



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

FORMER SECOND SECTION

CASE OF KART v. TURKEY

(Application no. 8917/05)

JUDGMENT

STRASBOURG

8 July 2008

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
03/12/2009**

This judgment may be subject to editorial revision.

In the case of Kart v. Turkey,

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

Françoise Tulkens, *President*,

András Baka,

Rıza Türmen,

Mindia Ugrekhelidze,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović, *judges*,

and Sally Dolle, Section Registrar,

Having deliberated in private on 15 January and 17 June 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 8917/05) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Atilla Kart (“the applicant”), on 8 February 2005.

2. The applicant was represented by Ms G. Egeli, a lawyer practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant complained in particular that the refusal to lift his parliamentary immunity had hindered criminal proceedings against him, thereby depriving him of his right of access to a court under Article 6 § 1 of the Convention.

4. In a decision of 15 January 2008, following a hearing on admissibility and the merits (Rule 54 § 3 of the Rules of Court), the Chamber declared the application admissible.

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 January 2008 (Rule 59 § 3).

There appeared before the Court:

– *for the Government*

Mr M. ÖZMEN,	<i>Co-Agent,</i>
Ms E. DEMİR,	
Ms F. NUREL UĞURAL,	
Ms Y. RENDA,	
Ms E. ESİN,	
Ms Z. GÖKŞEN ACAR,	
Mr I. NEZİROĞLU,	
Mr A. DEMİR,	
Mr L. SAVRAN,	<i>Advisers;</i>

– *for the applicant*

Ms G. EGELİ,	<i>Counsel,</i>
Mr A. KART,	<i>Applicant.</i>

The Court heard statements by Ms Egeli and Mr Özmen.

6. On 1 February 2008 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Second Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1954 and lives in Ankara.

8. In the parliamentary elections of 3 November 2002, as a member of the People's Republican Party (CHP), he was elected MP for the Konya constituency to the Grand National Assembly of Turkey (“the National Assembly”).

9. Prior to his election he practised as a lawyer in Konya and, in the course of his professional activities, two sets of criminal proceedings were brought against him, one for insulting a lawyer and the other for insulting a public official.

10. As an MP he enjoyed parliamentary immunity.

11. On 23 December 2002 the Karapınar public prosecutor applied to the General Directorate of the Ministry of Justice to have the applicant's parliamentary immunity lifted for the purposes of the criminal proceedings against him for insulting a lawyer.

12. On 17 January 2003 the General Directorate of the Ministry of Justice transmitted the request to the Prime Minister's Office.

13. On 11 April 2003 the Konya Assize Court ("the Assize Court") adopted a decision suspending the criminal proceedings against the applicant for insulting a public official, by virtue of Article 83 of the Constitution (on parliamentary immunity) and Article 253 § 4 of the Code of Criminal Procedure.

14. On 4 December 2003 the Assize Court transmitted the case file to the Ministry of Justice with a view to having the applicant's parliamentary immunity lifted.

15. On 23 December 2003 the Department of Criminal Affairs of the Ministry of Justice referred the question to the Prime Minister.

16. The Prime Minister's Office transmitted the case file to the National Assembly's joint committee ("the joint committee").

17. On 28 May 2004, after noting that the applicant had requested the lifting of his immunity, the joint committee decided, in view of the nature of the charges, to stay the proceedings against him for insulting a public official until the end of his term of parliamentary office. It transmitted its decision to the plenary Assembly of the National Assembly ("the plenary Assembly").

18. When the plenary Assembly met on 8 December 2004 the joint committee's report was read and appended to the minutes of the meeting.

19. On 15 December 2004 the applicant challenged the joint committee's decision. In his pleadings he made the point that parliamentary immunity had not been introduced to render Members of Parliament unaccountable or immune from punishment, but to allow them to discharge their duties wholly independently and dispassionately. Unlike non-liability, he argued, immunity was by nature a relative and temporary privilege. However, the scope of the immunity, the procedure for lifting it and the shortcomings in its implementation had undermined due respect for the National Assembly. The applicant added that it was unacceptable, in a society governed by the rule of law, that an institution originally meant to help MPs to discharge their duties should be transformed into a personal privilege.

20. On an unspecified date examination of the matter of the lifting of the applicant's parliamentary immunity in the proceedings concerning the insulting of a lawyer was referred to the joint committee under Rules 131 *et seq.* of the Rules of Procedure of the National Assembly. The National Assembly decided to stay the proceedings until the dissolution of the 22nd Parliament.

21. On 31 January 2005 the applicant challenged that decision.

22. His file was then sent before the plenary Assembly.

23. On 7 February 2005 the Secretariat of the Speaker's Office informed the applicant that the files concerning him had been placed on the agenda of the plenary Assembly.

24. At the meeting of the plenary Assembly on 16 February 2005 the applicant once again asked to be allowed to avail himself of his right to be judged in a fair trial and requested that the obstacles to his exercise of that right be removed.

25. The applicant was re-elected as CHP party MP for the Konya constituency in the parliamentary elections of 22 July 2007.

26. On 8 January 2008 the Speaker of the National Assembly sent him a letter informing him of progress with the procedure for lifting his parliamentary immunity.

The relevant passages read as follows:

“(…) during the 22nd Parliament [2002-2007] 299 files concerning immunity were forwarded to the joint committee. In 252 cases the committee decided to stay the proceedings until the next dissolution. In 226 cases that decision was challenged. The files corresponding to those cases were placed on the plenary Assembly's agenda for examination. However, the plenary Assembly did not examine them.

During the 22nd Parliament's term two files concerned your immunity. The first, file no. 3/176, concerned the proceedings brought against you by the Konya-Ereğli public prosecutor for insulting a lawyer; the second, file no. 3/453, concerned the proceedings before the Konya Assize Court for insulting a public official. In both cases the joint committee decided to stay the proceedings until the end of your term of office. Following your appeal, the files were placed on the plenary Assembly's agenda but have not been examined.

In this 23rd Parliament [which started in 2007] 77 files concerning the lifting of immunity remain pending before the joint committee. Two of those files are in your name; they were given the numbers 3/107 and 3/129 following your re-election on 22 July 2007. Since the beginning of this Parliament all the files, including yours, have been sent before three preparatory committees set up by the joint committee. These committees started work on 27 December 2007 (...). They are to announce their decisions within a month of that date.”

27. On 23 and 24 January 2008 the applicant filed two defence memorials against the suspension of the two sets of criminal proceedings against him. In them he repeated his wish to be allowed to exercise his right to a fair trial.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant domestic law and practice

1. Provisions of domestic law

28. Article 83 of the Turkish Constitution, on the subject of parliamentary immunity, reads as follows:

“Members of the Turkish Grand National Assembly shall not be liable for their votes and statements concerning parliamentary functions, for the views they express before the Assembly or, unless the Assembly decides otherwise on the proposal of the Bureau for that sitting, for repeating or revealing these outside the Assembly.

A Member who is alleged to have committed an offence before or after election shall not be arrested, interrogated, detained or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in the act of committing a crime punishable by a heavy penalty and in cases subject to Article 14 of the Constitution if an investigation has been initiated before the election. However, in such situations the competent authority shall notify the Turkish Grand National Assembly immediately and directly.

The execution of a criminal sentence imposed on a member of the Turkish Grand National Assembly either before or after his election shall be suspended until he ceases to be a member; the statute of limitations does not apply during the term of membership.

Investigation and prosecution of a re-elected deputy shall be subject to whether or not the Assembly lifts immunity in the case of the individual involved.

Political party groups in the Turkish Grand National Assembly shall not hold discussions or take decisions regarding parliamentary immunity.”

29. The Rules of Procedure of the Grand National Assembly of Turkey provide, *inter alia*:

“Work of the plenary Assembly

Agenda

Rule 49: the agenda of the plenary Assembly of the Grand National Assembly of Turkey shall comprise:

1. Presentations of the Speaker to the plenary Assembly.
2. Work to be included in the special agenda.
3. Votes.
4. Questions to be put to the vote.
5. Parliamentary reports.
6. General debates and prior discussions on parliamentary research to be done.
7. Oral questions.
8. Draft legislation and other work submitted by the committees.

At the proposal of the recommendation committee and with the agreement of the plenary Assembly, it is possible to set aside a day of the week and allocate a set time for items 6 and 7.

It is also possible to set aside a day of the week for the votes referred to in items 3 and 4.

The order in which items on the agenda are taken is determined according to the date on which they were received by the Speaker's Office.

When the Speaker deems it necessary, the recommendation committee may propose to the plenary Assembly the order in which matters pertaining to item 8 should be examined. Requests concerning that order submitted by the Government, substantive committees and the authors of bills shall be examined by the recommendation committee.

The opinion of the recommendation committee shall be submitted for the approval of the plenary Assembly. (...)

No subject which has not been subjected to the opinion of the recommendation committee, confirmed by the plenary Assembly and announced in advance by the Speaker's Office may be debated in the plenary Assembly. (...)

Immunity

Requests to lift immunity and committee competent to examine them

Rule 131: requests for the lifting of a Member's parliamentary immunity shall be transmitted by the Speaker's Office to the joint committee, composed of members of the constitutional and judicial committees. (...)

The preparatory committee and its hearings

Rule 132: the Chair of the joint committee shall appoint a preparatory committee composed of five sworn members to examine files concerning immunity. (...)

This committee shall examine all the documents and, if necessary, hear the Member concerned; it shall not hear witnesses.

The preparatory committee shall submit its report within one month of being convened.

The joint committee shall finalise the report within one month.

The report of the joint committee

Rule 133: the joint committee shall examine the report and its appendices [submitted by] the preparatory committee.

The joint committee shall decide whether to lift the Member's immunity or to stay the proceedings until the end of the term of parliamentary or ministerial office.

If the joint committee's report recommends a stay of proceedings, it shall be read out to the plenary Assembly. If no objection to the report is received in writing within ten days, the report shall become final.

If the report recommends lifting immunity or if a written objection is received within ten days, the report shall be examined by the plenary Assembly.

If the proceedings have been stayed and that decision is overturned by the plenary Assembly, no action may be taken against the Member concerned until the end of his or her term of parliamentary office, even if the legislature has been renewed.

The rights of the defence

Rule 134: When a request to lift a Member's immunity has been received, the Member concerned may, if he wishes, defend himself or be defended by another Member before the preparatory committee, the joint committee and the plenary Assembly.

The matter shall be decided on the evidence if a Member who has asked to speak in his defence fails to answer the invitation to do so.

In any event, the defence shall have a say.

The mere fact that a Member requests permission to waive his or her immunity shall not suffice.

30. Under Article 107 of the old Criminal Code enshrined in Law no. 765 of 1 March 1936:

“If the opening of proceedings is subject to authorisation, adoption of a decision or the resolution of a problem pending before another body (...), the running of time for the purposes of limitation shall be suspended until such authorisation is obtained, such decision adopted or such problem resolved.”

31. Law no. 5237 on the new Criminal Code was passed on 27 September 2004 and published in the Official Gazette on 12 October 2004. Article 67 of the Code provides:

“(1) When the investigation or prosecution depend on authorisation, adoption of a decision or the necessary resolution of a problem pending before another body, the running of time for the purposes of limitation shall be suspended until such authorisation [is granted], such decision adopted or such problem resolved (...)

(2) Where an offence has been committed, the running of time shall be suspended from the time when:

- (a) the prosecutor questions or takes a statement from the suspect or the accused;
- (b) a decision is taken to remand the suspect or the accused in custody;
- (c) an indictment for the offence is issued;
- (d) a conviction is pronounced, even if it concerns only some of the accused parties.

3) A suspension of limitation causes time to begin to run again. Where there are several grounds for suspension of limitation, the time begins to run again from the date of the last event triggering suspension (...)

32. On 21 March 1994 the Turkish Constitutional Court adopted a series of judgments¹ in cases concerning the lifting of several MPs' parliamentary immunity. Those cases gave the Constitutional Court an opportunity to clarify the scope of parliamentary immunity. The relevant passages of the judgments read as follows:

“a) Meaning of non-liability and parliamentary immunity

All democratic countries have granted the members of their legislative assemblies certain privileges and immunities in order to allow them to perform their legislative tasks properly. Quite evidently, the aim of granting the members of legislative assemblies a different status from that enjoyed by other citizens is not to make them a privileged group who are above the law.

Parliamentary immunity is not an aim; it is a means of enabling MPs to fulfil the nation's wishes in full by perfectly reflecting the wishes of the people within the Assembly.

Even though Article 83 of the Constitution is entitled “Parliamentary Immunity”, it actually establishes two institutions: parliamentary non-liability and parliamentary immunity. The first paragraph of the Article explains that the members of the Grand National Assembly of Turkey are not liable for their votes and statements in the course of the Assembly's work, for the views they express before the Assembly or, unless the Assembly decides otherwise on the proposal of the Speaker, for repeating or revealing these outside the Assembly.

The second paragraph of the Article stipulates that a Member who is alleged to have committed an offence before or after election may not be arrested, interrogated, detained or tried unless the Assembly decides otherwise. The only cases where this provision does not apply are those where a Member is caught in the act of committing a crime punishable by a heavy penalty, provided that proceedings were initiated before the election, and cases subject to Article 14 of the Constitution.

Article 83 of the Constitution does not specify on what grounds immunity may be lifted, and the Rules of Procedure of the Assembly do not cover the subject. That does not mean that the legislature has a free hand in the matter. The rationale for immunity and the way in which it has developed over the years show that Parliament's powers concerning the lifting of immunity are not absolute but limited. Furthermore, the fact that immunity has a place in the Constitution means that the rules and aims of immunity must be defined in the light of the rules and aims of the Constitution. There is no doubt that the intention, when immunity was provided for in Article 83, was to allow those responsible for legislative duties to carry them out in the knowledge that they were safely sheltered, and rightly so, from all worry and pressure. In other words, the aim of parliamentary immunity is to ensure that MPs are not prevented from fulfilling their functions, even temporarily, by arbitrary criminal proceedings. So the powers of the legislature in the matter are limited by the purpose for which immunity was institutionalised in the Constitution. (...)

1. Cases nos. 1994/11 E. 1994/30 K.; 1994/6 E. 1994/25 K.; 1994/18 E. 1994/37 K.; 1994/13 E. 1994/32 K.; 1994/5 E. 1994/24 K.; 1994/20 E. 1994/39 K.

In criminal proceedings an MP whose parliamentary immunity has been lifted is like any other citizen. He enjoys all the guarantees set out in the Constitution and laws of the Republic of Turkey. All the principles that apply to citizens likewise apply to him. He may, for example, be taken into police custody, questioned, detained and, to all intents and purposes, subjected like any other citizen to all the applicable procedural rules. (...)"

2. Application of domestic law

33. On 29 January 2008 the Secretariat of the National Assembly drew up a list of all the instances of lifting of parliamentary immunity since 1991. According to that list, between 1991 and 2008 the National Assembly lifted the immunity of seventeen MPs. In the course of the 22nd Parliament's life 299 files concerning immunity were forwarded to the joint committee. In 252 cases the committee decided to stay the proceedings until the end of the MP's term of office. In 226 cases that decision was challenged. The files corresponding to those cases were placed on the plenary Assembly's agenda but never examined.

Since the beginning of the 23rd Parliament, 78 files concerning the lifting of immunity have been sent before the joint committee. One of them, by request, was forwarded to the Prime Minister's Office; the other 77 remain pending before the joint committee.

B. Relevant Council of Europe and European Union documents

1. Provisions concerning the Parliamentary Assembly of the Council of Europe

34. Article 40 of the Statute of the Council of Europe (5 May 1949) provides:

"a. The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative [Parliamentary] Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions."

35. The General Agreement on Privileges and Immunities of the Council of Europe (2 September 1949) includes the following provisions:

"Article 14: Representatives to the Consultative [Parliamentary] Assembly and their substitutes shall be immune from all official interrogation and from arrest and all legal proceedings in respect of words spoken or votes cast by them in the exercise of their functions."

Article 15: During the sessions of the Consultative [Parliamentary] Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy:

a. on their national territory, the immunities accorded in those countries to members of Parliament;

b. on the territory of all other member States, exemption from arrest and prosecution.

This immunity also applies when they are travelling to and from the place of meeting of the Consultative [Parliamentary] Assembly. It does not, however, apply when Representatives and their substitutes are found committing, attempting to commit, or just having committed an offence, nor in cases where the Assembly has waived the immunity.”

36. The additional Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (6 November 1952) provides:

“Article 3: The provisions of Article 15 of the Agreement shall apply to Representatives to the [Parliamentary] Assembly, and their Substitutes, at any time when they are attending or travelling to and from, meetings of committees and sub committees of the Consultative [Parliamentary] Assembly, whether or not the Assembly is itself in session at such time.

Article 5: Privileges, immunities and facilities are accorded to the representatives of members not for the personal benefit of the individuals concerned, but in order to safeguard the independent exercise of their functions in connection with the Council of Europe. Consequently, a member has not only the right but the duty to waive the immunity of its representative in any case where, in the opinion of the member, the immunity would impede the course of justice and it can be waived without prejudice to the purpose for which the immunity is accorded.”

37. In its Resolution 1490 (2006) on the Interpretation of Article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe, the Parliamentary Assembly of the Council of Europe stated:

“1. The Parliamentary Assembly refers to its Resolution 1325 (2003) and Recommendation 1602 (2003) on immunities of members of the Parliamentary Assembly, which underlined that immunities are granted in order to preserve the integrity of the Assembly and to safeguard the independence of its members in exercising their European office. (...)

8. It resolves to interpret Article 15.a as follows: regardless of the national regime of immunity, Assembly Representatives or Substitutes shall be protected against prosecution and arrest in the exercise of their functions as Assembly members or when travelling on Assembly business, whether this is inside or outside of their national territory. If they are not active within this meaning or not travelling on Assembly business, the national regime shall apply within their country.

9. The Assembly also considers that it is appropriate for the relevant Assembly organs, when examining requests for the waiver of immunity and for the defence of immunity of its members, to question whether the competent national authorities have respected the European Convention on Human Rights as interpreted by the European

Court of Human Rights and other relevant Council of Europe legal instruments and texts which the respective countries have ratified or accepted. The Assembly should express its concern when Council of Europe norms have been obviously disregarded in respect of one of its members. (...)

11. Consequently the Assembly decides to:

11.1. add the following paragraph after paragraph 6 in Rule 64 of the Assembly's Rules of Procedure:

“a. When dealing with requests for the waiver of the Council of Europe immunity, or with requests to defend that immunity of an Assembly member, the competent Assembly bodies shall interpret Article 15.a of the General Agreement on Privileges and Immunities of the Council of Europe as follows. Assembly Representatives or Substitutes are immune from prosecution and arrest in the exercise of their functions as Assembly members or when travelling on Assembly business, whether this is inside or outside of their national territory. If they are not active within this meaning or not travelling on Assembly business, the national regime shall apply within their country.

b. The terms 'in the exercise of their functions' include all official duties discharged by Assembly Representatives and Substitutes in the member states on the basis of a decision by a competent Assembly body and with the consent of the appropriate national authorities.

c. In case of doubt, the Bureau of the Assembly shall decide if Assembly members' activities took place in the exercise of their functions.”

2. Immunity in the European Parliament

38. Article 10 of the Protocol on Privileges and Immunities of the European Communities (PPI) (8 April 1965) provides:

“During the sessions of the Assembly, its members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their Parliament;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to members while they are travelling to and from the place of meeting of the Assembly.

Immunity cannot be claimed when a member is found in the act of committing an offence and shall not prevent the Assembly from exercising its right to waive the immunity of one of its members.”

39. Rule 6 of the Rules of Procedure of the European Parliament, concerning the waiver of parliamentary immunity, states:

“1. In the exercise of its powers in respect of privileges and immunities, Parliament shall seek primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in performance of their duties.

2. Any request addressed to the President by a competent authority of a Member State that the immunity of a Member be waived shall be announced in Parliament and referred to the committee responsible.

3. Any request addressed to the President by a Member or a former Member to defend privileges and immunities shall be announced in Parliament and referred to the committee responsible.

The Member or former Member may be represented by another Member. The request may not be made by another Member without the agreement of the Member concerned.

4. As a matter of urgency, in circumstances where a Member is arrested or has his freedom of movement curtailed in apparent breach of his privileges and immunities, the President, after having consulted the chairman and rapporteur of the committee responsible, may take an initiative to assert the privileges and immunities of the Member concerned. The President shall communicate his initiative to the committee and inform Parliament.”

3. Work of the Group of States against Corruption

40. The evaluation report on Turkey adopted by GRECO (Group of States against Corruption) on 10 March 2006 (27th plenary meeting) states:

“III. EXTENT AND SCOPE OF IMMUNITIES

a. Description of the situation

80. According to the Constitution, the following categories of high-ranking officials benefit from immunity in criminal proceedings:

- the President
- Members of Parliament
- Prime Minister and ministers. (...)

84. Parliamentary Immunity is regulated in Article 83 of the Constitution. Members of Parliament shall not be liable for their votes and statements concerning parliamentary functions, for the views they express before the Assembly, or unless the Assembly decides otherwise on the proposal of the Bureau for that sitting, for repeating or revealing these outside the Assembly (Article 83 (1)).

85. Moreover, a Member of Parliament who is suspected of having committed an offence before or after election, cannot be arrested, interrogated, detained or tried unless the Assembly decides to lift the immunity. This provision does not apply in cases where a Member is caught in the act of committing a crime punishable by a

heavy penalty², nor does it apply if an investigation has been initiated before the parliamentary election. However, in such situations the competent authority shall notify Parliament immediately (Article 83(2)).

86. The execution of a criminal sentence imposed on a Member of Parliament either before or after his/her election is to be suspended until s/he ceases to be a member; the statute of limitations does not apply during the term of membership (Article 83(3)). Investigation and prosecution of a re-elected deputy shall be subject to whether or not the Assembly lifts his/her immunity (Article 83(4)). (...)

88. Political party groups in Parliament shall not hold discussions or take decisions regarding parliamentary immunity (Article 83(5)), nor concerning parliamentary investigations (Article 100(4)). (...)

b. Analysis

93. The GET [GRECO Evaluation Team] was concerned about the extensive list of officials who benefit from different types of immunity in Turkey. It should be noted that parliamentary immunity in the form of “inviolability” is substantially debated and challenged by civil society. The scope of parliamentary immunity has been identified as one of the problem areas in the context of corruption.

94. The circle of high ranking officials who enjoy immunity (inviolability) *stricto sensu* under the Constitution is limited to the President of the Republic, members of Parliament, Prime Minister and ministers who in principle are also members of Parliament. (...)

96. In the view of the GET, the regulation of the lifting of immunity of the members of Parliament (Article 83 of the Constitution and Articles 131-134 of the Regulation of the National Assembly) does not establish adequate conditions for objective considerations within the relevant parliamentary committees. A request by the prosecutor for the lifting of immunity is submitted to the Minister of Justice. After that, the request is transferred to the Office of the Prime Minister. The Office of the Prime Minister finally submits the request to the relevant parliamentary committee, which may delegate to sub-committees further consideration before the parliamentary committee brings the case to the Plenary for decision. No objective criteria have been established as regards the conditions for lifting immunity and the considerations would therefore appear to be political. Moreover, the GET was informed that the procedure may be lengthy, more than a month.

97. Since 2002, 206 requests to lift the immunity of 115 Members of Parliament had been submitted; 50 of these cases had related to abuse of function. There was no case where the Parliamentary immunity had been lifted. It seems that the established system of Parliamentary immunity and its application in practice constitutes an insuperable obstacle to the investigation, prosecution and adjudication of corruption offences. Therefore, the GET recommends to reconsider the system of immunities of members of Parliament in such a way as to establish specific and objective criteria to be applied when deciding on requests for the lifting of immunities and to ensure that

² “heavy penalty”: more than ten years’ imprisonment, pronounced by a court for a serious offence with aggravating circumstances.

decisions concerning immunity are free from political considerations and are based on the merits of the request submitted by the prosecutor. (...) »

C. Comparative law

1. *The scope of immunity*

41. Most European states recognise two categories of immunity for parliamentarians: firstly, the "*non-liability*" or "freedom of speech" of parliamentarians in respect of judicial proceedings over the opinions expressed and votes cast in the discharge of their parliamentary duties; secondly, their "*inviolability*" or "immunity in the strict sense", shielding them from all arrest, detention or prosecution without the consent of the chamber to which they belong.³

42. The precise scope of the immunity varies considerably from one country to another. This results in a wide array of legal approaches to its implementation. In some States there is no such institution (The Netherlands, San-Marino). In others its scope is very limited. For example, in the United Kingdom immunity covers civil matters only and MPs enjoy no particular protection in criminal matters and are treated like any other individual. In Ireland and Norway parliamentary immunity serves to prevent MPs from being arrested during sessions or on their way to or from Parliament. It therefore affords them minimal protection.

43. That said, most of the States Parties to the Convention grant their MPs non-professional immunity from criminal prosecution during their term as MPs (Albania, Germany, Austria – if the act does not clearly fall outside the ambit of their political activities – and Cyprus, Spain, Greece, Hungary, Lithuania, Poland, Russia, Serbia, Switzerland) and/or protection against imprisonment or deprivation of liberty (arrest or detention in all those countries which provide for immunity from prosecution, as well as Belgium, France, Georgia, Portugal and Romania). In certain cases MPs are protected from bodily searches, house searches and interception of their communications (Georgia, Hungary, Italy, Romania, Switzerland). Such proceedings or measures may be executed only with the consent of the assembly to which the MP belongs, Except in Cyprus, where such decisions lie with the courts.

44. In several States the scope of immunity has been restricted, as witnessed by some recent constitutional reforms. In France, for example, since the constitutional reform of 1995, the Chamber's authorisation is no longer necessary for criminal proceedings to be brought, but only for detention, arrest and other judicial supervision measures. A similar change

3. Report of the Venice Commission on the regime of parliamentary immunity (1996), § 11.

came about in Italy when Constitutional Law no. 3 of 29 October 1993 did away with the need for the prior authorisation of Parliament in order for criminal proceedings to be brought against an MP. In Romania, since the constitutional reform of 2003, senators may be placed under judicial investigation or criminal proceedings may be brought against them for acts not connected with votes cast or political opinions expressed in the course of their duties as senators.

45. In Germany's *Bundestag* the practice is generally for a new parliament to lift immunity from prosecution for all offences (with the exception of political defamation) at the start of the session. The aim of this is to protect the reputation of each Member of Parliament, by ensuring that they attract less media attention if proceedings are brought against them. In 2006 the Venice Commission published an opinion⁴ concerning a draft decision of the Albanian Parliament on the limitation of parliamentary immunity and the conditions in which authorisation to initiate investigations into corruption offences and abuse of duty may be given. That draft decision is an illustration of the current trend to limit the scope of immunity in European parliaments, at least where immunity from prosecution is concerned.

46. The duration of parliamentary immunity also varies from one country to another. Some countries extend parliamentary immunity to criminal proceedings brought prior to the MP's election (Germany, Belgium, Spain, Hungary, Italy, Portugal). In other countries, even if parliamentary authorisation is not required in order for proceedings initiated prior to the MP's election to be continued, Parliament may, of its own motion or at the request of the interested party, request the suspension of the proceedings or the waiving of restrictive measures during the MP's term of office (France, Poland, Switzerland).

47. As to the scope of parliamentary immunity *ratione materiae*, that is to say the acts it covers, there is a general tendency in the States Parties to the Convention for cases of *flagrante delicto* to be excluded. In certain constitutions *flagrante delicto* does not suffice to justify the lifting of parliamentary immunity; the crime must be a particularly serious one (Cyprus, Switzerland, Greece, Portugal, Turkey), but even this does not necessarily prevent Parliament from examining the matter and subsequently requesting the suspension of the proceedings or the custodial measures. In Austria, for example, even if the MP is caught in the act, subsequent legal action may require the authorisation of the Chamber concerned. In some countries the law excludes certain types of act from immunity (the Irish Constitution excludes high treason, felony and breach of the peace, for

4. Venice Commission's opinion on the draft decision of the Albanian Parliament on the limitation of parliamentary immunity and the conditions for authorisation to initiate investigation in relation with corruption offences and abuse of duty, 17-18 March 2006, §§ 14 and 17.

example) or the criterion may be the severity of the penalty incurred (the Portuguese Constitution excludes, in certain circumstances, deliberate offences punishable with imprisonment for over three years).

2. Procedure for lifting immunity

48. Parliamentary immunity may be lifted in most countries, except in those which afford very limited protection to MPs (the United Kingdom, Ireland and Norway).

49. The procedure for lifting immunity is generally the same. It is usually provided for in the Chamber's Rules of Procedure. It is set in motion by a proposal or a request for authorisation by the competent public authority (in most cases the Principal State Prosecutor), the injured party or the parliamentarian concerned. The request is transmitted to the Speaker of the Parliament, either directly or in certain cases through another authority (Minister of Justice, Prime Minister), then examined by a special or *ad hoc* parliamentary committee, which gives an opinion after hearing the MP concerned. It is then for the full Chamber to decide, with or without a debate, in private or in public, whether or not to lift immunity. The possibility of appealing against a decision of the Chamber to lift immunity exists in very few countries (Austria, Germany).

3. Possibility for MPs to waive their own immunity

50. The possibility for MPs to waive their own parliamentary immunity is not widespread (Poland, Switzerland) and is sometimes limited to minor offences (summary offences in Hungary) or to specific offences (defamation, in Ireland). Under Poland's Constitution MPs have the right to consent to criminal proceedings. In Switzerland the Federal Assembly Act gives MPs the right to consent in writing to be prosecuted or arrested.

51. In most of the Contracting States no provision is made for MPs to forgo their immunity of their own free will because immunity is a privilege granted not to MPs on an individual basis but to Parliament, to guarantee its smooth operation. In France provisions governing immunity are traditionally a matter of public policy and MPs cannot renounce it. Any act that violates parliamentary immunity is considered null and void. The question of immunity must be raised by a judge. A similar approach has been adopted in the European Parliament, where renunciation of immunity has no legal effect.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

52. The applicant complained that he had been deprived of his right to a fair trial and of the resulting restrictions on the rights of the defence, in that he had been deprived of the opportunity to clear his name. The Court considers that the complaint falls to be examined under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

53. The Government rejected that argument.

A. Applicability of Article 6 § 1 of the Convention

1. The parties' submissions

54. The applicant argued that he would be prosecuted in any event at the end of his term of office and pointed out that no trial had been possible during the 22nd Parliament's five-year term. As he had been re-elected, it might well be nine or ten years, until the end of the 23rd Parliament's term of office, before he could be tried if his immunity was not lifted. He submitted that having a criminal accusation hanging over him for such a long time without being given a fair trial amounted to a violation of Article 6 § 1 of the Convention.

55. The Government maintained that the facts in dispute had no bearing on the applicant's civil rights; they concerned criminal proceedings against him. As those proceedings had been stayed, there could be no question of any violation of the applicant's right to a fair trial. That being so, at this stage in the domestic proceedings the guarantees of Article 6 of the Convention did not apply. In so far as the criminal proceedings in question would resume their course at the end of the applicant's term of office, and he had not yet been convicted of any offence, the Government contended that the facts complained of did not constitute a restriction of the applicant's rights under Article 6.

2. The Court's assessment

56. The Court points out first of all that while it has had occasion in the past to examine the question of the immunity accorded to Members of Parliament and the effects thereof on access to a court (see, amongst other authorities, *A. v. the United Kingdom*, no. 35373/97, ECHR 2002-X; *Cordova v. Italy (no. 1)*, no. 40877/98, ECHR 2003-I; *Cordova v. Italy*

(no. 2), no. 45649/99, ECHR 2003-I; and *Tsalkitzis v. Greece*, no. 11801/04, 16 November 2006), this is the first time the party complaining of the effects of immunity on the right of access to a court is the beneficiary of the parliamentary immunity.

57. Although the Court considers that this is a new question of law on which there are few references in the case-law, it nevertheless considers it appropriate to reiterate that the right of access to a court constitutes an element which is inherent in the right to a fair hearing under Article 6 § 1 of the Convention, and intimately linked with the principle of the rule of law. And the rule of law is inconceivable without access to the courts (see, amongst other authorities, *Golder v. the United Kingdom*, judgment of 21 February 1975, series A no. 18, p. 18, §§ 35-36).

58. The Court also recalls having had occasion to point out that “the right of every accused person to a hearing before a tribunal is not absolute, insofar as the Convention does not prevent the public prosecutor's office from deciding not to prosecute (filing the case) or the judge from terminating the proceedings without a ruling (nonsuit)” (see *Deweert v. Belgium*, Commission Report of 5 October 1978, Series B, vol. 33, p. 28, § 58, which is referred to in the judgment of 27 February 1980, series A no. 35, § 49). The principle thus established was subsequently taken up and interpreted to mean that “there is no right under Article 6 of the Convention to a particular outcome of criminal proceedings or, therefore, to a formal conviction or acquittal following the laying of criminal charges”. That being so, the fact that criminal proceedings do not result in such an express decision does not constitute a violation of the presumption of innocence (see *Withey v. the United Kingdom* (dec.), no. 59493/00, ECHR 2003-X).

59. It is worth noting, however, that in respect of access to a tribunal, this principle prevails only in cases where the proceedings may be considered to have been terminated or the criminal case closed, so that it can no longer be regarded as having any important repercussions on the applicant's situation (see, amongst other authorities, *X. v. the United Kingdom*, no. 8233/78, Commission decision of 3 October 1979, Decisions and Reports (DR) 17, p. 146, and *Stoianova and Nedelcu v. Romania*, nos. 77517/01 and 77722/01, §§ 20-21, ECHR 2005-VIII).

60. In the light of the information in the case file and that submitted by the parties, it can only be said that the instant case corresponds to none of the above situations. The Court observes that by virtue of the provisions of domestic law, the effect of the applicant's parliamentary immunity has merely been to stay the proceedings against him, and by no means to terminate the criminal proceedings as such. In the instant case the statute of limitations in respect of criminal offences ceases to apply (paragraphs 28 and 30 above). It follows that the criminal proceedings against the applicant have simply been deferred until the end of his term of office, or until the Assembly of which he is a member authorises them.

61. The Court notes in this respect that the applicant's status as a Member of Parliament is only a temporary procedural obstacle to legal action, limited to the duration of his term of parliamentary office. He will not escape the application of the law, and the proceedings against him could well be resumed when he ceases to be an MP, a prospect which, in the Court's view, is not a mere theoretical possibility (contrast *Withey*, cited above).

62. In the cases of *A. v. the United Kingdom*, *Cordova (no. 1)*, *Cordova (no. 2)* and *Tsalkitzis*, cited above, the Court affirmed the principle of reviewing the compatibility of immunity from prosecution with the right to a court enshrined in Article 6 § 1 of the Convention. To accept this principle the Court had first of all to accept the applicability of Article 6 in the matter and, secondly, to place immunity from jurisdiction in the perspective of the requirements of the right to a fair trial. In accepting that Article 6 did apply, the Court pronounced itself in favour of the enforceability of immunity in the courts, paving the way for review on the merits of the compatibility of immunity from jurisdiction with the right of access to a court.

63. The Court sees no reason to depart from that approach in this case, which concerns “a criminal charge” against the applicant, who has no possibility of access to a criminal court. Consequently, the Court considers that the procedure at issue falls within the scope of Article 6 § 1 of the Convention.

B. Merits

1. The parties' submissions

64. The applicant maintained that the lifting of his immunity had been obstructed by the majority group in the National Assembly solely because of “personal and political apprehensions”. Not a single request for the lifting of immunity had been examined during the 22nd Parliament. All requests for them to be considered or placed on the agenda of the National Assembly had been rejected. As far as the applicant was concerned, it mattered little how serious the charges levelled against him were; they were likely to discredit him in the eyes of public opinion, which made no distinctions in that respect.

65. The applicant further complained that Rules 133 and 134 of the Parliament's Rules of Procedure had been disregarded, in that their use was not meant to be conditioned by the political situation, as it had been here.

66. The Government submitted that the parliamentary immunity provided for in Article 83 of the Constitution was meant to enable the National Assembly to discharge its legislative duties in a fully autonomous and independent manner. It was also intended to protect the Members of Parliament, particularly the opposition, from political harassment, and avoid

any obstruction of their work. Immunity also served to guarantee the separation of powers, a pluralist democracy and free debate in the Parliament. It therefore pursued a legitimate aim in the general interest.

67. Pointing out that parliamentary immunity, which existed in most of the Contracting States, was not a privilege accorded to Members of Parliament and was limited in time, the Government submitted that the applicant's parliamentary immunity was limited to the duration of his term of office or could be lifted by the National Assembly. That being so, the applicant would certainly be entitled to a fair trial. In that connection the Government emphasised the important difference between the suspension and the termination of criminal proceedings.

68. The Government further submitted that the right of access to a court was not absolute but subject to implicit limitations. As immunity was granted in order to allow MPs to discharge their duties fully independently, the impugned immunity was to be viewed as a restriction proportionate to the legitimate aim pursued. The courts were accordingly obliged to take parliamentary immunity into account.

69. Lastly, the applicant's re-election was proof, if any was needed, that his reputation and political career had not been affected in the slightest by the impugned suspension of the criminal proceedings. That being so, the complaint concerning an alleged violation of the presumption of innocence appeared devoid of all substance.

2. The Court's assessment

(a) Preliminary observations

70. First of all, the Court observes that most if not all the States Parties to the Convention confer some form of immunity on members of their legislative bodies, the specific details varying from one country to another. Privileges and immunities are also granted to members of the Parliamentary Assembly of the Council of Europe and the European Parliament (see paragraphs 34-38 above). So, the principle of parliamentary immunity is recognised in the vast majority of Europe's modern-day constitutions. In spite of this general historical and geographical consensus, parliamentary accountability has never ceased to be a subject of debate. While the principle of parliamentary non-liability is generally accepted, the same cannot be said of parliamentary "inviolability", which becomes a matter of controversy when it affords protection not to the elected representative but to the individual, for offences unrelated to his or her parliamentary activities.

71. In that connection the Court observes that most national legal systems protect MPs through two specific types of exemption which have come to be distinguished as follows; one – a substantive form of protection – is non-liability; the other – procedural – form is "inviolability". While

non-liability protects MPs from legal proceedings for things they do in the performance of their duties and for the votes they cast and the opinions they express in that context, “inviolability” affords immunity from prosecution for acts unrelated to their parliamentary duties. Unlike non-liability, “inviolability” does not “expunge” the offence but delays the proceedings against the MP and prevents him from being placed in detention or prosecuted without the authorisation of the chamber he belongs to.

72. While the Turkish constitutional system provides for both the non-liability and the “inviolability” of MPs, the applicant in the instant case has complained only of the consequences of his parliamentary “inviolability”. The Court makes it clear at the outset that its role is not to rule in an abstract manner on the compatibility of the system of parliamentary immunity with the Convention, but to ascertain *in concreto* whether the application in this case of the provisions of the Constitution concerning parliamentary immunity violated Article 6 of the Convention.

(b) General principles

73. The right of access to a court enshrined in Article 6 § 1 of the Convention is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation. It is not the Court's task to take the place of the relevant domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, *mutatis mutandis*, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2955, § 31, and *Saez Maeso v. Spain*, no. 77837/01, § 22, 9 November 2004).

74. However, the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, such a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I, and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V). The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court.

75. The Court observes in this connection that when a State affords immunity to its Members of Parliament, the protection of fundamental

rights may be affected. That does not mean, however, that parliamentary immunity can be regarded in principle as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the Contracting States as part of the doctrine of parliamentary immunity (see *A. v. the United Kingdom*, cited above, § 83, and, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 56, ECHR 2001-XI). The Court has already acknowledged that it is a long-standing practice for States generally to confer varying degrees of immunity on parliamentarians, with the aim of allowing free speech for representatives of the people and preventing partisan complaints from interfering with parliamentary functions (see *A. v. the United Kingdom*, cited above, §§ 75-77; *Cordova (nos. 1 and 2)*, cited above, §§ 55 and 56 respectively; and *De Jorio v. Italy*, no. 73936/01, § 49, 3 June 2004). That being so, the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued (see *A. v. the United Kingdom*, cited above, § 88).

76. It would be equally incompatible with the purpose and object of the Convention, however, if the Contracting States, by adopting one of the systems of parliamentary immunity commonly used, were thereby absolved from all responsibility under the Convention in relation to parliamentary activity. It should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see *Aït-Mouhoub v. France*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3227, § 52). It would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1, if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons (see *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, p. 49, § 65).

77. Thus, where parliamentary immunity hinders the exercise of the right of access to justice, in determining whether or not a particular measure was proportionate the Court examines whether the impugned acts were connected with the exercise of parliamentary functions in their strict sense (see *Cordova (no. 1)*, cited above, § 62, and *De Jorio*, cited above, § 53). The Court reiterates here that the lack of any clear connection with parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. This is particularly so where the restrictions on the right

of access stem from the resolution of a political body (see *Tsalkitzis*, cited above, § 49). Moreover, the broader an immunity, the more compelling must be its justification (see *A. v. the United Kingdom*, cited above, § 78).

78. The Court considers that the principles and criteria for reviewing the compatibility of immunity from jurisdiction with the right to a court thus embodied in its case-law must be brought to bear on the instant case.

(c) Application of the above principles in the instant case

79. By virtue of Article 83 of the Turkish Constitution, no MP suspected of having committed an offence before or after election may be arrested, questioned, detained or committed for trial unless the National Assembly decides to lift his or her immunity. The Court notes that the Turkish Constitutional Court has had occasion to point out that parliamentary immunity *per se*, in the sense of “inviolability”, is not a personal privilege for the benefit of the MP but rather a privilege linked to his or her status. The Constitutional Court has also ruled on the legitimacy of the parliamentary “inviolability” instituted under Article 83 of the Constitution, stating that the intention of immunity was to allow those responsible for legislative duties to carry them out in the knowledge that they were “safely sheltered (...) from all worry and pressure” and to make sure that MPs “are not prevented, even temporarily, from fulfilling their functions by arbitrary criminal proceedings” (paragraph 32 above).

80. In these conditions the Court can but recognise the legitimacy, relied on by the Government, of the aim pursued by this exception to the ordinary law, which is primarily to allow MPs to carry out their duties freely and without disturbance. There is no doubt whatsoever in the Court's mind – as it has had occasion to say before (see *A. v. the United Kingdom*, cited above §§ 75-77; *Cordova (nos. 1 and 2)*, cited above, §§ 55 and 56 respectively; and *De Jorio*, cited above, § 49) – that parliamentary immunity is an institution which pursues a legitimate aim, namely to guarantee the full independence of Members of Parliament and of Parliament itself by preventing any possibility of politically motivated proceedings and, beyond that, protecting the constitutional order and maintaining the separation of powers between the legislature and the judiciary.

81. The Court accepts that bringing proceedings against MPs may affect the very functioning of the Assembly of which they are members and disrupt Parliament's work. It is of little consequence, then, with regard to the legitimate aim pursued, what the nature of the act which prompts the proceedings is –in this case something not related to the MP's duties but quite independent of them.

82. That being so, the Court can but subscribe to the Turkish Constitutional Court's view that the exemptions that characterise parliamentary “inviolability” are legitimate only in so far as they relate to the status of the Member of Parliament and constitute not a personal

privilege but a principle of political law, aimed at protecting not the individual but the office he or she holds (see paragraph 32 above). It is only for that reason that it is relatively unimportant whether the impugned acts occurred before or after the Member's election to Parliament.

83. Having established the legitimacy of parliamentary “inviolability”, the Court cannot arrive at any conclusion concerning its compatibility with the Convention without considering the circumstances of the case. It must first assess the proportionality of the measure in relation to the applicant's rights under Article 6 of the Convention. This means taking into account the fair balance to be struck between the general interest which lies in the proper functioning of Parliament as an institution and the applicant's personal interest. In determining that proportionality the Court must pay special attention to the scope of “inviolability” in the present case, bearing in mind that the lack of an obvious link with parliamentary activities calls for a narrow interpretation of the notion of proportionality (see *Cordova (no. 1)*, cited above, § 63). In particular it is for the Court to examine whether or not the provisions of the Constitution, in the circumstances of the instant case, led to the applicant being denied justice.

84. While the Court is required to rule on the limits of parliamentary immunity vis-à-vis the rights enshrined in the Convention, there is no doubt in its mind that the granting of immunity falls within the scope of the State's margin of appreciation and that it is not the Court's role to substitute its own assessment for that of the State in order to determine whether or not immunity is necessary or appropriate in a particular case. Although the Court cannot be used as a means of verifying the relevance of the choices made by the national parliaments in the matter, it nonetheless remains that parliamentary practice must be in conformity with the imperatives of the rule of law as embodied in the Convention. The guarantees in Article 6 are aimed at preserving the rule of law essential to an effective political democracy. In order to verify compliance with the rule of law in the instant case, the Court must therefore carry out a full examination of the institutional approach to immunity in Turkish law and the conditions of its application.

85. The Court notes first of all that the “inviolability” conferred on Turkish MPs appears in many respects to be broader than that enjoyed by members of the legislative bodies of certain other Contracting States, the Parliamentary Assembly of the Council of Europe or the European Parliament. In particular, it applies to criminal and civil law matters, and to offences committed prior to the Member's election to Parliament as well as during his or her term in Parliament; and it protects MPs from being questioned, taken into custody or prosecuted. That said, the Court has already had occasion to affirm that the application of a rule of absolute parliamentary immunity cannot in itself be said to exceed the margin of

appreciation allowed to States in limiting an individual's right of access to a court (see *A. v. the United Kingdom*, cited above, § 87).

86. The Court further notes that under Turkish law “inviolability” is a matter of public policy, which means that the judicial authorities have an obligation to take parliamentary immunity into account of their own motion and that acts which do not comply with that rule are null and void *ipso jure*. Moreover, as parliamentary immunity is not a personal right of the MP, the applicant cannot waive it as of right. He does, however, have the possibility of asking the Assembly of which he is a member to lift it, as do the judicial authorities, in which case the Assembly may lift the immunity.

87. The Court notes in this connection that the procedure for lifting parliamentary immunity is set out in Article 83 of the Constitution and Rules 131 to 134 of the Rules of Procedure of the National Assembly. According to those provisions, when the joint committee receives a request for the lifting of immunity it may decide, after considering the opinion of a preparatory committee, either to propose lifting the immunity or to have the criminal proceedings against the MP concerned suspended. When the joint committee opts to have the proceedings suspended, an appeal is possible before the plenary Assembly, which then has to decide in its turn whether or not to lift immunity.

88. In the light of the above-mentioned provisions, the Court notes that no objective criteria have been established as regards the conditions for lifting immunity. The Turkish Constitutional Court has said that neither Article 83 of the Constitution nor the Rules of Procedure of the National Assembly specify on what grounds parliamentary immunity may be lifted (see paragraph 32 above). The criteria thus appear to be primarily political (see paragraph 40 above). While it is not for the Court to assess *in abstracto* the arrangements for implementing the procedure for lifting parliamentary immunity, there is no denying that the information in the case-file shows that the joint committee does not appear to have given any reasons for its decision to suspend the criminal proceedings in question. It appears to have referred only to the nature of the alleged offences and not to have taken into account or considered the possible effects of criminal proceedings on the applicant's performance of his parliamentary duties.

89. In the Court's view the absence of any arguments showing the reasoning of the competent committee, combined with the lack of clearly defined objective criteria as regards the conditions for lifting immunity, was capable of depriving all the persons concerned by the decision – in this case both the applicant and the victims of his alleged offences – of the means of defending their rights. The applicant had no real possibility of evaluating the manner in which the committee concerned had played its role, or the basis and criteria on the strength of which the plenary Assembly, the body responsible in the last resort for deciding on the lifting of parliamentary immunity, would adopt a decision.

90. The Court further observes that the procedure in question comprises no requirement for prompt action and is subject to no time-limit. The applicant's case was thus able to remain on the National Assembly's agenda for over two years during the 22nd Parliament without any decision being taken, in spite of the applicant's requests for his immunity to be lifted (see paragraphs 19-23 above). Although the Government stated in their submissions on the merits that under Article 49 of its Rules of Procedure the plenary Assembly was free to give priority to an important issue and to decide in what order it examined the items on its agenda, it clearly failed to do so in the instant case, without offering the applicant any justification or explanation.

91. The Court also considers that the suspension of all criminal proceedings against an MP for the duration of his term of office necessarily means that a long time will elapse between the commission of the alleged offences and the opening of criminal proceedings, rendering such proceedings uncertain, particularly where evidence is concerned. In another context the Court has already found that the time taken to hear an appeal might cast doubt on its effectiveness (see *Tsalkitzis*, cited above, § 50, and, *mutatis mutandis*, *Ganci v. Italy*, no. 41576/98, § 30, ECHR 2003-XI). In the instant case the Court has no doubt in its mind that the applicant directly suffered the consequences of such a delay, which was prejudicial not only to the proper administration of justice but also to the applicant himself, who was under suspicion the whole time.

92. In that connection, the Court cannot ignore the fact that parliamentary "inviolability" in Turkey is a controversial subject and meets with strong popular opposition. Furthermore, the scope of the immunity has been identified as one of the main problem areas in the context of corruption (see the conclusion of the GRECO report in paragraph 40 above). Similarly, in the light of the status report on cases concerning parliamentary immunity drawn up by the Secretariat of the National Assembly, the Court cannot ignore the erosion of the procedure for lifting parliamentary immunity, in so far as the plenary Assembly clearly seems to have refrained from exercising its prerogatives in the matter (see paragraph 33 above).

93. In such a context the Court understands the applicant's concerns about the repercussions and the risks of discredit that such a long procedure might entail if the lack of a decision concerning the lifting of his parliamentary immunity were to be perceived as a tactic to delay justice. It can only regret that his clear wish to waive immunity was disregarded. In the eyes of the Court the opacity of the decision-making process, devoid as it is of objective criteria defining the conditions for lifting immunity, the inertia of the plenary Assembly, which failed to settle the applicant's case during the 22nd Parliament's term, and the delays in the procedure, which is still pending before the national authorities, are all impediments which

prevented any ruling being given on the merits of the applicant's case by the criminal courts.

94. In the circumstances of the instant case it cannot be said that the decision-making process in question and the manner of its implementation were compatible with the requirements of a proper administration of justice; instead, they undermined the effectiveness of the applicant's right of access to a court to an extent that cannot be considered proportionate to the legitimate aim pursued.

95. In conclusion, the Court finds that the applicant was deprived of his right of access to a court, that the deprivation was disproportionate and that it impaired the very essence of that right. There has therefore been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

96. 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.”

97. The applicant has submitted no claim for just satisfaction. It is therefore unnecessary to rule on this point.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention.

Done in French, and notified in writing on 8 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dolle
Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Baka, Ugrekhelidze and Popović is annexed to this judgment.

F.T.
S.D.

JOINT DISSENTING OPINION OF JUDGES
BAKA, UGREKHELIDZE AND POPOVIĆ

We regret that we are unable to subscribe to the majority's opinion that there has been a violation of Article 6 § 1 of the Convention in this case.

Like the majority, we recognise the legitimacy, relied on by the Government, of the purpose of the parliamentary immunity system, which is aimed mainly at ensuring that Members of Parliament are able to discharge their duties freely and dispassionately. As the judgment points out and as the Court has already had occasion to affirm (*A. v. the United Kingdom*, cited above, §§ 75-77; *Cordova (nos. 1 and 2)*, cited above, §§ 55 and 56 respectively; *De Jorio*, cited above, § 49), there is no doubt that parliamentary immunity is an institution which pursues a legitimate aim, namely to guarantee the independence of Members of Parliament and of Parliament itself by preventing any possibility of *fumus persecutionis* (politically motivated proceedings) and, beyond that, protecting the constitutional order and maintaining the separation of powers between the legislature and the judiciary.

However, we cannot subscribe to the conclusions of the majority concerning the disproportionate nature of the impugned measure in relation to the applicant's rights under Article 6 of the Convention.

We realise that the “inviolability” conferred on Turkish MPs appears in many respects to be broader than that enjoyed by members of the legislative bodies of certain other Contracting States, the Parliamentary Assembly of the Council of Europe or the European Parliament. In particular, it applies to criminal and civil law matters, and to offences committed prior to the Member's election to Parliament as well as during his or her term of office; and it protects MPs from being questioned, taken into custody or prosecuted. That said, the Court has already had occasion to affirm that the application of a rule of absolute parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to a court (see *A. v. the United Kingdom*, cited above, § 87).

Here, however, we consider that the impact of parliamentary “inviolability” is attenuated in so far as, although the applicant cannot waive it as of right, he does have the possibility of asking the Assembly of which he is a member to lift it, as do the judicial authorities, in which case the Assembly has the power to lift the immunity.

Moreover, if we consider that the Court is to rule on the limits of parliamentary immunity vis-à-vis the rights enshrined in the Convention, there is no doubt in our minds that the granting of immunity falls within the scope of the State's margin of appreciation and that it is not the Court's role to substitute its own assessment for that of the State in order to determine whether or not immunity is necessary or appropriate in a particular case.

The Parliament's internal decisions, including decisions whether or not to lift immunity, what items to put on its agenda and what questions to debate, are undeniably matters for Parliament alone to decide. The Court cannot be used as a means of verifying the relevance of the choices made by the national parliaments in such matters, provided that those choices made are in conformity with the imperatives of the rule of law as embodied in the Convention.

We are not unaware that in Turkey parliamentary “inviolability” is a controversial subject and meets with strong popular opposition, or that the scope of the immunity has been identified as one of the main problem areas in the context of corruption (see the conclusion of the GRECO report in paragraph 40 of the judgment). We would like to point out, however, that it is not for the Court to assess *in abstracto* the arrangements for implementing the procedure for lifting parliamentary immunity, but rather to determine *in concreto* whether those arrangements violated Article 6 of the Convention.

In the instant case the procedure for lifting parliamentary immunity is defined and regulated by Article 83 of the Constitution and Rules 131 to 134 of the Rules of Procedure of the National Assembly. These provisions clearly show that the procedure concerned guarantees the applicant's right to appeal as well as the rights of the defence (see paragraph 29 of the judgment). Furthermore, we remark that the purpose of the immunity in question is simply to suspend any proceedings against an MP until the end of his term of office, in the interest of the Assembly of which he is a member. The proceedings are therefore merely deferred, to ensure that MPs are not abusively prevented from discharging their duties.

We further note in this connection that the immunity system at issue comprises special rules concerning the time-bar on criminal offences. As time ceases to run for the purposes of limitation during the Member's parliamentary term, the criminal proceedings against the applicant can be resumed when he ceases to be an MP. The immunity at issue here is therefore a mere procedural obstacle to the criminal proceedings, which cannot be considered to have deprived the applicant of the possibility of having his case determined on the merits. In this respect the immunity enjoyed by the applicant is only partial.

On the basis of the foregoing, we consider that the application of a rule conferring immunity of the type associated with the applicant's status as an MP cannot be considered to overstep the margin of appreciation the States enjoy in limiting their citizens' right of access to a court.

It is indeed regrettable that the question of the lifting of the applicant's parliamentary immunity should have remained pending before the plenary Assembly of the 22nd Parliament for over two years without ever being addressed; but that alone is not enough to change our conclusion concerning the proportionality of the parliamentary immunity at issue, as the creation of

exceptions to such immunity, the application of which would be contingent, would necessarily seriously undermine the legitimate aims pursued.

We therefore consider that there has been no violation of Article 6 § 1 of the Convention.