



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

SECOND SECTION

CASE OF YÜKSEK v. TÜRKİYE

(Application no. 4/18)

JUDGMENT

Art 10 • Freedom of expression • Pre-trial detention of the co-chair of a pro-Kurdish political party charged with membership of an illegal organisation on account of his political speeches • Absence of any concrete evidence of a link between the applicant and such an organisation • Interpretation and application of terrorism-related offences so broad as to not afford adequate protection against arbitrary interferences
Art 5 § 1 • Art 5 § 3 • Lack of reasonable suspicion of applicant having committed an offence and lack of reasonableness of pre-trial detention

Prepared by the Registry. Does not bind the Court.

STRASBOURG

22 October 2024

FINAL

17/03/2025

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

In the case of Yüksek v. Türkiye,

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

Arnfinn Bårdsen, *President*,

Jovan Ilievski,

Saadet Yüksel,

Lorraine Schembri Orland,

Frédéric Krenç,

Diana Sârcu,

Gediminas Sagatys, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 4/18) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Kamuran Yüksek (“the applicant”), on 27 November 2017;

the decision to give notice to the Turkish Government (“the Government”) of the complaints concerning Article 5 §§ 1 and 3 and Article 10 of the Convention and to declare the remainder of the application inadmissible;

Having deliberated in private on 24 September 2024,

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

INTRODUCTION

1. The application concerns the pre-trial detention of the applicant, co-chair of the Democratic Regions Party, who was charged with membership of an illegal organisation on account of his speeches. The case raises issues under Article 5 §§ 1 and 3, and Article 10 of the Convention.

THE FACTS

2. The applicant was born in 1980. He was detained in Diyarbakır at the time when his application was lodged. Before the Court the applicant was represented by Mr M. Özdemir, Mr M. Bektaş and Mr M. N. Özmen, lawyers practising in Diyarbakır.

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

4. At the material time the applicant was the co-chair of the Democratic Regions Party (*Demokratik Bölgeler Partisi* – “the DBP”), a left-wing pro-Kurdish political party.

5 On 12 November 2015 the Diyarbakır public prosecutor initiated a criminal investigation in respect of the applicant on the charge of membership of an illegal organisation, the PKK/KCK (the Kurdistan Workers’

Party/Kurdistan Communities Union). The applicant's speeches during and after the "events of 6-8 October 2014" and the "trench events" (see paragraphs 6-20 below) were used as the basis for opening the investigation (see the case of *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, §§ 17-54, 22 December 2020) for a detailed description of the facts surrounding the events of 6-8 October 2014 and the trench events).

I. THE APPLICANT'S SPEECHES

6. Between 27 January 2015 and 18 April 2016 the applicant, in his capacity as the co-chair of an opposition political party, made a number of speeches and statements at party meetings, public demonstrations and press conferences.

7. On 27 January 2015 the applicant gave a speech at a public meeting organised by the provincial organisation (*İl teşkilatı*) of the DBP in Diyarbakır. The relevant parts of his speech read as follows:

"Kobani is free, is there anything greater than this? May it be a gift to the Kurdish people, the people of the Middle East, President Apo and all the martyrs. Every day, every year ... Kurdistan will become more and more free. ... Our struggle will continue until Kurdistan and President Apo become free." (*"Kobani özgür bundan daha öte bir şey var mı? Kürt halkına, Ortadoğu halkına, Başkan Apo'ya ve tüm şehitlere armağan olsun, kutlu olsun. Her gün, her sene, ... Kürdistan özgürlüğüne kavuşacak. ... Bu mücadelemiz Kürdistan ve Başkan Apo özgürleşene kadar devam edecek."*)

8. On 6 September 2015 the applicant gave a speech to a group of people who had gathered in front of the DBP building in Diyarbakır to protest against the imposition of a curfew in the Sur district. The relevant parts of his speech read as follows:

"We want to say this once again here in Amed [Diyarbakır]. We have no problem with the peoples of Anatolia, our Turkish brothers, our Laz brothers, our Circassian brothers. We have a problem with this state of the AKP [the Justice and Development Party] ... These murderous state and government policies pit our peoples against each other. What do we want so much that they are turning towards our cities [and] burning and destroying houses in our cities with tanks and artillery? We want democracy, we want freedom, we no longer want to be governed from Ankara. That's the whole point. Our people in Sur, Silvan, Lice, Cizre, Silopi, everywhere are saying that we want to develop local democracy, we no longer want to be governed by a district governor, a governor appointed by a person from Ankara. ... the results caused by the district governors and governors appointed by Ankara are ... massacres, persecution, oppression and torture. ... We want this regime to change, to democratise and for these cities to be governed by people elected by the people. ... We want democracy ... Every day our cities are bombarded by tanks and artillery because we want democracy. This is the situation that Suriçi is facing. ... As a delegation, we will now go to Sur on your behalf and try to witness what is happening there and to play a role in preventing further deaths." (*"Biz buradan Amed'ten bir kez daha şunu söylemek istiyoruz. Bizim Anadolu halklarıyla, Türk kardeşlerimizle, Laz kardeşlerimizle, Çerkez kardeşlerimizle hiçbir sorunumuz yok. Bizim bu AKP'li devletle sorunumuz var ... Bu katil devlet ve hükümet politikaları biz halkları karşı karşıya getirip kırdırıyor. Ne istiyoruz da bu kadar kentlerimize yöneliyorlar, tanklarla ve toplarla kentlerimizde evleri yakıp yıkıyorlar."*)

Demokrasi istiyoruz, özgürlük istiyoruz, artık Ankara'dan yönetilmek istemiyoruz. Bütün mesele budur. Halkımız Sur'da, Silvan'da, Lice'de, Cizre'de, Silopi'de, her yerde şunu söylüyor: biz yerel demokrasiyi geliştirmek istiyoruz, artık Ankara'dan bir kişinin atamış olduğu bir kaymakam, bir vali tarafından yönetilmek istemiyoruz. ... Ankara'nın atamış olduğu kaymakam ve valilerin yol açtığı sonuçlar ... katliamdır, zulümdür, baskıdır, işkencedir. ... Bu rejim değişsin demokratikleşsin bu halkın seçmiş olduğu insanlar tarafından bu kentler yönetilsin istiyoruz. ... Demokrasi istiyoruz ... İşte Suriçi'nin yaşamış olduğu durum budur. ... Biz şimdi bir heyet olarak sizlerin adınıza Sur'a gideceğiz ve orada olan bitenlere tanıklık etmeye, yeni ölümler olmasın diye rol oynamaya çalışacağız.”)

9. On 10 November 2015 the applicant gave a statement to the press at the party headquarters, which was published on social media and some websites. He stated:

“People in the cities are proposing a new system based on local democracy – what we call self-governance. We do not want to be governed from Ankara with a unitary, centralist system. We want to govern ourselves. The AKP [Justice and Development Party] responds with war, tanks and cannons. In this country, discussing the presidential system is allowed, but it is forbidden to discuss democratic autonomy. So, shouldn't we be able to discuss what kind of regime we should have in this country? Can only the AKP discuss it? All the press and media are open to the AKP. They say: ‘The presidential system should be discussed in this country’. By all means, let it be discussed. But democratic autonomy? No, you cannot discuss that. Is that possible? That is called fascism. A system can be discussed, but no other alternative can be discussed. That cannot happen. That is why we are facing a civil coup in this country. We have the right to talk about the future of this country. Our project is democratic autonomy. The AKP government, which silences all opposition groups, is trying to prevent any project other than its own from being discussed. But we will discuss [other ideas] and [we will] struggle. This country is ours, and we are proposing a new future for all peoples.

I would like to make it clear that we do not approve of certain attitudes of some HDP (Peoples' Democratic Party) deputies and some intellectual writers, who consider themselves democrats, regarding the election results, the actual situation and the people's struggle. It is a big mistake to consider the people's struggle for democratic autonomy and self-governance as a factor [negatively] affecting the election process without seeing the AKP's policy of war and repression, without considering its [policy] anti-democratic. That is manipulation and a method of psychological warfare of the AKP and we see that many parts of society also fall for this method of psychological warfare. The right thing to do is to be on the side of the people. The people want local democracy, they are establishing local democracy in opposition to the dictatorship. [For which they are blamed]. We cannot accept that. After having [blamed the people], no one can call himself a democrat. A discourse that legitimises the current massacres by the State instead of standing on the side of the people is unacceptable.

We will explain the [idea of] democratic autonomy to all levels of society in the provinces, districts, and villages. [We will explain] what it is, what it is not, we want to eliminate the perversion [of this term]. We call for resistance against this policy of massacre that the state is currently carrying out in the cities of the region. Our people must resist, struggle, and not surrender. The AKP will not be able to make the Kurds obey. Everybody [else] may have turned around and done U-turns. But we will not bow down. We will continue to struggle. We will act in a principled way. Our concern is to solve the problems of our people. We do not believe that the problems of our people

will be solved by the current impositions. At the moment, we are facing an AKP government that denies the [existence of the] Kurdish problem [but] we will continue striving to solve that problem. If the AKP government changes its policy on the Kurdish question, the peace process and Rojava, we are ready for all kinds of talks, discussions and the construction of a new future in the interests of our people. The Kurds must struggle, inspired by the spirit of mobilisation, in all cities, especially in Silvan, [and] in all cities which are under attack with tanks and artillery.”

“*Kentlerde insanlar, yerel demokrasiye dayalı- biz buna öz yönetim diyoruz- yeni bir sistem önermesi içerisinde. Tekçi, merkeziyetçi bir sistemle Ankara’da yönetilmek istemiyoruz. Kendi kendimizi yönetmek istiyoruz. AK Parti ise buna savaş, tank, topla yanıt veriyor. Bu ülkede başkanlık sistemini tartışmak serbest, demokratik özerkliği tartışmak yasak. Peki, bu ülkede biz, nasıl bir rejim olması gerektiğini tartışamayacak mıyız? Sadece AKP mi tartışabilir? Bütün basın, medya AKP’ye açılmış durumda. ‘Başkanlık sistemi bu ülkede tartışılmalı’ deniliyor. Eyvallah tartışılın. Peki, demokratik özerklik? ‘Hayır, tartışamazsınız.’ Böyle bir şey olur mu? Bunun adı faşizmdir. Bir sistem tartışılabilir, onun dışında hiçbir alternatif tartışamayacak. Böyle bir şey olamaz. Onun için bu ülkede bir sivil darbeyle karşı karşıyayız. Biz, bu ülkenin geleceğiyle ilgili söz söyleme hakkına sahibiz. Bizim projemiz, demokratik özerkliktir. Bütün muhalif kesimleri susturan AK Parti hükümeti, kendi dışında hiçbir projeyi tartışmamaya çalışıyor. Ama biz tartışacağız, mücadele edeceğiz. Bu ülke bizim, bütün halklar için yeni bir gelecek öneriyoruz. Açık belirteyim, kimi HDP milletvekilleri dahil olmak üzere demokrat olarak geçinen aydın yazarlar çevreler dahil olmak üzere, şu ana kadar seçim sonuçları ve yaşanan süreçle, halkın geliştirdiği mücadeleyle alakalı olarak, ortaya koydukları kimi tutumları doğru bulmuyor, kabul etmiyoruz. AKP’nin uyguladığı savaş politikalarını görmeden, uyguladığı baskı politikalarını görmeyip, bunu anti-demokratik değerlendirmeyip, halkın demokratik özerklik, öz yönetim çerçevesinde mücadele etmesini, seçim sürecini etkileyen faktör olarak, değerlendirilmesi büyük yanılgıdır. Bu bir manipülasyondur, AKP’nin psikolojik savaş yöntemidir ve birçok kesimin de bu psikolojik savaş yöntemine geldiğini görmekteyiz. Doğru olan halkın yanında olmaktır. Halk yerel demokrasi istiyor, diktatörlüğü karşı, yerel demokrasi geliştiriyor. Birileri de çıkıp, halkı suçlayacak. Böyle bir şeyi kabul edemeyiz. Bunu söyledikten sonra kimse kendine demokrat diyemez. Halkın yanında olmak yerine, devletin şu anki katliamlarını meşrulaştırmak üzere söylem kabul edilemez. İllerde, ilçe, köylerde, toplumun bütün kesimlerine demokratik özerkliği anlatacağız. Ne olduğunu ne olmadığını, bu çarpıtmaları ortadan kaldırmak istiyoruz. Devletin şu anda bölgedeki kentlerde uyguladığı bu katliam politikalarına karşı, direniş çağrısı yapıyoruz. Halkımız direnmeli, mücadele etmeli, teslim olmamalı. AKP Kürtler’i biat ettiremeyecektir. Herkes dönmüş, ‘U’ dönüşü yapmış olabilir. Ama biz baş eğmeyeceğiz. Mücadele etmeye devam edeceğiz. Biz ilkel hareket edeceğiz. Derdimiz halkımızın sorunlarının çözümüdür. Biz, şu anki dayatmalarla halkımızın sorunlarının çözüleceğine inanmıyoruz. Şu an, Kürt sorunun reddeden bir AK Parti hükümetiyle karşı karşıyayız, bununla mücadele etmeye devam edeceğiz. AK Parti hükümeti, eğer Kürt sorunu, çözüm süreci, Rojava politikalarını değiştirirse, halkımızın çıkarları doğrultusunda mevcut iktidar kimse, her türlü görüşme, tartışma ve yeni bir gelecek şekillendirmeye de hazırız. Bütün kentleri, başta Silvan için olmak üzere, tank, toplarla saldırılara maruz kalan bütün kentlerin Kürtler’in seferberlik ruhuyla mücadele etmesi gerekiyor.”*

10. On 13 December 2015 the applicant made a statement to the press at Dağkapı Square (*Dağkapı Meydanı*) in the Sur district. The relevant parts of that statement read as follow:

“Look, a part of our city, which we see behind us, is currently under occupation. We can see such things when a state invades ... another country. ... the Suriçi region has been surrounded by the military and police, and our people have been held hostage for days under the name of a curfew, [which has been enforced arbitrarily without being] based on any code, law, legislation or constitution, and there have been clashes there for days. Our people are hungry, thirsty, miserable ...” (*“Bakın arkamızda gördüğümüz kentimizin bir bölümü şu anda işgal altında. Bir devlet gidip bir başka ülkenin devletini işgal ettiğinde biz bu tür görüntüleri görebiliyoruz. ... Suriçi bölgesi asker ve polis tarafından ablukaya alınmış günlerdir sokağa çıkma [yasağı] adı altında, ne olduğu belirsiz olan, hiçbir kanun, hiçbir hukuka, hiçbir yasaya ve anayasaya dayanmayan keyfi bir uygulama ile halkımız orada adeta rehin tutulmakta ve günlerdir orada çatışmalar oluyor. Halkımız aç, susuz, perişan ...”*)

11. On 18 December 2015, a news portal published a statement by the applicant in which he gave his opinion about the right to self-determination. The applicant said the following:

“In 2003 [Türkiye] signed the convention recognising the right to self-determination, that is the right of peoples to determine their own destiny. Erdoğan was the then Prime Minister. He has committed to this. ... we remind you of that signature. We are not talking about a right of separation, but we remind you that it was signed by the Prime Minister and the President of the Republic. In 2013, it was Erdoğan who said that ‘even our ancestors, the Ottomans, called [that region] Kurdistan and why [shouldn’t we establish] a seven-region [federal] system in Türkiye.’” (*“[Türkiye] 2003 yılında self determinasyon hakkı yani halkların kendi kaderlerini tayin hakkını kabul eden sözleşmeyi imzalamıştır. Başbakan Erdoğan’dı o zaman. Bunu taahhüt etmiştir. (...) bu attığınız imzayı hatırlatıyoruz. Bir ayrılma hakkından söz etmiyoruz ama bunun Başbakan’ın, Cumhurbaşkanı’nın imzaladığını hatırlatıyoruz. 2013 yılında ecdatlarımız Osmanlı bile Kürdistan dedi Türkiye’de yedi bölgesi eyalet sistemi neden olmasın diyen Erdoğan’dı.”*)

12. On 20 December 2015 the following statement made by the applicant was published on some news portals which were allegedly controlled by the PKK:

“If a state uses tanks and cannons against its people, it is legitimate to resist it. The AKP has declared war not only against the Kurds but against the whole of Türkiye. The State is an occupier in Kurdistan. The Kurds lost 100 years ago, but they will not lose this time. The dispute has grown – take your place, struggle. If the Kurds succeed, Turkey will become more democratic. ... Consequently, this process is a process of active struggle for us. In this process all means of struggle are legitimate. If a state has started to use all kinds of weapons, tanks, cannons, soldiers and police against its society, the right to resist is the most legitimate of rights.” (*“Bir devlet toplumuna karşı tank ve top kullanıyorsa buna karşı direnmek meşrudur. AKP sadece Kürtlere değil tüm Türkiye’ye savaş açmış durumda. Devlet Kürdistan’da işgalcidir. Kürtler 100 yıl önce kaybetti, ama bu kez kaybetmeyecek. Kavga büyümüştür, yerinizi alın, mücadele edin. Kürtler başarırsa Türkiye demokratikleşir. ... Dolayısıyla süreç bizim açımızdan aktif mücadele etme sürecidir. Bu süreçte her tür mücadele yolu meşrudur. Eğer bir devlet, toplumuna karşı silah, tank, top, asker ve polis her türlü enstrümanı kullanmaya başlamışsa buna karşı direnmek en meşru haktır.”*)

13. On 26 and 27 December 2015 the applicant attended the extraordinary meeting of the Democratic Society Congress in Diyarbakır. On 26 December 2015, he gave a speech, the relevant parts of which read as follows:

“The unitary nation-state system must change itself from now on, the nation-state system must be abandoned. All peoples living in this geograph[ical area], all ethnic structures, all beliefs and all social segments, especially us Kurds, as the main element of this country, should have a new arrangement, a new social contract; a new social forum should be formed in which they can coexist in this country freely with their own identity, language and self-governance in a framework that can also have political autonomy. In other words, unitary, centralised nation-building must be abandoned.”
(*“Tekçi ulus devlet yapılanması bundan sonra kendisini değiştirmek durumunda olmalıdır, ulus devlet yapılanmasından vazgeçilmesi lazım. Bu coğrafyada yaşayan bütün halklar, biz Kürtler başta olmak üzere bütün etnik yapılar, bütün inançlar ve bütün toplumsal kesimler bu ülkenin ana unsuru olarak bu ülkede kendi kimliğiyle, diliyle özgür bir şekilde ve kendi kendini yönetebilecek bir şekilde siyasi özerkliği de olabilen bir çerçevede bir arada olabileceği yeni bir düzenlemeye kavuşmalıdır, yeni bir toplumsal sözleşmeye kavuşturulmalıdır, yeni bir toplumsal forum oluşmalıdır. Yani artık tekçi, merkezîyetçi ulus yapılanmasından vazgeçilmelidir.”*)

On the second day of the meeting he gave another speech in which he once more defended self-governance and resistance.

14. On 5 January 2016 the applicant gave a statement to the press after the police raided and searched the DBP’s building in Diyarbakır. The relevant parts of his statement were as follows:

“There is no democracy anymore in Türkiye. There is no such thing as law in Türkiye. There is only the AKP junta. The AKP government has seized the country, carried out a coup and is waging a war against our people. ... We will continue to struggle for democracy together with our people. ... we will continue to struggle against this AKP junta and coup together with our people every moment and every minute ...”
(*“Türkiye’de demokrasi diye bir şey kalmamıştır. Türkiye’de hukuk diye bir şey yoktur. Sadece ve sadece AKP cuntası var. AKP hükümeti ülkeye el koymuş, darbe yapmış ve halkımıza karşı da bir savaş yürütmektedir. Kurumumuz da bu çerçevede basılmıştır. ... Biz demokrasi mücadelesi vermeye, halkımızla beraber demokrasi mücadelesi vermeye devam edeceğiz. ... her an her dakika halkımızla birlikte bu AKP cuntasına ve darbesine karşı direnmeye mücadeleye devam edeceğiz ...”*)

15. On 6 January 2016, the applicant made a statement to the press in which he criticised the operations carried out by the security forces in the south-east of Türkiye and described as a “war crime” the killing of S.D., a member of the DBP, and two others on 4 January 2016 during those operations. He also called on citizens to protest against the killing of civilians, which he described as “extrajudicial executions”. The relevant parts of his statement read as follows:

“Yesterday in Silopi, three of our women friends, including our party council member S.D., were murdered because of the state’s intention and attacks. S.D. [was] a civilian politician who worked for 20 years in the lawful struggle of the Kurdish political movement ... and [most recently] in the Democratic Regions Party. ... And lately she served as a member of the party assembly. A member of a party established in accordance with the constitution and regulated by law was assassinated. ... They are among 215 of our civilian friends who have been massacred since July. ... This government has blood on its hands. ... When we establish a democratic legal order, they will be held accountable before that democratic legal order. ... I call on everyone ... to take to the streets and show their reactions to these extrajudicial executions and

massacres.” (“*Dün Silopi’de parti meclis üyemiz S.D. ’nin de içinde bulunduğu üç kadın arkadaşımız devletin yönelim ve saldırıları sonucu katledilmiştir. ... S.D. 20 yıldır Kürt siyasi hareketinin legal mücadelesi içerisinde ... ve şimdi de Demokratik Bölgeler Partisinde çalışmış görev almış sivil bir siyasetçidir. ... Ve en son olarak da parti meclisi üyesi olarak görev alan bir arkadaşımızdı. Anayasayla kurulmuş yasalarla düzenlenmiş bir partinin ... üyesi katledildi. ... Temmuz ayından bu yana katledilen 215 sivil arkadaşımızdan biri bunlar. ... Bu hükümetin eli kana bulaşmıştır. ... Demokratik bir hukuk düzeni inşa ettiğimizde bu demokratik hukuk düzeni karşısında hesap verecekler. ... Herkesi ... bu yargısız infazlara, bu katliamlara karşı sokağa çıkıp tepkilerini göstermeye çağırıyorum. ...*”)

16. On 27 and 29 February 2016, the co-chairs of the Democratic Society Congress, the People’s Democratic Congress, the Peoples’ Democratic Party and the DBP held a joint press conference. During his intervention, the applicant made statements calling on the government authorities to lift the curfews and reiterating his call for protests against the operations carried out by the security forces in the district of Sur.

17. On 2 March 2016 the applicant made statements to the media in a television programme broadcast on Özgür Gün TV, a channel which was allegedly controlled by the PKK. The relevant parts of his statement read as follows:

“... people are facing a policy of war carried out by the AKP. ... all our institutions and democratic organisations are subject to the AKP’s war policy. Our municipalities are among the most targeted. So far, as a result of the policy which they have pursued against our communities, 20 of our friends have been arrested ... and around 60 municipal council members and members of the provincial general assembly have been dismissed. ... even during the fascist *coup d’état* of 12 September such things did not happen. ... Every day one of our party buildings is raided [and our members/partisans] are arrested ... or threatened. ... The aim of all this, the aim of all these practices, the aim for all these policies is that the Kurds do not reappear on the stage of history and democracy does not develop in Türkiye. ... We have begun to take the situation in Sur seriously again ... These blockades must be lifted, and the massacre policy abandoned to save the people there.” (“... *halkımız AKP’nin yürütmüş olduğu savaş politikası ile karşı karşıyadır. ... bütün kurumlarımız, demokrasi kurumları AKP’nin savaş politikasının hedefindedir. Belediyelerimiz de bunun başında geliyor. Belediyelerimize yönelik bugüne kadar uyguladıkları politikalar neticesinde hala 20 arkadaşımız tutuklu ... 60 civarında belediye meclis üyesi ve il genel meclis üyemiz görevden alındı. ... 12 Eylül faşist darbesinde dahi bu tablolar yaşanmamıştı. ... her gün bir parti binamız basılıyor, gözaltına alınıyor, ... tehdit ediliyor. ... Bütün bunların nedeni ne, bütün bu uygulamaların bu politikaların nedeni ne, Kürtler tarih sahnesine yeniden çıkmasın diye ve Türkiye’de demokrasi gelişmesin diye. ... Sur’un durumunu tekrar biz ciddi bir şekilde ele almış durumdayız ... Bu ablukaların kalkması katliam politikalarından vazgeçilmesi oradaki insanların da kurtulabilmesi için.*”)

18. On 16 April 2016, the applicant made a statement to the press criticising the arrest of members of the DBP, deputies of opposition parties and human rights activists. The relevant parts of his statement read as follows:

“(...) Thousands of our party members, workers in civil society associations, patriotic people, [and] people who are in favour of democracy, resolution and peace in Türkiye have been arrested. ... The toll [over the past] seven months is now 1,100 detainees,

thousands of arrests, and thousands of deaths. ... Political genocide operations have been launched against us as the Democratic Regions Party [and] our municipalities, [against] the members and leaders of the People's Democratic Party, including their deputies, [and against] non-governmental organisations. This will only decrease the chances of reaching a democratic solution and deepen the war. ... Of course we want to live together. We want to live together under the same roof, with equal rights, [and we want to live] freely. We prefer it that way, but if you take away the means of achieving it, these people will naturally try to fend for themselves in the new century." ("... binlerce parti üyemiz, sivil toplum derneklerinin çalışanları, yurtsever insanlarımız, Türkiye'de demokrasiden, çözümden, barıştan yana olan insanlarımız gözaltına alındı. ... Yedi ayın bilançosu, şu anda bin yüz tutuklu, binlerce gözaltı, binlerce ölüm. ... Demokratik Bölgeler Partisi olarak bizlere, belediyelerimize, Halkların Demokratik Partisi milletvekilleri dahil olmak üzere yöneticilerine, üyelerine, sivil toplum örgütlerine karşı siyasi soykırım operasyonları tekrar başlatılmış durumda. Bu demokratik çözüm imkanlarını ortadan kaldırmaktan ve savaşı derinleştirmekten başka hiçbir işe yaramayacaktır. ... Elbette birlikte yaşamak istiyoruz. Aynı çatı altında eşit haklarla birlikte yaşamak istiyoruz, özgürce. Tercihimiz bundan yana ama bunun imkanlarını ortadan kaldırırsanız bu halkta elbette ki yeni yüzyıl şekillenirken kendi başının çaresine bakmaya çalışacak. ...")

19. On 18 April 2016, the applicant made a statement to the press and reiterated his previous criticisms of the then government. He said:

"... The direction of change in Türkiye should be towards local democracy and the method should be democratic and political, not violent. The AKP is now trying to consolidate its system by favouring the way of violence, by trying to crush all opponents, all those who think outside its perspective, by trying to make them obey it. ... Our party's ... members are being arrested and detained because they defend local democracy, decentralisation ... and democratic autonomy, because they try to explain, organise, and develop this [democratic autonomy], which is contrary to the AKP's [policy]. ... Even ... two of our party members, S.D. and M.Y., lost their lives as a result of the attacks in Cizre and Silopi. They are martyrs of our party, martyrs of democracy. ..." ("... Türkiye'nin değişim istikameti yerel demokrasi yönünde olmalı ve yöntem de demokratik, siyasal yollarla olmalı, şiddet yöntemiyle olmamalı. AKP şimdi şiddet yolunu tercih ederek, bütün muhalifleri, bütün kendi perspektifi dışında düşünen kesimleri ezmeye çalışarak, bati ettirmeye çalışarak, sistemini tahkim ettirmeye çalışıyor. ... Parti ... üyelerimiz, AKP'nin bu perspektifinin aksine, yerel demokrasiyi, yerinden yönetimi ... demokratik özerkliği savunduğu, bunu anlatmaya, bunu örgütlemeye, geliştirmeye çalışıkları için gözaltına alınıyor, tutuklanıyorlar. ... Hatta ... iki parti meclisi üyemiz S.D. ve M.Y., Cizre ve Silopi'de saldırılar sonucu hayatını kaybettiler. Onlar partimizin şehitleridir, demokrasi şehitleridirler. ...")

20. On 1 May 2016 the applicant participated in a meeting at which he gave a speech in favour of democratic autonomy. He said:

"I bow with respect in front of all our people who struggle for freedom in every city of Kurdistan and I believe ... that the Kurdish people will be able to live freely in their own land like all other peoples in the world. ... Today we propose democratic autonomy as a solution [f]or two reasons: [it can] protect the unitary integrity of countries and allow peoples to live freely. ... Autonomy will solve the Kurdish problem, autonomy will also solve the problem[s] of poverty and unemployment. ... Do not be fooled by those who distort and interpret the democratic autonomy project in a different way. ..." ("... Kürdistan'ın her kentinde özgürlük için mücadele eden bütün insanlarımızın önünde saygıyla eğiliyorum ve inanıyorum ki ... Kürt halkı da dünyadaki diğer bütün

halklar gibi kendi topraklarında özgürce yaşayabilecektir. ... Bugün biz çözüm açısından demokratik özerkliği öneriyoruz. İki nedenden dolayı: Demokratik özerklik hem ülkelerin üniter bütünlüğünü koruyabilecek hem de halkların özgürce yaşayabileceği bir modeldir. ... Özerklik Kürt sorununu da çözecek, özerklik aynı zamanda yoksulluk sorununu da çözecek, işsizlik sorununu da çözecektir. ... Demokratik özerklik projesini başka şekilde çarpıtıp yorumlayanlara kesinlikle kanmayın. ...”)

II. THE APPLICANT’S PRE-TRIAL DETENTION AND PROSECUTION

21. On 12 November 2015 the Diyarbakır public prosecutor initiated a criminal investigation against the applicant on suspicion of membership of an illegal organisation, namely the PKK/KCK. The applicant’s above-mentioned speeches were used as the basis for opening the said investigation.

22. On 10 May 2016, in the course of the criminal investigation, the applicant was arrested and taken into police custody on the instructions of the Diyarbakır public prosecutor’s office, which described him as a member of a terrorist organisation.

23. On 12 May 2016 the prosecutor ordered that the applicant’s detention in police custody be extended. Later the same day the Diyarbakır 2nd Magistrate’s Court rejected the applicant’s objection against the prosecutor’s decision to extend his detention by the police. There is no indication in the case file as to whether the applicant was questioned by the police.

24. On 13 May 2016 the applicant, assisted by three lawyers, appeared before the Diyarbakır public prosecutor. The latter questioned the applicant about speeches he had given during the meetings of the DBP and public demonstrations, and statements he had made to several media organisations between 27 January 2015 and 18 April 2016 (see paragraphs 6-20 above). According to the record of the questioning (*sorgulama tutanağı*), the prosecutor read out the content of each of the above-mentioned speeches and statements made by the applicant and asked him to provide an explanation.

25. The applicant denied the accusations of membership of a terrorist organisation and maintained that in his interventions he had criticised the government’s actions and policy in his capacity as the leader of an opposition political party. He stated that his statements in favour of, and demands for self-determination and self-governance should not be subject to investigation and that he had not made any statement encouraging the digging of ditches and the building of barricades. He explained that by words such as “struggle” and “resistance” he had meant political and civil struggle against the government’s war policies, and that his calls for civil disobedience had referred to non-violent acts.

26. The applicant added that on 6 September 2015 he had delivered a speech to a group gathered in front of the DBP’s party building. He asserted

that the sole purpose of his speech had been to prevent the group from marching to Sur. He dismissed the allegations that he had participated in an unauthorised demonstration. He explained that he had used the term “occupation” in his speech on 13 December 2015 to draw an analogy with scenes of occupation of one country by another. With regard to his speech on 6 January 2016, he indicated that he had criticised the authorities for their negligence in the deaths of S.D. and two other people who were civilian politicians and not members of a terrorist organisation. He said he had qualified the killing of civilians as a “war crime” because the government had a responsibility to protect civilians, which it had failed to do. The applicant further stated that in his statement of 2 March 2016 he had used the terms “political genocide” to characterise the arrest of DBP members and mayors. As regards his statements about the government’s alleged use of the Islamic State of Iraq and Syria (ISIS) against the Kurds, he affirmed that they constituted political criticism, and that similar allegations had been put forward elsewhere in public opinion. He maintained that he could not be held responsible for slogans chanted, banners carried, and photographs brandished in support of the PKK during his interventions as he had participated in press statements and gatherings only as a speaker. He further affirmed that he had never made comments in his speeches regarding members of a terrorist organisation who had died during the “trench events”. During his interview he also stated that the Democratic Society Congress and the People’s Democratic Congress, whose invitation he had accepted to attend some press conferences, were legally established umbrella organisations. He added that he had no connection with those organisations, either at the executive or any other level.

27. Then the applicant was asked to add some further observations. He replied as follows:

“... All the statements I made were aimed at ending the conflict. They are critical statements against government policies. I have not taken any action to prevent the operations carried out by the security forces.”

Finally, his answer to the question as to whether he was a member of the PKK/KCK and whether he had received instructions from the organisation was as follows:

“I have no connection with the armed organisation PKK/KCK or any other such organisation. I have not received any orders or instructions from anyone with links or connections to that organisation. The fact that my statements cover the same topics as those made by the leaders of an illegal organisation or that statements have been made on similar topics does not mean that I have a connection with a [terrorist] organisation. I clearly state that I do not accept any violent methods and that I use democratic forms of politics as a method of struggle. No criminal offence has been committed as a result of my statements.”

28. Following the questioning, the public prosecutor sought an order for the applicant's pre-trial detention on suspicion of membership of an armed terrorist organisation (Article 314 § 2 of the Criminal Code).

29. On the same day the applicant was brought before the Diyarbakır Magistrate's Court. The applicant, assisted by his lawyers, essentially repeated his statement to the prosecutor. He emphasised that his statements on "self-governance" were in line with the political stance of the DBP and that he had been making such statements for years. He further stated that the system of self-governance which the party defended was respectful of the territorial integrity of Türkiye and was peaceful. He indicated that his party had never advocated separatism or armed struggle. He further specified that the fact that the DBP and the PKK both defended "self-governance" did not mean that his party approved of the methods employed by that organisation. He also added that his interventions during the recent operations of the security forces had been aimed at saving the lives of civilians. He declared to the magistrate that his calls to protest against the government's actions had been in line with the law and that the protests had consisted of switching off lights or organising public demonstrations.

30. The magistrate also examined the applicant about some documents that had been seized from his house and from the DBP headquarters. In particular, he questioned him about two documents entitled "Corruption Investigation Report" (*Yolsuzluk Araştırma Raporu*) and "Report of A.D." (*A.D.'in raporu*). According to the case file, the first report concerned allegations that donations collected by the party were being used for personal purposes. In the latter report, A.D., a party member, stated that she wanted to divorce her husband and asked the party executives for help. The applicant explained that the said documents related to internal matters of the party.

31. At the end of the examination, the applicant claimed that there was no evidence in the case file to establish a link between him and the PKK or to prove that he had acted on its instructions.

32. Having heard the applicant, the magistrate ordered his pre-trial detention, noting that there was concrete evidence giving rise to a strong suspicion that an offence had been committed under Article 100 of the Code of Criminal Procedure ("the CCP"), namely membership of an armed terrorist organisation. He considered that the applicant had made statements in support of the PKK/KCK's declaration of "self-governance" and had been at the forefront of illegal activities carried out in response to calls of that organisation. He also mentioned that, in his statements, the applicant had described the operations of the security forces as attacks, persecution, oppression, and massacres, and the activities of the terrorist organisation as resistance, struggle, and war, and that under the guise of political activity he had called on the people to take to the streets in accordance with the aims of the terrorist organisation. The magistrate further indicated that the applicant had aimed to disseminate the policies of the terrorist organisation through the

activities he carried out, following the instructions received from senior leaders. He also stated that the applicant's activities had been continuous and intensive. In his decision, the magistrate also relied on the content of the house search report and pieces of evidence discovered during searches conducted by the police at the DBP headquarters (the case file does not contain the search reports referred to by the magistrate).

33. As to the grounds for the applicant's detention, the magistrate noted that the offence in question was among those listed in Article 100 § 3 of the CCP – the so-called “catalogue offences” – for which a suspect's pre-trial detention was deemed justified in the event of strong suspicion. Subsequently, taking into account the severity of the sentence prescribed by law for the offences in question, he held that the measure of pre-trial detention was necessary and proportionate and that alternative measures to detention appeared insufficient.

34. On 20 May 2016 the 3rd Diyarbakır Magistrate's Court dismissed an objection lodged by the applicant against the order for his detention, stating that the detention order had been in compliance with the law and the procedure.

35. On 12 June 2016 the the 1st Diyarbakır Magistrate's Court, in the course of an automatic periodic review, of the ordered the applicant's continued detention. The magistrate stated that the case file contained concrete evidence giving rise to a strong suspicion that the applicant had committed the alleged offence. He also took into account the maximum penalty prescribed by law for the alleged offence and the fact that it was a “catalogue” offence.

36. On 13 June 2016 the Diyarbakır public prosecutor's office filed a bill of indictment with the Diyarbakır Assize Court in respect of the applicant, charging him, in particular, with membership of an armed terrorist organisation, namely the PKK/KCK, under Article 314 § 2 of the Criminal Code. The public prosecutor made particular reference in the indictment to the applicant's above-mentioned speeches and statements. The indictment also referred to the objects and documents seized from the applicant's house and the DBP headquarters, in particular some banned books allegedly containing propaganda of the PKK and its leader, a lighter bearing the inscription “President Apo”, and documents allegedly showing that the applicant and the DBP had adopted the policies of the PKK.

37. On 29 June 2016 the 5th Diyarbakır Assize Court accepted the bill of indictment filed by the public prosecutor. On the same day, the court also ordered the continuation of the applicant's pre-trial detention, finding that it was justified by the fact that the alleged offence was among those listed in Article 100 § 3 of the CCP and by the existence of a reasonable suspicion that the applicant had committed a criminal offence. Taking into account the severity of the sentences prescribed by law for the offence in question, the Assize Court held that the applicant's continued pre-trial detention was

proportionate and that alternative measures to detention appeared insufficient.

38. On 30 June 2016 the applicant lodged a further objection against the decision to continue his pre-trial detention. In a decision of 1 July 2016, the 6th Diyarbakır Assize Court dismissed the objection, considering that the impugned decision had complied with the law and the procedure.

39. On 29 July 2016 the 5th Diyarbakır Assize Court examined of its own motion the question of the applicant's continued detention. Having regard to the nature of the charges against the applicant, the concrete evidence giving rise to a strong suspicion that he had committed an offence and bearing in mind the fact that the alleged offence was among those listed in Article 100 § 3 of the CCP, the 5th Diyarbakır Assize Court ordered his continued pre-trial detention. In view of the upper and lower limits of the sentences prescribed by law for the offence in question, it held that the application of alternative measures to detention would be insufficient. The applicant did not lodge an objection against that decision.

40. On 25 August 2016 the 5th Diyarbakır Assize Court examined of its own motion the lawfulness of the applicant's pre-trial detention and ordered its extension, reproducing verbatim the reasons given in the previous order. On 1 September 2016 the applicant filed an objection against the prolongation of his detention. On 2 September 2016 the 6th Diyarbakır Assize Court, acting as an appeal court, dismissed the applicant's objection and held that the decision in question was in compliance with the law and the procedure.

41. On 22 September 2016, the 5th Diyarbakır Assize Court examined of its own motion the question of the applicant's continued detention and ordered the continuation of his detention on similar grounds as before, namely "having regard to the nature of the offence, concrete evidence giving rise to a strong suspicion that he had committed an offence, the upper and lower limits of the applicable sentence and the insufficiency of alternative measures to detention". The applicant did not lodge an objection against that decision extending his pre-trial detention.

42. On 7 October 2016 the 5th Diyarbakır Assize Court held the first hearing in the trial. At the close of the hearing the court ordered the release pending trial of the applicant after hearing statements in his defence against the charges brought by the public prosecutor's office on 13 June 2016. It held that the applicant's continued detention would be disproportionate considering that his statements in defence had been taken and that there was a possibility that the offence would be reclassified in his favour.

43. On 8 October 2016 the public prosecutor filed an objection against the decision of the 5th Diyarbakır Assize Court to release the applicant pending trial. On 14 October 2016 the 6th Diyarbakır Assize Court dismissed the public prosecutor's request.

44. At the end of the criminal proceedings the 5th Diyarbakır Assize Court, in a judgment of 28 March 2017, sentenced the applicant to eight years and nine months' imprisonment for membership of a terrorist organisation, an offence under Article 314 § 2 of the Criminal Code, on the basis of the statements and speeches he had made between 27 January 2015 and 18 April 2016 (see paragraphs 6-20 above). The court also considered as evidence some banned books and a lighter with the inscription "President Apo" that had been seized in the applicant's residence during police searches.

45. The 5th Diyarbakır Assize Court also ordered that the applicant be detained pending appeal. An objection filed by the applicant's lawyer against that order was rejected on 20 April 2017 by the 6th Diyarbakır Assize Court. According to the information provided by the Government, the applicant had not complied with the detention order and had absconded abroad.

46. Following an appeal by the applicant, on 3 April 2017 the Gaziantep Regional Court of Appeal upheld the first-instance court's judgment in every respect.

47. The applicant appealed further, but on 1 February 2021 the Court of Cassation upheld the judgment, and his conviction became final.

III. THE APPLICANT'S INDIVIDUAL APPLICATION TO THE CONSTITUTIONAL COURT

48. On 10 August 2016, while the criminal proceedings brought against him were still pending before the 5th Diyarbakır Assize Court, the applicant lodged an individual application with the Constitutional Court alleging that he was being subjected to pre-trial detention because of political speeches he had made in his capacity as a politician and co-chair of a political party. He contended that those statements should be assessed in the context of his right to freedom of expression. The applicant argued that his pre-trial detention violated both his right to liberty and security and his right to freedom of expression. He asserted that his pre-trial detention was unlawful as it was not based on reasonable suspicion. Furthermore, he argued that the reasons provided by the domestic courts to justify his pre-trial detention were insufficient. Additionally, he complained that the length of his pre-trial detention was excessive.

49. On 10 July 2017 the Constitutional Court declared the applicant's application inadmissible as being manifestly ill-founded (application no. 2016/14516). It held that the reasons given by the competent judicial authorities in their decisions were relevant and sufficient to justify the lawfulness and legitimacy of the applicant's placement and maintenance in pre-trial detention (see paragraph 13 of the above-mentioned decision). It appears from the Constitutional Court's decision that it did not examine the applicant's complaint concerning the lack of reasonable suspicion that he had committed a criminal offence.

With regard to the complaint concerning the alleged violation of the applicant's right to freedom of expression, the Constitutional Court found that his pre-trial detention had been ordered in the context of a criminal procedure initiated against him for membership of a terrorist organisation. It concluded that the applicant's contention that he had been placed and maintained in pre-trial detention solely for acts which fell within the scope of his right to freedom of expression was unfounded (see paragraph 21 of the Constitutional Court's decision).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Constitution

50. The relevant parts of Article 19 of the Constitution read as follows:

“Everyone has the right to personal liberty and security.

...

Individuals against whom there are strong presumptions of guilt may be detained only by order of a judge and for the purposes of preventing their absconding or the destruction or alteration of evidence, or in any other circumstances provided for by law that also necessitate their detention. No one shall be arrested without an order by a judge except when caught *in flagrante delicto* or where a delay would have a harmful effect; the conditions for such action shall be determined by law.

...

A person who has been arrested or detained shall be brought before a judge within forty-eight hours at the latest or, in the case of offences committed jointly with others, within four days, not including the time required to convey the person to the nearest court to the place of detention. No one shall be deprived of his or her liberty after the expiry of the aforementioned periods except by order of a judge. These periods may be extended during a state of emergency or a state of siege or in time of war.

...

Anyone who has been detained shall be entitled to request a trial within a reasonable time and to apply for release during the course of the investigation or criminal proceedings. Release may be conditioned by a guarantee to ensure the person's appearance throughout the trial, or the execution of the court sentence.

Everyone who is deprived of his or her liberty for any reason whatsoever shall be entitled to apply to a competent judicial authority for a speedy decision on his or her case and for his or her immediate release if the detention is not lawful.

...”

B. Relevant provisions of the Criminal Code

51. Article 314 is worded as follows:

“1. Anyone who forms or leads an armed organisation with the purpose of committing the offences listed in the fourth and fifth parts of this chapter shall be sentenced to a term of imprisonment of ten to fifteen years.¹

2. Anyone who joins an organisation referred to in the first paragraph of this Article shall be sentenced to a term of imprisonment of five to ten years.

3. The other provisions governing the forming of an organisation for criminal purposes shall also apply in this context.”

C. Relevant provisions of the Code of Criminal Procedure

52. Pre-trial detention is governed by Articles 100 *et seq.* of the CCP. In accordance with Article 100, a person may be placed in pre-trial detention where there is factual evidence giving rise to a strong suspicion that the person has committed an offence and where the detention is justified on one of the grounds laid down in the Article in question, namely: if the suspect has absconded or there is a risk that he or she will do so, or if there is a risk that the suspect will conceal or tamper with evidence or influence witnesses.

53. For certain offences listed in Article 100 § 3 of the CCP, there is a statutory presumption of the existence of grounds for detention. The relevant passages of Article 100 § 3 of the CCP read as follows:

“3. If there are facts giving rise to a strong suspicion that the offences listed below have been committed, it can be presumed that there are grounds for detention:

(a) for the following crimes provided for in the Criminal Code (no. 5237 of 26 September 2004):

...

(11) crimes against the constitutional order and against the functioning of the constitutional system (Articles 309, 310, 311, 313, 314 and 315);

...”

54. Article 101 of the CCP provides that pre-trial detention is ordered at the investigation stage by a magistrate at the request of the public prosecutor and at the trial stage by the competent court, whether of its own motion or at the prosecutor’s request. An objection may be lodged with another magistrate or another court against decisions ordering or extending pre-trial detention. Such decisions must include legal and factual reasons.

55. Pursuant to Article 108 of the CCP, during the investigation stage a magistrate must review a suspect’s pre-trial detention at regular intervals not exceeding thirty days. Within the same period, the detainee may also lodge an application for release. During the trial stage, the question of the accused’s detention is reviewed by the competent court at the end of each hearing, and in any event at intervals of no more than thirty days.

¹. The fourth and fifth parts in question provide respectively for “offences against State security” and “offences against the constitutional order and its functioning”.

56. Article 141 § 1 (a) of the CCP is worded as follows:

“Compensation for damage ... may be claimed from the State by anyone ...:

(a) who has been arrested or taken into or kept in detention under conditions or in circumstances not complying with the law;

...”

57. Article 142 § 1 of the CCP reads as follows:

“The claim for compensation may be lodged within three months after the person concerned has been informed that the decision or judgment has become final, and in any event within one year after the decision or judgment has become final.”

58. According to the case-law of the Court of Cassation, it is not necessary to wait for a final decision on the merits of the case before ruling on a compensation claim lodged under Article 141 of the CCP on account of the excessive length of pre-trial detention (decisions of 16 June 2015, E. 2014/21585 – K. 2015/10868 and E. 2014/6167 – K. 2015/10867).

II. COUNCIL OF EUROPE MATERIALS

A. European Commission for Democracy through Law (the Venice Commission)

59. On 11 and 12 March 2016, at its 106th plenary session, the Venice Commission adopted its Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey (no. 831/2015). The relevant parts of the Opinion read as follows (footnotes omitted):

“...

E. Article 314 (armed organisation)

95. Article 314 of the [Criminal] Code criminalises the establishment and command of, as well as the membership in an armed organisation that engages in offences listed in parts four and five of Chapter IV of the [Criminal] Code (Offences against State and Nation).

...

1. Membership of an armed organisation (Art. 314)

98. The [Criminal] Code does not contain a definition of an armed organisation or an armed group. In its judgment E. 2006/10-253 K. 2007/80 of 3 April 2007, the General Criminal Board of the Court of Cassation listed the main criteria that a criminal organisation – for the purposes of Article 220 of the [Criminal] Code – should display. The group has to have at least three members; there should be a tight or loose hierarchical connection between the members of the group and an ‘abstract link’ between the members is not sufficient; the members should have a common intention to commit crimes (even though no crime has yet been committed); the group has to present continuity in time; and the structure of the group, the number of its members, tools and equipment at the disposal of the group should be sufficient/appropriate for the commission of the envisaged crimes.

...

100. There is a rich case-law of the Court of Cassation in which the high court developed the criterion of ‘membership’ in an armed organisation. The Court of Cassation examined different acts of the suspect concerned, taking account of their ‘continuity, diversity and intensity’ in order to see whether those acts prove that the suspect has any ‘organic relationship’ with the organisation or whether his or her acts may be considered as committed knowingly and wilfully within the ‘hierarchical structure’ of the organisation. In case E. 2010/2839, K. 2012/1406 of 6 February 2012, the suspects who were constantly providing shelter to new candidates willing to become members of a terrorist organisation, providing them with falsified identity cards and introducing them to the organisation and looking for other new members for the organisation, were convicted for being members of an armed organisation. Acquiring a code name (within the organisation) in order to hide his/her real identity and hiding in his/her apartment a bomb delivered by the members of a terrorist organisation; giving courses on the aims and structure of the organisation to the new members, contacting again the organisation after having been released from prison and trying to collect money for the organisation and to find new members, delivering his/her ‘CV report’ to the organisation in order to become its member or driving new comers willing to become members of the organisation, to the camping place of the organisation, collecting money for the organisation under the guise of collecting tax for the organisation or organising the medical treatment of the new members before they were sent to the camping place of the organisation, etc. were all considered by the Court of Cassation as proving the membership of the defendant to an armed organisation under Article 314 of the [Criminal] Code, as the continuity, diversity and intensity of the acts attributed to the defendants showed that they were acting knowingly and willingly within the hierarchical structure of the armed organisation.

...

102. According to non-governmental sources, in the application of Article 314, the domestic courts, in many cases, decide on the membership of a person in an armed organisation on the basis of very weak evidence, which would raise questions as to the ‘foreseeability’ of the application of Article 314. Similarly, Freedom House in its 2015 Report on Freedom of Press in Turkey noted that ‘Article 314 of the [Criminal] Code, with its broad definition of ... membership in an armed organization, continued to be invoked against journalists, especially Kurds and those associated with the political left’. Also, Amnesty International, in its 2013 Report on Turkey, considered that conduct, which is not in itself criminal, as for instance an activity related to the exercise of the rights to freedom of assembly, association and expression, is considered as evidence of membership of the defendants in an armed organisation. The reason for this approach, according to the Report, is that the prosecution services perceive those activities as having the same overall objective as a terrorist group and as a result, ‘individuals have been prosecuted for membership of terrorist organisation on charges relating solely to their engagement in peaceful and, in themselves, lawful pro-Kurdish activities’. The examples of concrete cases provided by Amnesty International in which the evidence was considered to link the defendants to a terrorist organisation included, attendance at six different demonstrations allegedly organised by a terrorist organisation and a speech made at one of those demonstrations, or, in another case, the participation of the defendant in the ‘Political Academy’ organised by the Peace and Democracy Party (BDP – a recognised Pro-Kurdish political party) and his diverse activities in the framework of this Academy.

...

106. In conclusion, the Venice Commission recommends, first, that the established criteria in the case law of the Court of Cassation that acts attributed to a defendant should show ‘in their continuity, diversity and intensity’, his/her ‘organic relationship’ to an organisation or they should prove that he/she acted knowingly and willingly within the ‘hierarchical structure’ of the organisation, should be applied strictly. The loose application of these criteria may give rise to issues concerning in particular the principle of legality within the meaning of Article 7 [of the Convention].

107. Second, the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation. Where the only evidence consists of forms of expression, the conviction for being a member of an armed organisation, would constitute an interference with the right of the defendants to freedom of expression, and that the necessity of this interference on the basis of the criteria as set forth in the case-law of the [Court], in particular the criteria of ‘incitement to violence’, should be examined in the concrete circumstances of each case.

...

123. The Venice Commission ... concludes that the progress made is clearly insufficient. All articles subject to the present opinion provide for excessive sanctions and have been applied too widely, penalising conduct protected under the [Convention], in particular its Article 10 and the related case-law as well as conduct protected under Article 19 [of the International Covenant on Civil and Political Rights – the ICCPR].

124. All four articles have to be applied in a radically different manner to bring their application fully in line with Article 10 [of the Convention] and Article 19 [of the] ICCPR. The Commission underlines that prosecution of individuals and convictions in particular by lower courts, which have a chilling effect on the freedom of expression, must cease. This is not sufficient if individuals are in some cases finally acquitted by the Court of Cassation after having been subject of criminal prosecution for several years. Moreover, the Commission underlines the importance of States’ positive obligation to create a favourable environment where different and alternative ideas can flourish.

...

128. With respect to **Article 314 (Membership [of] an armed organisation)**, the established criterion in the case law of the Court of Cassation that acts attributed to a defendant should show ‘in their continuity, diversity and intensity’ his/her ‘organic relationship’ to an armed organisation or whether his/her acts may be considered as committed knowingly and wilfully within the ‘hierarchical structure’ of the organisation, should have a strict application. ...”

60. On 13 March 2017, at its 110th plenary session, the Venice Commission published an Opinion (no. 852/2016) on the duties, competences and functioning of the “criminal peace judgeships” (magistrates’ courts). The relevant parts of the Opinion read as follows (footnotes omitted):

“76. The length of pre-trial detention remains a serious problem in Turkey. The Ministry of Justice provided statistics showing that the rate of detained persons as compared to the number of convicted persons was reduced from 50 per cent to 14 per cent between 2007 and 2014, before the establishment of the peace judges. However, this rate remained stable until the coup. These statistics thus show that the establishment of peace judgeships and the system of horizontal appeals between peace judgeships of

the same level has not succeeded in reducing the problem of the length of pre-trial detention.

78. ... [D]etentions ordered by peace judgeships are problematic due to the system of horizontal appeals. Furthermore, for persons who remain under detention in the investigation phase and who have been detained by peace judgeships on the basis of insufficiently reasoned decisions ... [, the p]rosecution should request their release as soon as possible.

94. ... [T]he way of establishment of the peace judgeships and the system of functioning examined above are conducive to insufficient motivation of their decisions. Individual examples are thus very likely to be indicative of a wider problem. The fact that the decisions of peace judgeships can be appealed to the Constitutional Court does not remedy this structural problem.

95. To sum up, there are numerous instances where peace judges did not – and probably were not even able to due to their workload – sufficiently reason decisions which have a drastic impact on human rights of individuals.”

B. Council of Europe Commissioner for Human Rights

61. On 15 February 2017 the Commissioner for Human Rights published a Memorandum on freedom of expression and media freedom in Turkey (CommDH(2017)5). The relevant parts of the Memorandum read as follows (footnotes omitted):

“43. ... The aforementioned report of the Commissioner’s predecessor contains a long list of provisions of the Turkish Criminal Code and Anti-Terrorism Law which have directly led to violations of Article 10 [of the Convention].

44. The vast majority of these provisions are still in force in one form or another. The Commissioner notes, in particular, the opinion of the Venice Commission of March 2016 on Articles ... and 314 (establishment, command or membership of an armed organisation) of the Turkish Criminal Code. While acknowledging efforts to limit the application of these articles through amendments or case-law of the Turkish Court of Cassation, the Venice Commission concluded that ‘the progress made is clearly insufficient. All articles subject to the present opinion provide for excessive sanctions and have been applied too widely, penalising conduct protected under the [Convention], in particular its Article 10 and the related case-law as well as conduct protected under Article 19 [of the] ICCPR’.

...

46. ... a lack of restraint by prosecutors in bringing charges in cases clearly covered by freedom of expression, the excessive use of detentions on remand and defective reasoning in courts’ detention decisions which create a distinct chilling effect, as well as a failure to strike the right balance between freedom of expression and the offences relating to terrorism and criminal organisations, in particular in cases where membership of a criminal organisation is not proven and a statement is merely deemed to coincide with the aims or instructions of that organisation. When changes in legislation occurred, one could observe that prosecutions continued against similar acts and statements, sometimes by using some of the other provisions of the Criminal Code or the Anti-Terrorism Law.

...

51. The cases of prosecutions against persons who have exercised their freedom of expression and whose statements should clearly be considered protected under Article 10 of the [Convention] have not only continued but increased over recent years. This needs to be seen in context with a general increase in prosecutions and requests for detention on remand based on the relevant provisions of the Criminal Code. Official figures provided by the Turkish Ministry of Justice concerning the number of request for detentions on remand by prosecutors for Articles 216, 220 §§ 6 and 7, 301 and 314 show a more than three-fold increase from 1 698 requests in 2013 to 6 547 requests in 2015. The number of court decisions granting detention requests increased almost four-fold (from 1 099 to 3 732) over the same period.

...

68. ... long-standing problematic attitudes of the judiciary concerning the failure to carry out a proper contextual analysis of statements in order to determine whether they fall outside of speech protected under Article 10, affect a much wider population than before and create an even stronger chilling effect for the entire society. Detention on remand ... is still being used widely with defective reasoning straying from [Convention] standards and remains a key component of that chilling effect.

...

79. ... the exceptional nature of remands in custody, and the need to provide clear legal reasoning in cases where they are necessary are not embedded in the practice of the Turkish judiciary. A major problem in this connection are the so-called ‘catalogue crimes’, i.e. a list of crimes in the Code of Criminal Procedure with respect to which detention can be ordered during criminal proceedings, and which many Turkish judges still continue to use as the main criterion without a careful examination of the remaining conditions of detention.

...

87. The Commissioner is struck by the complete absence of any consideration for freedom of expression in the judge’s assessment, ..., as well as the lack of material evidence establishing any link whatsoever between the suspects and these organisations, aside from a non-contextual reading of newspaper articles critical of the government.

...

124. The Commissioner considers that practically all the recommendations in his predecessor’s aforementioned report remain valid. This includes the need for a complete overhaul of the Turkish Criminal Code, and in particular of Articles ..., 314 (establishment, command or membership of an armed organisation), ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

62. Relying on Article 10 of the Convention, the applicant complained of a breach of his right to freedom of expression on account of the decision to place him in pre-trial detention and of the subsequent decisions prolonging his pre-trial detention. Article 10 reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

63. The Government contested his complaint.

A. Admissibility

64. The Government invited the Court to declare the complaint under Article 10 inadmissible as being incompatible *ratione materiae* with the provisions of the Convention, arguing that the applicant’s acts fell within the scope of Article 17 of the Convention in that, by his speeches and statements, he had (i) produced propaganda for a terrorist organisation and (ii) incited people to violence. In the alternative, the Government invited the Court to declare the complaint inadmissible as being manifestly ill-founded.

65. The applicant did not comment on those points.

66. The Court reiterates, firstly, that “the purpose of Article 17, in so far as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms ...” (see *Lawless v. Ireland* (no. 3), 1 July 1961, pp. 45-46, § 7, Series A no. 3). Since the general purpose of Article 17 is, in other words, to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated in the Convention, this Article is applicable only on an exceptional basis and in extreme cases, as indeed is illustrated by the Court’s case-law (see *Paksas v. Lithuania* [GC], no. 34932/04, § 88, ECHR 2011 (extracts) and the case law references therein).

67. The Court’s decision in the case of *Roj TV A/S v. Denmark* ((dec.), no. 24683/14, §§ 32-38, 17 April 2018) provides a summary of the statements or activities which it held should be exempted by Article 17 from the protection of Article 10 of the Convention on account of their Islamophobic, anti-Semitic or racist purpose and/or their incitement to hatred and violence (see also, *Yüksekdağ Şenoğlu and Others v. Türkiye*, nos. 14332/17 and 12 others, § 486, 8 November 2022).

68. In the present case, there is no indication that the applicant was pursuing an aim of that nature. The Court finds that his statements cannot be said to have reached the high threshold for applicability of Article 17. Although some of his statements were controversial and his criticisms of government policies were severe, it is not immediately clear that they were intended to incite to violence and hatred or to destroy the rights and freedoms protected by the Convention (compare *Witzsch v. Germany* (no. 1) (dec.), no. 41448/98, 20 April 1999; *Schimanek v. Austria* (dec.), no. 32307/96, 1 February 2000; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts); *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI; *Witzsch v. Germany* (no. 2) (dec.), no. 7485/03, 13 December 2005; *Molnar v. Romania* (dec.), no. 16637/06, 23 October 2012; *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 113-115, 15 October 2015; and *Lilliendahl v. Iceland* (dec.), 29297/18, § 26, 12 May 2020). The applicant is thus not barred from relying upon his right to freedom of expression in this instance. The Government's objection of incompatibility *ratione materiae* must therefore be dismissed.

69. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

70. The applicant submitted that his pre-trial detention had been in breach of Article 10 because his speeches had not contained any elements of incitement to violence or terrorist propaganda. He claimed that he had made speeches in his capacity as co-chair of an opposition party and as a politician, and that they had concerned the conditions of civilians living under curfew and contained demands for a peaceful and democratic solution to the Kurdish issue.

71. The applicant stressed that the offence of membership of an armed terrorist organisation could only be committed by participating in the hierarchy of an organisation, and required a continuous, diversified and uninterrupted link to the organisation. He maintained that none of those had been made out in his case. He argued that his legitimate participation in public meetings, his statements to the written and visual media and his calls for democratic autonomy, in accordance with his identity as a politician and the programme and statutes of the DBP, fell within the scope of freedom of expression.

(b) The Government

72. The Government first submitted that there had been no interference with the applicant's right to freedom of expression. They argued that his pre-trial detention had been ordered on the suspicion that he was a member of a terrorist organisation, on the basis that he had produced terrorist propaganda and incited people to violence by his statements. They contended that the competent judicial authorities had given sufficient reasons when they decided to order and extend the applicant's pre-trial detention. The Government also maintained that the very short period which the applicant had spent in pre-trial detention, that is to say one hundred and forty-seven days, should also be taken into account when assessing whether there had been an interference with his right to freedom of expression.

73. In any event, any interference by the authorities had been in accordance with the law and necessary in the interests of national security, public safety, and for the prevention of disorder or crime.

74. As to the necessity of the interference in a democratic society, the Government submitted that the authorities had not transgressed the principles of reasonableness and proportionality. They argued that the applicant had been detained on suspicion of membership of a terrorist organisation under Article 314 § 2 of the Criminal Code – an offence of which the Assize Court had subsequently convicted him. The Government contended that there had been a pressing social need for the applicant's initial and continued pre-trial detention because he had produced propaganda for the PKK and incited people to violence by his statements. The competent courts had assessed the applicant's statements as a whole and found that he had called people onto the streets in accordance with the aims of the terrorist organisation. They claimed that he had continuously and persistently sought to legitimise the violent acts of the terrorist organisation and its members and had contributed to an environment of tension. Lastly, the Government reiterated that there had been a pressing social need for the applicant's initial and continued pre-trial detention.

2. The Court's assessment**(a) Whether there was an interference**

75. The Court reiterates that certain circumstances with a chilling effect on freedom of expression will confer on applicants who have yet to be convicted in a final judgment the status of victims of an interference with the freedom in question (see *Dink v. Turkey*, nos. 2668/07 and 4 others, § 105, 14 September 2010; *Altuğ Taner Akçam v. Turkey*, no. 27520/07, §§ 70-75, 25 October 2011; *Nedim Şener v. Turkey*, no. 38270/11, § 94, 8 July 2014; and *Şahin Alpay v. Turkey*, no. 16538/17, § 167, 20 March 2018).

76. In the present case, the Court observes that criminal proceedings were instituted against the applicant on suspicion of membership of a terrorist

organisation. On 28 March 2017 the 5th Diyarbakır Assize Court convicted him of that offence and sentenced him to a total of eight years and nine months' imprisonment under Article 314 of the Criminal Code. That judgment became final on 1 February 2021. In total, the applicant had been kept in pre-trial detention for approximately four months.

77. In the light of the foregoing, the Court considers that the applicant's initial and continued detention on account of his statements amounted to an interference with the exercise of his freedom of expression (see *Açık and Others v. Turkey*, no. 31451/03, § 40, 13 January 2009, and *Sabuncu and Others v. Turkey*, no. 23199/17, § 226, 10 November 2020).

(b) Whether the interference was prescribed by law

(i) General principles

78. The general principles concerning the question whether an interference with freedom of expression is "prescribed by law" are summarised as follows in the case of *Selahattin Demirtaş v. Turkey (no. 2)* ([GC], no. 14305/17, §§ 249-54, 22 December 2020):

"249. The Court refers to its well-established case-law to the effect that an impugned measure must have some basis in domestic law and also be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles. In particular, it would be contrary to the rule of law for the discretion granted to the competent authorities to be expressed in terms of an unfettered power. The law must therefore indicate the scope of any such discretion conferred on them and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference ... In that context, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law ... The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention ... The expression "prescribed by law" in the second paragraph of Article 10 also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects ...

250. One of the requirements flowing from the expression "prescribed by law" is foreseeability. In the Court's view, a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 of the Convention unless it is formulated with sufficient precision to enable people to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. While 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 criterion of foreseeability cannot be interpreted as requiring that all detailed conditions and procedures governing the application of a law should be laid down in the text of the law itself; it may be satisfied if points which cannot be satisfactorily resolved on the basis of domestic law are set out in enactments of lower rank than statutes. A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim

of the measure in question, to give the individual adequate protection against arbitrary interference ...

251. The Court reiterates in this context that it is not for it to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention ...

252. The Court also confirms that in cases originating in an individual application under Article 34 of the Convention its task is not to review domestic law in the abstract but to determine whether the way in which it was applied to the applicant gave rise to a breach of the Convention ...

253. The Court considers that a degree of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that a legal provision is capable of more than one construction mean that it fails to meet the requirement of “foreseeability”. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice ... At the same time, the Court is aware that there must come a day when a given legal norm is applied for the first time ...

254. As to the notion of foreseeability, its scope depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed ... Nevertheless, quality of the law implies that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention ...”

(ii) Application of the above principles in the present case

79. In the present case, the Court firstly observes that at the time the applicant was placed in pre-trial detention, all of the legal provisions applied in the case were accessible, that is to say the Constitution, the CCP and the legislation on the basis of which the public prosecutor sought the applicant’s conviction. It is not in dispute that the applicant was placed in pre-trial detention on the basis of Articles 100 *et seq.* of the CCP. The question in the present case is whether the provisions of the Criminal Code on membership of an armed terrorist organisation can be considered to satisfy the “quality of the law” requirement. The Court must therefore determine whether the interference with the applicant’s right to freedom of expression can be said to have been “prescribed by law”. In particular, the Court will examine whether the domestic law, as interpreted and applied in the present case, was foreseeable in its effects at the time of the speeches by the applicant that led to his prosecution and pre-trial detention.

80. On 10 May 2016 the applicant was taken into police custody on the charge of membership of a terrorist organisation. On 13 May 2016 the Diyarbakır public prosecutor asked the Diyarbakır 2nd Magistrate’s Court to place the applicant in pre-trial detention on suspicion of membership of an armed terrorist organisation, punishable under Article 314 § 2 of the Criminal Code.

81. On the same day, the 2nd Diyarbakır Magistrate's Court ordered the applicant's pre-trial detention, taking into account the speeches made by him between 27 January 2015 and 18 April 2016 (see paragraphs 6-20 above), and considering that there was a strong suspicion that he had committed the offence of membership of an armed terrorist organisation (Article 314 § 2 of the Criminal Code). The magistrate indicated that the applicant had aimed to disseminate the policies of the terrorist organisation through his statements, following the instructions he had received from senior leaders, and that his activities had been continuous and intensive (see paragraph 32 above).

82. In an indictment filed on 13 June 2016, the Diyarbakır public prosecutor sought the applicant's conviction for the same offence. The competent judicial authorities ordered the applicant's continued detention, referring simply to the entirety of the evidence against him, until 7 October 2016, when he was released pending trial by the 5th Diyarbakır Assize Court.

83. In any event, it is clear that the applicant's pre-trial detention was ordered and prolonged on the basis of his speeches and because he had been charged with a terrorism-related offence, provided for in Article 314 § 2 of the Criminal Code, namely membership of a terrorist organisation.

84. The Court is mindful of the difficulties linked to preventing terrorism and formulating anti-terrorism laws. The member States inevitably have recourse to somewhat general wording, the application of which depends on its practical interpretation by the judicial authorities. In that context, when interpreting the law, the national courts must give the individual adequate protection against arbitrary interference (see *Selahattin Demirtaş*, cited above, § 275).

85. In this connection, the Court reiterates that criticism of governments and the publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges such as belonging to or assisting an armed terrorist organisation, attempting to overthrow the government or the constitutional order, or disseminating terrorist propaganda. It is important to note that such matters deserve the high level of protection guaranteed to political speech, and that the domestic courts are expected to take these elements into consideration. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 211, 20 March 2018; *Şahin Alpay*, cited above, § 181; and *Selahattin Demirtaş*, cited above, § 276).

86. This being so, the Court observes, in line with the Venice Commission's findings in its opinion on Articles 216, 299, 301 and 314 of the Criminal Code, that the Code does not define the concepts of "armed organisation" and "armed group". The qualifying criteria for a criminal organisation have been set out in the case-law of the Court of Cassation: such an organisation has to have at least three members; there should be a

hierarchical connection between the members; they should have a common intention to commit crimes; the group has to display continuity in time; and the structure of the group, the number of its members, its tools and its equipment should be appropriate for the commission of the crimes envisaged. Regarding “membership of an armed organisation”, the Court of Cassation takes into account the continuity, diversity and intensity of the acts attributed to suspects in order to determine whether those acts prove that suspects had an “organic relationship” with the organisation or whether their acts may be considered to have been committed knowingly and willingly within the “hierarchical structure” of the organisation (*Selahattin Demirtaş*, cited above, § 277).

87. In the present case, the national judicial authorities, including the public prosecutor who conducted the criminal investigation and charged the applicant, the magistrates who ordered his initial and continued pre-trial detention, and the assize court judges who decided to extend his pre-trial detention, adopted a broad interpretation of the offences provided for in Article 314 § 2 of the Criminal Code. The Court observes that the applicant made political statements in which he expressed his opposition to certain government policies. In his statements he particularly argued for self-governance and made calls for people to struggle against the policies of the government. He qualified some actions of the public authorities as “political genocide” and the killing of three members of his party as a “war crime”. The Court notes that those elements were held to be primary elements to constitute acts capable of establishing an active link between the applicant and an armed organisation. However, the judicial authorities who ordered the initial and the continued pre-trial detention of the applicant did not provide any evidence to show that he had acted in accordance with instructions he had allegedly received from the illegal armed organisation. The applicant’s statements as a politician, which were allegedly in line with the policy of the armed organisation, were considered to be a sufficient basis for his arrest and for ordering his pre-trial detention on suspicion of membership of a terrorist organisation.

88. The Court further notes that the 2nd Diyarbakır Magistrate’s Court, in its detention order, considered that the applicant’s acts had been “continuous and intensive”. The Court can only conclude that the magistrate, without providing sufficient explanation, justified his decision by a mere reference to the established case-law of the Court of Cassation in which it developed that particular criterion for membership of a terrorist organisation. In particular, the competent judicial authorities in the instance case, including the Diyarbakır Magistrate’s Court, do not appear to have duly examined the “continuity, diversity and intensity” of the applicant’s acts, or whether he had committed offences within the hierarchical structure of the terrorist organisation in question, as required by the case-law of the Court of Cassation.

89. In that connection, the Court refers to the findings of the Commissioner for Human Rights, who pointed out that it was increasingly common in Türkiye for the evidence used to justify detention to be solely limited to statements and acts that were manifestly non-violent and which should in principle be protected by Article 10 of the Convention. The Commissioner viewed that as a systematic omission on the part of Turkish prosecutors and courts to perform appropriate contextual analyses and to filter evidence in the light of the Court's well-established case-law concerning Article 10 of the Convention.

90. Similarly, the Venice Commission also found that the domestic courts, in applying Article 314 of the Criminal Code, often tended to decide on a person's membership of an armed organisation on the basis of very weak evidence (see paragraph 59 above). The present case also supports that finding. The range of acts that may have justified the applicant's pre-trial detention in connection with serious offences punishable under Article 314 of the Criminal Code is so broad that the content of that Article, coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities. In the Court's view, such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to an illegal armed organisation in the absence of any concrete evidence of such a link.

(iii) Conclusion

91. Having established that the interference with the applicant's freedom of expression did not comply with the requirement of the quality of law, the Court finds that there has been a violation of Article 10 of the Convention on account of the interpretation and application in the applicant's case of the provisions of Article 314 § 2 of the Criminal Code.

92. That conclusion makes it unnecessary to examine whether the interferences pursued one or more of the legitimate aims listed in paragraph 2 of Article 10 and were "necessary in a democratic society".

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 3 OF THE CONVENTION

93. The applicant argued that there had been no evidence capable of creating a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. He maintained that the reasons given by the domestic courts for his continued detention had lacked relevant and sufficient grounds. He complained in that connection that there had been a violation of Article 5 §§ 1 (c) and 3 of the Convention, the relevant parts of which provide:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. Admissibility

94. The Government argued that the applicant had failed to exhaust the compensation remedy under Article 141 of the CCP in respect of his complaints under Article 5 of the Convention, which the Court had declared to be effective in its judgment of *A.Ş. v. Turkey* (no. 58271/10, §§ 92-95, 13 September 2016).

95. The applicant contested the Government’s argument. He asserted, in particular, that a compensation claim had not offered any reasonable prospect of success in terms of remedying the unlawfulness of his detention or securing his release.

96. As regards the period during which the applicant was in detention, the Court reiterates that for a remedy in respect of the lawfulness of an ongoing deprivation of liberty to be effective, it must offer a prospect of release (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 40, 6 November 2008, and *Mustafa Avcı v. Turkey*, no. 39322/12, § 60, 23 May 2017). It has already found that the remedy provided for in Article 141 of the CCP was not capable of ending an applicant’s pre-trial detention (see *Mehmet Hasan Altan*, cited above, § 103, and *Şahin Alpay*, cited above, § 82).

97. As to the period during which the applicant was released pending trial, the Court notes that he had already submitted his complaints under Article 5 of the Convention in the context of his applications to the Constitutional Court. That court examined his complaints corresponding to Article 5 § 3 of the Convention on the merits and dismissed them in its judgment of 10 July 2017. However, the Constitutional Court omitted to examine the applicant’s complaint regarding the alleged lack of reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention (see paragraph 49 above).

98. The Court considers that, regard being had to the rank and authority of the Constitutional Court in the Turkish judicial system, and in view of the conclusion reached by that court concerning the applicant’s complaints, a claim for compensation under Article 141 of the CCP had, and continues to have, no prospect of success (see, to similar effect, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 27, Series A

no. 332, and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 58, ECHR 2010). Accordingly, the Court considers that the applicant was not required to avail himself of that compensatory remedy, even after his release. The fact that the Constitutional Court failed to examine the complaints of the applicant corresponding to Article 5 § 1 of the Convention does not change the Court's finding in this regard.

99. It follows that the objection raised by the Government must be dismissed.

100. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

101. The applicant submitted that he had been placed in pre-trial detention on account of his political opinions. He submitted that, at the time of his pre-trial detention, there had been no facts or information that could have satisfied an objective observer that he had committed the offence of which he had been accused.

102. The applicant also considered that his pre-trial detention had been in breach of Article 5 § 3 of the Convention. In his view, the decisions to remand him in custody had been justified by a mere statement of the grounds for pre-trial detention provided for by the legislation and were formulated in abstract, repetitive and stereotyped terms.

(b) The Government

103. The Government, referring to Articles 100 and 101 of the CCP, submitted that the applicant's pre-trial detention had been in accordance with domestic law.

104. The Government further stated that the applicant had been placed in pre-trial detention during a criminal investigation initiated in connection with the fight against terrorism, and more specifically against the PKK/KCK. They submitted that the evidence collected during the criminal investigation and included in the case file made it objectively possible to conclude that there had been a reasonable suspicion that the applicant had committed the offence of which he had been accused. The applicant had repeatedly disseminated propaganda for a terrorist organisation, which had constituted the offense of membership in an armed terrorist organisation. In their view, that satisfied the criteria, such as continuity and intensity, set by the Court of Cassation in its well-established case-law.

105. The Government also submitted that there had been relevant and sufficient grounds for ordering the applicant's pre-trial detention. They further maintained that his pre-trial detention had not breached Article 5 § 3 of the Convention on account of its length. In that context, they considered that the applicant's detention had been justified in view of the complexity and importance of the case, the nature of the offence with which he had been charged, the fact that it had related to the fight against organised crime, the potential penalty concerned and the risk of his absconding.

2. The Court's assessment

(a) Alleged lack of reasonable suspicion that the applicant committed a criminal offence (Article 5 § 1 of the Convention)

106. For the general principles as established in the Court's case law, the Court refers to the case of *Selahattin Demirtaş* (cited above, §§ 311-21).

107. The Court notes that the crux of the matter is whether, at the time of the applicant's detention, there was a reasonable suspicion that he had committed the offence with which he had been charged within the meaning of sub-paragraph (c) of Article 5 § 1 of the Convention. The Court observes that the applicant was suspected of being a member of an illegal armed organisation, a serious criminal offence which is punishable by imprisonment under Turkish law.

108. The Court's task under Article 5 of the Convention is to ascertain whether there were sufficient objective elements to satisfy an impartial observer that the applicant could have committed the offence of which he was accused. In view of the seriousness of the offence and the severity of the potential sentence, the facts needed to have been examined with great care. In that connection, it was essential that the facts grounding the suspicion should have been justified by verifiable and objective evidence and that they could be reasonably considered as having fallen under one of the sections describing criminal behaviour in the Criminal Code.

109. In the present case, the Court should also take into consideration the specificity of the circumstances surrounding the events of "6-8 October 2014" and the "trench events" which are laid out in the case of *Selahattin Demirtaş* (cited above, §§ 17-54). In view of the difficulties inherent in the investigation and prosecution of terrorism-related offences, the "reasonableness" of the suspicion justifying deprivation of liberty cannot always be judged according to the same standards as are applied in dealing with conventional crime (*ibid.*, § 323).

110. Having regard to these particular circumstances, the Court should confine its assessment under Article 5 § 1 of the Convention to the evidence before the domestic authorities at the material time. In that regard, the Court notes that the dispute between the parties in the present case does not concern the likelihood or attributability to the applicant of the acts referred to in the

decisions of the judicial authorities which ordered his initial and continued pre-trial detention. The dispute is about the plausibility of the accusations and their classification as criminal conduct.

111. In that respect, the Court should first consider whether the evidence relied on as grounds for the suspicion against the applicant could reasonably establish an offence at the material time. The starting point of the Court's analysis should therefore be the domestic courts' decisions on his initial detention. Therefore, the decision of the Diyarbakır 2nd Magistrate's Court of 13 May 2016 is of crucial importance, since his initial pre-trial detention was based on the reasoning set out in that decision and the subsequent court decisions extending the detention mainly referred to that original decision.

112. The Court notes that the Diyarbakır 2nd Magistrate's Court ordered the applicant's pre-trial detention relying in particular on the speeches he gave between 27 January 2015 and 18 April 2016. In the detention order the magistrate noted that the applicant had described the operations of the security forces as attacks, persecution, oppression and massacres, and the activities of the PKK as resistance, struggle and war. He also considered that the applicant, under the guise of political activity, had called on the people to resist the security forces and take to the streets. He further stated that the applicant had made those speeches and calls in order to disseminate the policies of the illegal armed organisation in accordance with the orders he received from its leaders. He also considered that the applicant's activities had been continuous and intensive. The Court also notes that the magistrate relied, in the alternative, on the search report drawn up by the police following the search of the applicant's house and the headquarters of the DBP. In that context, the Court considers it appropriate to first examine the applicant's speeches and then the evidence gathered during the searches carried out by the police.

113. As to the content of the applicant's speeches and statements, the Court notes that on several occasions the applicant had called on the people to take to the streets to protest against the policies of the government and the measures taken by the public authorities. However, it considers that, when read as a whole, they cannot be regarded as relevant in establishing the existence of a reasonable suspicion that the offence of membership of a terrorist organisation had been committed. The speeches were made as part of the applicant's political activity and cannot be construed as grounding a reasonable suspicion that he had committed the offences in question. The Court considers it important that the applicant's remarks in the speeches in question should be viewed in their entirety. The messages conveyed in the impugned speeches concerned an ongoing public debate in relation to which the applicant raised concerns and strongly criticised the Government and the security forces' actions during, in particular, the "trench events". The contents of his speeches can be viewed as being very harsh and may be regarded as offensive, shocking or disturbing by the State or a section of the

population. However, their contents would not satisfy an objective observer that the applicant might have committed the offence on suspicion of which he was placed in pre-trial detention, unless other grounds and evidence justifying his detention were put forward. The notion of “reasonable suspicion” cannot be interpreted so extensively as to impair the applicant’s right to freedom of expression under Article 10 of the Convention (see *Selahattin Demirtaş*, cited above, § 328).

114. The Court reiterates that it has already found under Article 10 of the Convention that the present case confirms the tendency of the domestic courts to decide on a person’s membership of an armed organisation on the basis of very weak evidence (see paragraph 90 above). It concluded under that head that the range of acts that could have justified the applicant’s pre-trial detention under Article 314 of the Criminal Code was so broad that the content of that provision, coupled with its interpretation by the domestic courts, did not afford him adequate protection against arbitrary interference by the national authorities. On that account it found that the terrorism-related offence at issue, as interpreted and applied in the present case, was not “foreseeable”. In the Court’s view, that consideration is equally valid as regards the charges relating to the applicant’s speeches. In particular, the statements he made as co-chair of an opposition party cannot be deemed sufficient justification of the reasonableness of the suspicion on which his pre-trial detention was supposed to have been based. Given the foregoing, the Court considers that the speeches of the applicant, by themselves, would not satisfy an objective observer that he might have committed the offense of membership of a terrorist organisation, on suspicion of which he was placed in pre-trial detention.

115. The Court further observes that the authorities were unable to refer to any concrete evidence capable of suggesting that the PKK/KCK had issued any requests or instructions directly to the applicant to make speeches and statements aimed at spreading the policies of that organisation and disrupting the operations carried out by the security forces by calling on the people to take to the streets. The applicant’s criticisms of the Government’s policy and of the measures taken by the public authorities (in particular during the “trench events”) cannot be seen as an indication that he had received instructions from the PKK/KCK. In the Court’s view, at no stage of the investigative proceedings did the domestic authorities present any concrete evidence capable of suggesting that the applicant had made speeches and participated in meetings on the instructions of the illegal organisation PKK/KCK. Furthermore, the fact that his advocacy of “self-governance” or calls for “struggle” may have coincided with the aims or instructions of an illegal armed organisation does not remove them from the scope of protection of the Convention. The case file does not contain any fact or evidence to suggest that the applicant made the impugned speeches following instructions given to him by the PKK. The Court notes in that respect that, in order to

justify his pre-trial detention, the relevant judicial authorities created confusion between, on the one hand, criticism of the government in the context of public debate and, on the other hand, the pretexts used by illegal armed organisations to justify their violent acts. They characterised criticism levelled legitimately at the authorities in the context of public debate, and in exercise of the right to freedom of political expression, as demonstrating membership of a terrorist organisation. Such an interpretation of the criminal law is not only difficult to reconcile with the domestic legislation recognising public freedoms, but also posed a considerable risk to the Convention system, resulting in any person expressing a view at odds with the views advocated by the government and the official authorities being characterised as a terrorist or a person assisting terrorists. Such a situation is incapable in a pluralist democracy of satisfying an objective observer of the existence of a reasonable suspicion against politicians who are aligned with the political opposition but do not promote the use of violence (see, *mutatis mutandis*, *Sabuncu and Others*, cited above, §§ 178-179).

116. The Court further observes that the competent judicial authorities emphasised the “continuous and intensive” nature of the applicant’s activities. It takes also note that, in alignment with the magistrate’s assessment, the Government asserted that the activities of the applicant were likely to meet the criteria – “continuity and intensity” – defined by the Court of Cassation as necessary for establishing the offense of membership in a terrorist organisation. The Court reiterates its previous finding that, in his speeches, the applicant expressed his political opinions and criticisms of the Government’s policies and of the measures taken by public authorities. Consequently, the magistrate’s vague and general reference to the principles laid down by the Court of Cassation cannot be regarded as sufficient justification for the reasonableness of the suspicion on which the applicant’s pre-trial detention was allegedly based (on this point see also paragraph 88 above).

117. The Court therefore considers that the logic applied in the present case by the authorities responsible for the pre-trial detention, by which they equated the activities of the applicant to the offence with which he was charged, cannot be regarded as an acceptable assessment of the facts.

118. As for the objects (banned books and a lighter bearing the inscription “President Apo”) and documents (see paragraphs 30 and 36 above) seized during the searches carried out at the applicant’s home and at the headquarters of the DBP, on which the judicial authorities also relied to place the applicant in pre-trial detention, the Court considers that they were not such as to give rise to suspicion that the applicant had committed the offense of membership of a terrorist organisation. In the absence of other elements establishing the criminal nature of those facts and elements, the Court fails to see how they could, by themselves, justify the suspicion in question.

119. For the reasons set out above, the Court considers that none of the decisions on the applicant's initial and continued pre-trial detention cited evidence that could have indicated a clear link between his actions – mainly his political speeches – and the offence of membership of a terrorist organisation on suspicion of which he was detained. In the present case, the judicial authorities failed to demonstrate that the evidence available to them met the standard of “reasonable suspicion”, which is required by Article 5 of the Convention, such as to satisfy an objective observer that the applicant could have committed the offence for which he was detained.

120. The Court therefore concludes that there has been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion that the applicant had committed an offence.

(b) Alleged lack of reasoning in the decisions ordering and prolonging the applicant's pre-trial detention (Article 5 § 3 of the Convention)

121. The Court refers to the general principles under Article 5 § 3 of the Convention concerning the justification of detention, as set out in *Buzadji v. the Republic of Moldova* [GC] (no. 23755/07, §§ 87-91, 5 July 2016) and *Merabishvili v. Georgia* ([GC], no. 72508/13, §§ 222-25, 28 November 2017).

122. In the present case the Court has already found that no specific facts or information capable of giving rise to a suspicion justifying the applicant's pre-trial detention were put forward by the national courts at any time during his detention and that there was therefore no reasonable suspicion that he had committed an offence.

123. The Court reiterates that the persistence of a reasonable suspicion that the detainee has committed an offence is a condition *sine qua non* for the validity of his or her continued detention (see *Merabishvili*, cited above, § 222, with further references). In the absence of such suspicion, the Court considers that there has also been a violation of Article 5 § 3 of the Convention.

124. In view of the above, it is not necessary to ascertain whether the competent national authorities gave relevant and sufficient grounds to justify the applicant's pre-trial detention, or whether they displayed “special diligence” in the conduct of the proceedings.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

125. Article 41 of the Convention provides:

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

A. Damage

126. The applicant claimed 250,000.00 Turkish liras (TRY – approximately 7,380 euros (EUR)) in respect of pecuniary damage corresponding to the time he spent in pre-trial detention. He also claimed TRY 500,000.00 (approximately EUR 14,760) in respect of non-pecuniary damage.

127. The Government submitted that the amounts claimed were excessive and incompatible with the Court’s case-law.

128. The Court observes that there is no direct link between the violations found and the pecuniary damage alleged. It therefore rejects this part of the claim.

129. As regards the non-pecuniary damage allegedly suffered by the applicant, the Court notes that he absconded during the proceedings (see paragraph 45 above). The Court accordingly considers that a finding of a violation can be regarded as sufficient just satisfaction in the present case, and thus rejects the applicant’s claim under this head (see *Yüksekdağ Şenoğlu and Others*, cited above, § 649).

B. Costs and expenses

130. The applicant also claimed TRY 72,000.00 (approximately EUR 2,125) for costs and expenses corresponding to (i) twenty-seven hours of legal work undertaken by his lawyers at an hourly rate of TRY 1,000; (ii) TRY 20,000 for his lawyers’ drafting of correspondence with the Court; (iii) TRY 20,000 for the proceedings before the national courts; and (iv) TRY 5,000 for postal and other expenses.

131. The Government contested those claims, arguing that the applicant had failed to submit any “valid” documents demonstrating that the costs and expenses outlined in the previous paragraph had indeed been incurred.

132. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, among many other authorities, *L.B. v. Hungary* [GC], no. 36345/16, § 149, 9 March 2023). In the present case, having regard to the documents in its possession and to its case-law, the Court considers it reasonable to award the applicant the sum of EUR 1,500 in respect of the proceedings before it.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;
3. *Holds*, by six votes to one, that there has been a violation of Article 5 § 1 of the Convention;
4. *Holds*, by six votes to one, that there has been a violation of Article 5 § 3 of the Convention;
5. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
6. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 October 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Arnfinn Bårdsen
President

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

DISSENTING OPINION OF JUDGE YÜKSEL

As I maintain the legal views expressed in my dissenting opinions annexed to the judgments in *Selahattin Demirtaş v. Turkey* (no. 2) ([GC], no. 14305/17, 22 December 2020) and *Yüksekdağ Şenoğlu and Others v. Türkiye*, (nos. 14332/17 and 12 others, 8 November 2022), which were principally relied upon in the present judgment, I respectfully disagree with the finding of a violation of Article 10 and Article 5 §§ 1 and 3 of the Convention in the present case.