public functions or rights,

5. Even if the periods specified in Article 53 of the Criminal Code have lapsed ... not to be or to have been convicted of ... offences against State security ...”

C. Procedure for the restoration of rights

41. The provision setting out the procedure for the restoration of rights can be found in section 13/A of Law no. 5352:

“Without prejudice to Article 53 §§ 5 and 6 of the Criminal Code, and in cases where a person’s rights and privileges have been restricted as a statutory consequence of the imposition of a sentence other than those provided for in the Criminal Code, those forfeited rights may be reinstated provided that:

a) the [convicted] person has not committed a further offence during the period of three years following the completion of his sentence;

b) the court forms a favourable opinion regarding the [convicted] person’s conduct.

...

(4) The court may examine the request without holding a hearing or by hearing the public prosecutor and the applicant ...”

D. Law on Criminal Records

42. Law no. 5352 on Criminal Records provides for a regular criminal record and an archived criminal record. The information on the person’s criminal record is transferred to an archived version when the sentence is fully executed, when the time-limits for the penalty have expired, or in the case of a general amnesty.

43. In the application of Article 76 of the Constitution or in other offences where conviction entails restrictions of certain rights on the basis of laws other than the Criminal Code, the conviction of a person is expunged from the criminal record entirely fifteen years after the court decision to restore the person’s rights, and in the absence of such a decision thirty years after the date when the person’s criminal record is archived. In other types of convictions, they are expunged entirely from the criminal record five years after the date when the person’s criminal record is archived.

THE LAW

ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 8 OF THE CONVENTION

44. The applicant complained under Article 6 § 1 of the Convention that she had been made to bear consequences of the mistake committed by the relevant authorities in miscalculating her release date, and that the courts examining her request for the restoration of her rights and for the rectification of the second writ of execution had given an excessively formalistic decision in dismissing her case. Under Articles 5 and 7 of the Convention she further complained that the second writ of execution had amounted to a penalty since she was effectively returned to the conditional release regime, and that the date when her sentence would be deemed to have been fully executed had been unlawfully postponed. In that connection she argued that the dismissal of her request to correct the dates on the second writ of execution had had serious repercussions on her private and professional life.

45. Being the master of the characterisation to be given in law to the facts of the case, the Court is not bound by the characterisation given by the applicant or a government (see *Radomilja and others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018). In the present case, the Court considers that the applicant did not complain about her second incarceration as such, but rather about the way in which the second writ of execution was drawn up by the authorities with complete disregard for the period between 5 November 2004 and 13 December 2011 which she had spent at liberty; in her view, that time should have counted as a conditional release period. She argued that she had suffered in her private and professional life because of the courts' decision not to restore her rights on account of their formalistic reliance on the second writ of execution. The Court therefore considers that the applicant's complaints raised under Articles 5, 6 and 7 should be examined from the standpoint of Articles 6 § 1 and 8 of the Convention.

The relevant parts of these provisions provide as follows:

Article 6 § 1

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

Article 8

“1. Everyone has the right to respect for his private ... 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 national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

1. *Compatibility ratione materiae under Article 6 § 1*

(a) The parties’ submissions

46. Relying on the Court’s findings in the cases of *Aldrian v. Austria*, (no. 16266/90, Commission decision of 7 May 1990, Decisions and Reports (DR) 65, p. 337) and *Montcornet de Caumont v. France* ((dec.), no. 59290/00, ECHR 2003-VII) to the effect that Article 6 was not applicable to proceedings concerning the execution of sentences following a final conviction, the Government argued that Article 6 of the Convention was not applicable to the proceedings before the Ankara Assize Court concerning the applicant’s request for the restoration of her rights in as much as that request concerned a procedure concerning the execution of a prison sentence. The Government contended that those proceedings had concerned not a dispute over “civil rights and obligations”, or the “determination of a criminal charge” under Article 6 § 1 of the Convention, but an issue relating to the execution of a sentence.

47. The applicant contested that argument.

(b) The Court’s assessment

48. The Court reiterates that the examination of requests for temporary release or of issues relating to the manner of execution of a custodial sentence do not fall within the scope of Article 6 § 1 of the Convention. They concern neither the determination of “a criminal charge” nor the determination of “civil rights and obligations” within the meaning of this provision (see, *inter alia*, *Aldrian* and *Montcornet de Caumont*, both cited above, and *Dybeku v. Albania*, no. 41153/06, § 55, 18 December 2007). The Court would further observe that the Convention does not guarantee, as such, a right to conditional release or to serve a prison sentence in accordance with a particular sentencing regime (see *Dybeku*, cited above, § 55 and *Aydın v. Turkey* (dec.), no. 41954/98, 14 September 2000).

49. That being so, the Court notes that the scope of the “civil” concept in Article 6 is not limited by the immediate subject matter of the dispute. Instead, the Court has developed a wider approach, according to which the “civil” limb has covered cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual. Through this approach, the civil limb of Article 6 has been applied to a variety of disputes which may have been classified in domestic law as

public-law disputes (see, among others, *Denisov v. Ukraine* [GC], no. 76639/11, § 51, 25 September 2018).

With regard to criminal records and in particular a dispute about the non-inclusion of a conviction in a criminal record, which is comparable to the subject-matter of the present dispute, the Court has found Article 6 to be applicable under its civil limb (see *Alexandre v. Portugal*, no. 33197/09, §§ 54-55, 20 November 2012).

50. In the instant case, the Court notes that the proceedings brought by the applicant before the Ankara Assize Court did not concern a request for conditional release, the manner of execution of her custodial sentence or an amnesty. In fact, the issue raised in those proceedings was whether the conditions for the restoration of certain rights of which the applicant had been deprived as a result of her conviction, such as entering or being employed in the civil service, had been met. The Court recalls that after her criminal sentence was revised following the entry into force of the new Criminal Code, the lifelong prohibition on the applicant's right to enter into civil service, which had been part of her previous sentence, had been converted into a restriction that was to last only for the duration of her revised sentence, that is to say for six years and three months (see paragraphs 6 and 12 above). This is because the idea of collateral consequences of a conviction continuing after a sentence has been served was not accepted by the new Criminal Code. In order to align this new legal policy with the other legal provisions outside the Criminal Code, former convicts had the right to request restoration of their restricted rights under section 13/A of Law no. 5352. There can be little doubt therefore that the outcome of the impugned proceedings on the restoration of rights had a direct impact on the applicant's enjoyment of a broad spectrum of rights or privileges, including her eligibility for recruitment to the civil service and her ability to exercise a regulated self-employed profession. Furthermore, those proceedings were also decisive for the date when a person's archived criminal record would be deleted, for in the case of a formal decision restoring a former convicted person's civil and political rights, the criminal record would be expunged after fifteen years from that decision as opposed to thirty years from the date when her sentence is completely served. Thus, in the present case, the proceedings at issue concerned a dispute over the applicant's civil rights (see, *mutatis mutandis*, *Alexandre*, cited above, §§ 54 and 55).

51. In the light of the foregoing considerations, the Court finds that Article 6 § 1 is applicable to the impugned proceedings under its civil head. Consequently, the Government's objection that the applicant's complaint is incompatible *ratione materiae* must be dismissed.

52. Having regard to its conclusion in the preceding paragraph, the Court does not find it necessary to determine whether the criminal limb of Article 6 § 1 of the Convention was applicable in the present case to the

proceedings before the Ankara Assize Court (see *Užukauskas v. Lithuania*, no. 16965/04, § 40, 6 July 2010).

2. *Compatibility ratione materiae under Article 8 of the Convention*

53. The Court notes that neither party contested the applicability *ratione materiae* of Article 8 of the Convention to the facts of the case. At the same time, it reiterates that the scope of the Court's jurisdiction is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case. Consequently, the mere absence of a plea of incompatibility cannot extend that jurisdiction. To hold the contrary would mean that where a respondent State waived its right to plead or omitted to plead incompatibility, the Court would have to rule on the merits of a complaint against that State concerning a right not guaranteed by the Convention. Accordingly, the Court has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the question of its jurisdiction at every stage of the proceedings even where no objection has been raised in this respect (see *J.B. and Others v. Hungary* (dec.), no. 45434/12 and two others, § 123, 27 November 2018 with further references).

54. To begin with, the Court reiterates that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII, and *Gillberg v. Sweden* [GC], no. 41723/06, § 67, 3 April 2012). This rule is not limited to reputational damage but has been expanded to a wider principle according to which personal, social, psychological and economic suffering which could be the foreseeable consequences of the commission of a criminal offence could not be relied on in order to complain that a criminal conviction in itself amounted to an interference with the right to respect for private life (see *Gillberg*, cited above, § 68, and *Evers v. Germany*, no. 17895/14, § 55, 28 May 2020). The Court therefore has to determine in the first place whether the principles established in *Gillberg* exclude altogether the applicant's grievances from the scope of Article 8 of the Convention (the *Gillberg* exclusionary principle, as referred to in *Denisov*, cited above, § 121). The Court recalls in that connection that when the negative effects complained of are limited to the consequences of the unlawful conduct which were foreseeable by the applicant, Article 8 cannot be relied upon to allege that such negative effects encroach upon private life (*ibid*, § 121). Be that as it may, in the present case, the applicant contended that the domestic courts' decisions in the restoration of rights proceedings had not been foreseeable because, in her view, by not rectifying the second writ of execution, they had unlawfully returned her to the conditional release regime and thus prevented her from benefiting from the restoration of her

rights. The Court therefore considers that the circumstances of the present case are distinguishable from *Gillberg* and the Court cannot follow this approach.

55. In addition, the Court observes that, subsequently to the review of the applicant's conviction in the light of the new Criminal Code, her loss of reputation temporarily prevented her from taking up employment in the civil service and restricted her enjoyment of certain other civil and political rights as specified in Article 53 of the Criminal Code (see, *mutatis mutandis*, *Linkevičienė and Others v. Lithuania* (dec.), nos. 33556/07 and 2 others, § 109, 20 June 2017). The applicant submitted that the collateral restrictions following her conviction had amounted to a civil death. The applicant framed her complaint from the angle of her eligibility for employment in the civil service, presenting the example of the rejection of her appointment to the post of research assistant. The Court must therefore maintain its examination on the applicability of Article 8 in the context of employment-related disputes.

56. In that connection, whereas no general right to employment, or a right of access to the civil service (see *Vogt v. Germany*, 26 September 1995, § 43, Series A no. 323; *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 57, ECHR 2007-II; and *Emel Boyraz v. Turkey*, no. 61960/08, § 41, 2 December 2014), or a right to choose a particular profession (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 41, ECHR 2000-IV, and *Naidin v. Romania*, no. 38162/07, § 31, 21 October 2014) can be derived from Article 8, the notion of "private life", as a broad term, does not exclude in principle activities of a professional or business nature. In *Sidabras and Džiautas* (cited above, §§ 46-47), the Court concluded that notwithstanding its approach in *Vogt* and *Thlimmenos*, the far-reaching ban on former KGB agents taking up private-sector employment, at issue in the case, did affect "private life" such as to engage Article 8. It noted in this context that the ban had created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives, and that the publicity caused by the ban and its application to them had caused them to suffer constant embarrassment and had impeded their establishment of contacts with the outside world (§§ 48-49). Similarly, in *Albanese v. Italy* (no. 77924/01, § 54, 23 March 2006), the Court concluded that a number of limitations imposed on the activities of the applicant as a result of his bankruptcy had influenced his ability to develop relationships with the outside world and that Article 8 was accordingly engaged. Likewise, the Court adopted a similar approach in *Campagnano v. Italy* (no. 77955/01, 23 March 2006), where the entry of that applicant's name in the bankruptcy register entailed a series of legal restrictions on the exercise of her professional activities and civil rights. It therefore affected the applicant's opportunities to develop relationships with the outside world and fell within the sphere of her private life (see also

D.M.T. and D.K.I. v. Bulgaria, no. 29476/06, § 103, 24 July 2012). In *Pişkin v. Turkey* (no. 33399/18, §§ 186-188, 15 December 2020), where the applicant was dismissed on the basis of a legislative decree providing for termination of contract on maintaining links with an illegal organisation, the Court found Article 8 to be applicable, attaching importance to the applicant's argument that his dismissal on those grounds had the effect of branding him as a "terrorist" and that no employers dared offer him a job.

By contrast, in the case of *Calmanovici v. Romania*, (no. 42250/02, §§ 137-139, 1 July 2008), the Court declared the applicant's complaint under Article 8 concerning his temporary suspension from his functions as a police officer to be incompatible *ratione materiae* with the provisions of the Convention. It observed, *inter alia*, that the applicant did not allege that he was prevented from finding employment in the private sector and thus distinguished its judgment in *Sidabras and Džiautas*, cited above (see *Misick v. the United Kingdom* (dec.), no. 10781/10, § 25, 16 October 2012). A similar conclusion on inadmissibility was reached in the case of *Briani v. Italy* ((dec.), no. 33756/09, 9 September 2014), where the Court considered that the impossibility of obtaining a promotion in the civil service did not trigger the applicability of Article 8 in much as the situation was significantly different from a general prohibition on employment (*ibid.*, § 24).

57. Furthermore, the Court refers to the case of *Denisov v. Ukraine* (cited above, §§ 103-114), where the Grand Chamber outlined, in the context of an employment dispute, two different approaches the Court employs when examining whether cases involving Article 8 complaints fall within the ambit of "private life". In particular, it distinguished between the reason-based approach, under which the Court examines whether there is a private-life issue in the underlying reasons for the impugned measure, and the consequence-based approach, under which the Court analyses the effects of the impugned measure on the individual's private life. If the latter approach is used, the severity threshold takes on crucial importance and it is for the applicant to show convincingly that the threshold was attained in his or her case. The Court will only accept that Article 8 is applicable *ratione materiae* where the consequences of a measure are very serious and affect the applicant's private life to a very significant degree (*ibid.*, § 116).

58. The Court has established criteria for assessing the severity or seriousness of alleged violations in different regulatory contexts. An applicant's suffering must be assessed by comparing his or her life before and after the measure in question. The Court further considers that in determining the seriousness of the consequences in employment-related cases, it is appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. This analysis would have to cover both the material and the non-material impact of the alleged measure. However, it remains for the

applicant to define and substantiate the nature and extent of his or her suffering, which should have a causal connection with the impugned measure (ibid., § 117).

59. Turning to the facts of the case, the Court recalls that the applicant complained of the refusal of the domestic courts to restore her rights owing to the fact that her conviction had not yet been spent, and of the negative consequences of that decision for her employment prospects in the civil service, and more specifically on her chances of obtaining a post as a research assistant in a public university. Having regard to the applicant's complaint, the Court notes that it must take the consequence-based approach in the present case.

60. The applicant contended that as a result of the domestic courts' decision to reject her request for the restoration of her rights, her candidature had been refused by the appointing authorities at the university. In her view, the impugned domestic court decision had significantly affected her professional aspirations and her reintegration into society. The Court notes that it has already considered the outcome of the domestic courts' impugned decision to have been decisive for the purpose of the applicability of Article 6 § 1 under its civil head (see paragraph 50 above), but this conclusion does not automatically bring the issue into the ambit of Article 8 of the Convention. The Court further reiterates that the Convention does not guarantee, as such, a right of recruitment to the civil service. Moreover, the applicant did not argue, nor is there any indication in the case file, that she was unable to find employment in the private sector or that she faced any difficulties or prejudice owing to the fact that her rights had not been restored (contrast, for example, with *Pişkin*, cited above, § 186). The Court further notes that the applicant was not prevented from practising a specific profession. In the absence of these elements, it cannot be said that the domestic courts' decision in refusing to restore her rights affected the applicant's opportunities for establishing and maintaining professional life to the extent that is deemed necessary under the consequence-based approach.

61. In conclusion, the Court considers that the requisite threshold of severity was not attained, in the particular circumstances of the applicant's case, to give rise to an issue under Article 8 of the Convention.

62. The Court therefore finds that the applicant's complaint must be dismissed as incompatible *ratione materiae* with the Convention pursuant to Article 35 §§ 3 (a) and 4.

3. *Exhaustion of domestic remedies*

(a) **The parties' submissions**

63. Referring to the proceedings before the administrative courts and the applicant's subsequent application to the Constitutional Court with

reference to the rejection of her appointment to the research assistant position, the Government argued that the applicant's complaint should be declared inadmissible for non-exhaustion of domestic remedies.

64. The applicant submitted that her complaint to the Court concerned the proceedings before the Ankara Assize Court, which dismissed her request for the restoration of her rights, disregarding the relevant authorities' miscalculation of conditional release date to her detriment. Those proceedings had become final with the Ankara Assize Court's decision of 9 April 2012, before the right of individual application to the Constitutional Court had become available. She further explained that the rejection of her application for the post of research assistant and the proceedings before the administrative courts and the Constitutional Court were not the subject matter of her present application.

(b) The Court's assessment

65. The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts)). However, applicants are only required to exhaust domestic remedies which are available in theory and in practice at the relevant time and which are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (ibid., and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

66. The Court notes that the applicant in the present case complained about the allegedly excessive formalism of the assessment of her request for the restoration of her rights by the Assize Court in its decision of 19 March 2012. The only available remedy against the decision at the time was an appeal to a different chamber of the Assize Court, of which remedy the applicant availed herself. Therefore, this part of the application cannot be declared inadmissible for non-exhaustion of domestic remedies and accordingly the Government's objection must be dismissed. Her subsequent application to the administrative courts and then to the Constitutional Court strictly concerned the university's decision of 4 October 2011 not to appoint her as a research assistant and therefore pursued a different purpose from that of the present application. In any event the administrative court proceedings could not have any reasonable prospects of success for as long as the dates on the second writ of execution had not been rectified. It follows that the Government's objection as to the exhaustion of domestic remedies in respect of Article 6 of the Convention must be rejected.

4. *Victim status*

67. Relying on the date of lawful release, that is to say 11 July 2013, as indicated in the second writ of execution, as well as the decision of the Istanbul Assize Court of 9 May 2014 restoring the applicant's rights, the Government argued that the applicant could no longer claim to be a victim of the alleged violations of the Convention.

68. The applicant did not comment on this point.

69. The Court reiterates that a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for the main principles, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178-213, ECHR 2006-V, and *Cocchiarella v. Italy* [GC], no. 64886/01, §§ 69-98, ECHR 2006-V).

70. The Court observes that the applicant lodged her application after the domestic courts had dismissed her request for the restoration of her civil rights on the basis of the dates indicated in the second writ of execution. It is true that subsequently, on 9 May 2014, the Istanbul Assize Court restored the applicant's rights, but that decision did not expressly or implicitly acknowledge that the previous assessments made by the domestic courts in respect of the calculation of eligibility for the restoration of her rights had been excessively formalistic. As there is, moreover, no indication of the latest decision having been granted as a means of offering redress, the applicant may claim to have been the victim of the violation of the Convention alleged by her (see, *mutatis mutandis*, *Murray v. the Netherlands* [GC], no. 10511/10, § 84, 26 April 2016). Accordingly, the applicant can still claim to be a "victim" of a violation of Article 6 § 1 of the Convention within the meaning of Article 34. The Government's objection in this respect must therefore be dismissed.

5. *Conclusion as to admissibility*

71. The Court finds that the applicant's complaint under Article 6 § 1 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

72. The applicant maintained that her second incarceration was the result of a mistake on the part of the authorities. The authorities had exacerbated her situation by drawing up the second writ of execution which indicated her conditional release date as 18 December 2011 – in disregard of her first

release on 5 November 2004 and of her seven consecutive years of good behaviour – thereby unjustifiably deferring the date when her sentence would be deemed to have been fully served further to one year and six months and 25 days. The dates indicated in the second writ of execution had had a direct consequence for the limitation of her civil rights. In the domestic proceedings concerning her request for the restoration of her rights, the Ankara Assize Court had failed to assess the realities of her situation and taken a formalistic view of the date on which her sentence would have been deemed to have been executed. She therefore considered that she had been denied access to a court, given the domestic courts' unduly formalistic approach to the restoration of her civil rights.

73. The Government disagreed with the applicant's interpretation of the case. They explained that writs of execution could only be drawn up in respect of prison sentences consequent upon a final conviction. Thus, the Government claimed that there had been no mistakes in respect of the first and the second writs of execution in the applicant's case. Accordingly, the first writ of execution had been drawn up as a result of her conviction becoming final on appeal on 8 July 2002 and which had indicated her conditional release date as 3 September 2007 and final release day as 2 September 2012 (see paragraph 7 above). In contrast to the applicant's account, the Government argued that she had not been conditionally released on 5 November 2004 but that she had been released because the Assize Court had decided to suspend the execution of her prison sentence pursuant to Article 402 of the Code on Criminal Procedure in anticipation of the possible reduction of her sentence on the basis of the more lenient sentences in the new Criminal Code. After the new Criminal Code had entered into force and as a result of the adaptation proceedings before the Assize Court, her sentence had been recalculated. Thus, on the basis of the judgment in the adaptation proceedings and the reduced sentence of six years and three months, the public prosecutor recalculated the minimum time the applicant had to serve to be eligible for conditional release, which amounted to 1710 days. However, when the applicant had been released pursuant to the decision to suspend the execution of her sentence, she had only served 1705 days. Thus, the Government argued that the difference of five days was not a mistake, but only a consequence of the fact that her exact sentence had been determined in the adaptation proceedings and not when her execution of her sentence was suspended. The Government argued in that respect that the decision to suspend the execution of her sentence had halted the running of time concerning the period of conditional release and the date of final release. Moreover, the Government submitted that the decision to suspend the execution of the applicant's sentence had been granted at her request with a view to respecting her right to liberty should the imprisonment sentence calculated during the adaption proceedings in the

application of the more favourable penalty call for a shorter term for her eligibility for conditional release.

2. *The Court's assessment*

74. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see, among many authorities, *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18, and *Baka v. Hungary* [GC], no. 20261/12, § 120, 23 June 2016). The right to a fair hearing places the “tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence presented by the parties, without prejudice to its assessment of whether they are relevant (see, for instance, *Perez v. France* [GC], no. 47287/99, § 80, ECHR 2004-I).

75. The Court further reiterates that it is not its function to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, for example, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, and *Perez v. France*, cited above, § 82), for instance where they can be said to amount to “unfairness” in breach of Article 6 of the Convention. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts’ assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see, for example, *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013; and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, §§ 64-65, ECHR 2015). An error of law or fact by the national court which is so evident as to be characterised as a “manifest error” – that is to say, an error that no reasonable court could ever have made – may be such as to disturb the fairness of the proceedings (*ibid.*, § 62).

76. Thus, in *Dulaurans* the Court found a violation of the right to a fair trial because the sole reason why the French Court of Cassation had arrived at its contested decision rejecting the applicant’s cassation appeal as inadmissible was the result of “une erreur manifeste d’appréciation” (“a manifest error of assessment”) (see *Dulaurans*, cited above, § 38). In *Khamidov*, the unreasonableness of the domestic courts’ conclusion as to the facts was “so striking and palpable on the face of it” that the Court considered that the proceedings complained of had to be regarded as “grossly arbitrary” (see *Khamidov*, cited above, § 174). In *Anđelković*, the Court found that the arbitrariness of the domestic court’s decision, which principally had had no legal basis in domestic law and had not contained

any connection between the established facts, the applicable law and the outcome of the proceedings, amounted to a “denial of justice” (see *Anđelković*, cited above, § 27). In *Carmel Saliba v. Malta* (no. 24221/13, §§ 69-79, 29 November 2016), the Court found fault with the domestic courts for having relied on the inconsistent testimony of one witness and having failed to adequately comment on the remaining evidence; combined with other less significant shortcomings of the civil proceedings, this meant that those proceedings had not been fair. In *Tel v. Turkey* (no. 36785/03, § 75, 17 October 2017), the Court held that the administrative court’s dismissal of the request to rectify a decision which had been based solely on a document that that court had set aside with retroactive effect in a related set of proceedings had been a manifest error of assessment.

77. It transpires from the above-mentioned case-law that a domestic judicial decision cannot be qualified as arbitrary to the point of prejudicing the fairness of proceedings unless no reasons are provided for it or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a “denial of justice” (see *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, § 85, 11 July 2017).

78. The Court notes at the outset that the applicant’s complaint under Article 6 of the Convention is essentially directed at the outcome of the domestic proceedings, and more specifically at the domestic courts’ assessment of the facts and domestic law. In that connection the Court notes that she has not alleged any procedural unfairness that could otherwise raise an issue under Article 6 of the Convention. Be that as it may, the Court reiterates that its jurisdiction in determining whether the proceedings were fair in their substantive aspect is very limited, for it cannot act as a court of fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable. Thus, the only issue which it can examine in the present case is whether, in rejecting the applicant’s request for the restoration of her rights, the domestic courts committed a manifest error of assessment that can be discerned from their reasoning.

79. In that connection, the Court notes that the applicant has maintained both before the domestic courts and the Court that the domestic authorities made a mistake in calculating her eligibility for conditional release when they first released her from prison on 5 November 2004, which in turn gave rise to her conditional release date and final release date being unlawfully deferred as a result of the adaptation proceedings. The applicant has also maintained that after the completion of the adaptation proceedings and in keeping with the spirit of the *lex mitior* principle, her final release date should have been drafted retrospectively, that is to say by adding the amount of her sentence to the date when she was first incarcerated.

80. The Court notes that it transpires from the domestic courts’ assessment that they answered the applicant’s request for the restoration of

her rights in the negative, considering that her sentence had not yet been fully completed on account of the termination of the adaptation proceedings on 11 October 2011 and the period of supervision counting from 18 December 2011. In assessing whether the domestic courts' decisions can be regarded as arbitrary or manifestly unreasonable, the Court will make its assessment in the light of the applicant's submissions before the domestic courts concerning the facts as well as her legal arguments.

81. As regards the applicant's submissions before the domestic courts concerning the facts of her case, the Court notes that she has failed to arguably demonstrate that her second incarceration was imputable to the domestic authorities on account of an error they made in calculating whether she served the required period to be eligible for conditional release in 5 November 2004. In fact, it can be understood from the reasoning of the Istanbul Assize Court and from the legal provision on which it relied (see paragraphs 10 and 33 above) that the applicant was released on account of the suspension of the execution of her sentence, which in effect meant that the periods in relation to her sentence, including conditional release and the running of the time up to the final release period, were temporarily halted. The Court further notes that the applicant's sentence was suspended at her own request, so that she could benefit from a possible reduction in her sentence under the more favourable provisions of the new Criminal Code. In view of the foregoing considerations, the Court does not consider that the domestic courts were under an obligation to verify the allegations advanced by the applicant, since they were unsubstantiated.

82. As regards the applicant's remaining claim before the domestic courts, the Court notes that she did not rely on any legal provision, domestic precedent or doctrine in support of her arguments to the effect that the dates on her second writ of execution should be revised with retroactive effect in keeping with the realities of her situation. In the light of the domestic legal provisions, and also of the fact that the applicant's sentence was technically suspended with a view to averting an unjustified incarceration should her sentence at the end of the adaptation proceedings provide for a shorter term for eligibility for conditional release, the Court cannot discern any legal basis upon which the applicant's assertions could be regarded as tenable. Where submissions of this nature, which are unfounded in law and consist only of a litigant's subjective views on what is fair and reasonable, it cannot be said that they require the courts to take a specific position (cf. the cases cited in paragraph 76 above). The Court therefore does not consider that the assessment of the domestic courts amounted to "a manifest error of assessment", or a "gross misinterpretation" of the relevant circumstances, or a failure to connect the established facts, the applicable law and the outcome of the proceedings. Lastly, the Court would add, for the sake of clarity, while it is true that the applicant spent a period of seven years which was not taken into account in the calculation of the completion of her sentence

and that the date when her sentence was deemed to be completed was deferred to 11 July 2013 rather than 2 September 2012 - the final release date under her old sentence - she still benefited from early release, earlier than had been foreseen for her conditional release date under her old sentence (see paragraph 7 above). More importantly, on account of the application of the new Criminal Code, the permanent restriction on her right to hold a position in civil service was converted into a restriction that was applicable only during the period of execution of her sentence.

83. Accordingly, the applicant did have a “fair hearing” of her case, as required by Article 6 § 1 of the Convention.

84. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of that provision.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning access to a court under Article 6 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 6 of the Convention;

Done in English, and notified in writing on 22 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President