



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

1959 · 50 · 2009

GRAND CHAMBER

CASE OF KART v. TURKEY

(Application no. 8917/05)

JUDGMENT

STRASBOURG

3 December 2009

In the case of Kart v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Nicolas Bratza,
Peer Lorenzen,
Josep Casadevall,
Giovanni Bonello,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Lech Garlicki,
Alvina Gyulumyan,
Khanlar Hajiyeu,
Egbert Myjer,
Mark Villiger,
Giorgio Malinverni,
András Sajó,
Nona Tsotsoria,
Ann Power,
Işıl Karakaş, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 4 March and 4 November 2009,

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

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 15 January 2008, following a hearing on the admissibility and merits (Rule 54 § 3), it was declared partly admissible by a Chamber of that Section, composed of Françoise Tulkens, András Baka, Rıza Türmen, Mindia Ugrehelidze, Vladimiro Zagrebelsky, Danutė Jočienė and Dragoljub Popović, judges, and Sally Dollé, Section

Registrar. On 8 July 2008 the same Chamber delivered a judgment in which it held by four votes to three that there had been a violation of Article 6 § 1 of the Convention.

4. On 1 December 2008, following a request by the Turkish Government (“the Government”) dated 6 October 2008, a panel of the Grand Chamber decided to refer the case to the Grand Chamber in accordance with Article 43 of the Convention.

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

6. The applicant and the Government each filed observations on the merits of the case.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 4 March 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr M. ÖZMEN,

Co-Agent,

Mr İ. NEZİROĞLU,

Ms E. DEMİR,

Ms N. UĞURAL,

Ms N. ÇETİN,

Advisers;

(b) *for the applicant*

Ms G. EGELİ,

Counsel,

Mr A. KART,

Applicant.

The Court heard addresses by Mr Kart and Mr Özmen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

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

10. 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.

11. Once elected as an MP he enjoyed parliamentary immunity.

12. 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.

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

14. 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 National Assembly's joint committee ("the joint committee") under Rules 131 et seq. of the Rules of Procedure of the National Assembly. The joint committee decided to stay the proceedings until the dissolution of the 22nd Parliament.

15. The applicant challenged that decision. His file was then sent before the plenary Assembly of the National Assembly ("the plenary Assembly").

16. 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 and Article 253 § 4 of the Code of Criminal Procedure.

17. 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.

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

19. The Prime Minister's Office transmitted the case file to the joint committee.

20. 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.

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

22. 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 MPs unaccountable or immune from punishment, but to allow them to discharge their duties in all freedom and independence and without fear. Unlike non-liability, he argued, inviolability was by nature a relative and temporary privilege. However, the scope of the inviolability, 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 arrangement originally intended to help MPs to discharge their duties should be transformed into a personal privilege.

23. On 7 February 2005 the Secretariat of the Speaker's Office informed the applicant that the two files concerning the lifting of his immunity 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 a 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 procedures for lifting his parliamentary immunity.

The relevant passages read as follows:

"... during the 22nd Parliament [2002-07] 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 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.

28. The reports of the joint committee recommending a stay of the criminal proceedings against the applicant until the end of his term as an MP were placed on the National Assembly's agenda of 15 January 2009, together with the applicant's objections to those findings.

29. The matter is still pending before the Assembly.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant domestic law and practice

1. Provisions of domestic law

30. 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 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 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, questioned, 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 office.

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.”

31. Article 85 of the Constitution reads as follows:

“If the parliamentary immunity of a deputy has been waived ..., the deputy in question or another deputy may, within seven days from the day of the decision of the Grand National Assembly of Turkey, appeal to the Constitutional Court for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the rules or procedure of the Turkish Grand National Assembly. The Constitutional Court shall decide on the appeal within fifteen days.”

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

“Immunity

Requests to lift immunity and the 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 lifting immunity or if an objection is received within the conditions set out in paragraph 3, the report shall be examined by the plenary Assembly.

If the proceedings have been stayed and that decision is not 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."

33. 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, questioned, 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, even temporarily, from fulfilling their functions 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.

Provision has been made for decisions of the Grand National Assembly of Turkey concerning the lifting of immunity to be scrutinised by the Constitutional Court with regard to their conformity not only with the Constitution but also with the Rules of Procedure ...

When such decisions of the Grand National Assembly of Turkey are scrutinised, attention must be paid to the seriousness of the accusation and whether or not it is politically motivated. In addition, the decision must be in conformity with the rationale behind immunity as a constitutional institution.

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. ...”

34. Under Article 107 of the old Criminal Code enshrined in Law no. 765 of 1 March 1926:

“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.”

35. Law no. 5237 on the new Criminal Code was passed on 26 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 is more than one ground for suspension of limitation, time begins to run again from the date of the last event triggering suspension ...”

36. Under Article 253 § 4 of the old Code of Criminal Procedure enshrined in Law no. 1412 of 4 April 1929, when the criminal proceedings, and therefore the trial, are subject to a condition precedent and it is

established that the condition has not been met, a decision to stay the trial is adopted until the condition has been met.

On 4 April 2004 a new Code of Criminal Procedure was introduced.

2. Application of domestic law

37. On 29 January 2008 the Secretariat of the National Assembly took stock of the number of cases where parliamentary immunity had been lifted since 1991. It found that the National Assembly had lifted the parliamentary immunity of seventeen MPs in the course of the 19th, 20th and 21st Parliaments.

According to the lists and information provided by the parties, during the 22nd Parliament 299 files concerning the lifting of immunity were pending before parliamentary bodies, but no decisions to lift immunity were taken. Since the start of the 23rd Parliament, 315 files concerning the lifting of immunity have apparently been pending before the National Assembly.

B. Relevant European law and practice

1. Relevant Council of Europe and European Union documents

(a) The Parliamentary Assembly of the Council of Europe

38. 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.”

39. 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 questioning 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.”

40. The 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.”

41. 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.’”

(b) Immunity in the European Parliament

42. Article 10 of the Protocol on Privileges and Immunities of the European Communities (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.”

43. 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.”

2. *Comparative law*

(a) **The scope of parliamentary inviolability**

44. Parliamentary immunity is not a homogeneous notion. Most European states recognise two categories of immunity for parliamentarians: firstly, the “non-liability” of parliamentarians in respect of judicial proceedings for 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 for offences unrelated to their parliamentary duties without the consent of the Chamber to which they belong. This comparative law study focuses on the latter aspect of parliamentary immunity (see the Venice Commission’s Report on the regime of parliamentary immunity, 1996).

45. The precise scope of the inviolability varies considerably from one country to another. The very nature of this aspect of immunity 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 inviolability 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 inviolability serves to prevent MPs from being arrested during sessions or on their way to or from Parliament. It therefore affords them limited protection.

46. That said, most of the States Parties to the Convention grant their MPs immunity from criminal prosecution during their term as MPs that goes beyond the exercise of parliamentary functions (Albania, Austria and Germany – if the act does not clearly fall outside the ambit of their political activities – and Cyprus, Greece, Hungary, Lithuania, Poland, Russia, Serbia, Spain and 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 body searches, house searches and interception of their communications (Georgia, Hungary, Italy, Romania and 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.

47. In several States the scope of inviolability 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 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 brought against them for acts not connected with votes cast or political opinions expressed in the course of their duties as senators.

48. In Germany's *Bundestag* the practice is generally for a new parliament to lift immunity from prosecution for all offences (with the exception of defamation of a political character) at the start of the parliamentary term. The aim of this is to protect the reputation of each MP, by ensuring that they attract less media attention if proceedings are brought against them.

49. As to the scope of parliamentary inviolability *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 such cases the prior authorisation of the Chamber concerned is not required, but even this does not necessarily prevent Parliament from examining the matter and subsequently requesting the suspension of the proceedings or the custodial

measures (Georgia and Romania, for example). In some countries the law excludes certain types of act from inviolability, 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).

50. The duration of parliamentary inviolability also varies from one country to another. Some countries extend parliamentary immunity to criminal proceedings brought prior to the MP's election (Belgium, Germany, Hungary, Italy, Portugal and Spain). 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 and Switzerland).

(b) Procedure for lifting immunity

51. Parliamentary immunity may be lifted in most countries. 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 (the Minister of Justice, the 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 and Germany).

(c) Possibility for MPs to waive their own immunity

52. The possibility for MPs to waive their own parliamentary immunity is not widespread (Poland and Switzerland) and is sometimes limited to minor offences (summary offences in Hungary) or to specific offences (defamation in Ireland and the United Kingdom). 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.

53. 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.

(d) Conclusion

54. This comparative presentation does not reveal any uniform pattern of existing parliamentary practice. It is worth noting, however, that a majority of European countries have recognised parliamentary immunity and incorporated it in their constitutional systems as an essential factor in the smooth functioning of the legislature.

55. There are nevertheless marked differences in the nature and scope of the protection inviolability offers MPs. They reflect the different political and historical experiences of the States, and often illustrate the needs that underlie inviolability. It would appear that the scope of this privilege, which is considered as an inextricable part of the separation of powers, the autonomy of Parliament or the protection of the parliamentary opposition, is defined in each State in keeping with the degree of autonomy necessary for Parliament to be able to fulfil its duties.

THE LAW

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

56. 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. He relied on Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

57. The Government rejected that argument.

A. Applicability of Article 6 § 1 of the Convention

1. The Chamber judgment

58. The Chamber unanimously found that Article 6 § 1 was applicable, after pointing out that in *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) the Court had affirmed the principle of reviewing the compatibility of immunity from prosecution with the right to a court enshrined in Article 6 § 1. Seeing no reason to depart from that approach in this case, which concerned “a criminal charge” against the applicant, the Chamber considered that the procedure at issue fell within the scope of Article 6 § 1 (Chamber judgment, §§ 62-63).

2. The parties’ submissions

(a) The applicant

59. The applicant alleged that the accusations against him were likely to harm his reputation and his career as a lawyer and an MP. Similarly, the suspension of the proceedings against him and the resulting uncertainty were likely to discredit him in the public eye. The press regularly published a list of MPs in respect of whom requests had been made to lift their immunity, and his name was on that list alongside the names of people he alleged were guilty of corruption.

60. The applicant further submitted that his right of access to a court had been impaired by the majority group in the National Assembly. He argued that the right to a fair trial implied the effective possibility of having one’s case heard by a court. In the instant case, however, if that possibility existed, it was purely hypothetical and it had not been open to him in practice. Since his election his case had been pending without any final decision being reached, depriving him of his right to a trial within a reasonable time. The fact that the proceedings had been pending since his election, and would have been so for nine years by the time he ceased to be an MP, had compromised his reputation and his political career.

(b) The Government

61. The Government submitted that this case had no precedent in the Court’s case-law, so that the principles it had established in *Cordova (no. 1)* and *(no. 2)* and *Tsalkitzis*, cited above, and *De Jorio v. Italy* (no. 73936/01, 3 June 2004) were not applicable to the present case.

62. They also argued that the applicant’s civil rights to respect for his honour and reputation had not been impaired by the stay of the criminal proceedings. Basing themselves on the *Helmerts v. Sweden* judgment (29 October 1991, § 29, Series A no. 212-A), they submitted that if the criminal proceedings had not been stayed, it would only have been possible to rule on the claimant’s civil rights. Furthermore, prior to the staying of the prosecution nothing had occurred that might have given the impression that the accusations against the applicant were substantiated, and no such thing had been suggested in the media. His re-election for a second term showed that his good name and reputation had not been affected by the proceedings

against him. In any event, if the public knew about the proceedings they also knew that the accusations against the applicant did not concern corruption. So the applicant's fears on that score were unjustified.

63. The Government also referred to the *Deweert v. Belgium* judgment (27 February 1980, § 49, Series A no. 35), in which the Court agreed with the Commission's opinion that the right to a court, as enshrined in the first paragraph of Article 6 of the Convention, was subject to implied limitations, two examples of which were the decision not to prosecute and the discontinuance of the proceedings. According to the Government, it followed that the claimant could not claim the right to have the criminal proceedings continued. To acknowledge that the applicant, as the defendant, might have the right to obtain the continuation of the proceedings when even the complainant had no such right, would be stretching the limits of the right of access to a court.

3. *The Court's assessment*

(a) *Precedents*

64. The Court has already examined several cases concerning the immunity from legal proceedings granted to members of national parliaments in relation to the right to a fair trial (see, for example, *A. v. the United Kingdom*, *Cordova (no. 1)*, *Cordova (no. 2)*, and *Tsalkitzis*, all cited above; and, more recently, *C.G.I.L. and Cofferati v. Italy*, no. 46967/07, 24 February 2009). The cases it has examined all concerned the right of persons who considered they had been wronged by the words or deeds of an MP to take court action. They complained before the Court that parliamentary immunity obstructed the work of the national courts, preventing civil complaints from being brought before a judge. Article 6 was therefore applicable.

65. Through this jurisprudence the Court, acknowledging the applicability of Article 6, verified the conformity of parliamentary immunities with the Convention, against the benchmark of the right to a court guaranteed by the Convention. It was an opportunity for the Court to temper the effects of the immunity from legal proceedings enjoyed by MPs by establishing the principle that it would not be consistent with the rule of law in a democratic society if a State could remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see *A. v. the United Kingdom*, cited above, § 63; *Cordova (no. 1)*, cited above, § 58; *Cordova (no. 2)*, cited above, § 59; and *Tsalkitzis*, cited above, § 46).

66. There is no denying, however, that the facts of the instant case differ considerably from those in the above-mentioned cases. For the first time the Court is faced with a case where the beneficiary of the parliamentary inviolability has complained that his inviolability prevented him from being

tried. The nature of the rights at issue and the complaint the Court must judge are thus substantially distinct from those it has examined to date. It is no longer a matter of the “civil” rights or claims of third parties, but of the right of an MP accused of a criminal offence to have his case heard by a court. This application therefore raises a new legal issue.

(b) The nature of the right concerned

67. The Court notes that the applicant has two sets of criminal proceedings pending against him which were instituted prior to his election to Parliament. Because of his parliamentary inviolability, both sets of proceedings were stayed, one at the prosecution stage and the other during the trial. It should be remembered in this context that the right of everyone charged with a criminal offence to have his case heard by a court is not absolute but subject to implied limitations (of which *Deweer*, cited above, § 49, which refers to the Commission’s report of 5 October 1978, Series B no. 33, § 58, gives two examples: the decision not to prosecute and the discontinuance of the proceedings).

68. While 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 (see *Withey v. the United Kingdom* (dec.), no. 59493/00, ECHR 2003-X), there is indisputably a right to have one’s case heard by a court within a reasonable time once the judicial process has been set in motion. That right is based on the need to ensure that accused persons do not have to remain too long in a state of uncertainty as to the outcome of the criminal accusations against them (see *Stögmüller v. Austria*, 10 November 1969, § 9, Series A no. 9, and *Wemhoff v. Germany*, 27 June 1968, § 18, Series A no. 7).

69. Parliamentary inviolability, it should be remembered, is merely a procedural arrangement; it does not absolve an MP of liability for the consequences of his actions. Nor does it terminate the proceedings against the applicant, it just suspends them. As time ceases to run for the purposes of limitation when criminal proceedings are suspended because of parliamentary immunity (see paragraphs 30 and 34-36 above), the course of justice is simply delayed until the accused ceases to be an MP, when the proceedings against him can be resumed. In the instant case the applicant has therefore had criminal accusations pending against him for over six years.

70. However, the vicissitudes of criminal proceedings that remain pending for too long generally also harm the reputation of the alleged offender. The person’s situation is thus necessarily affected when criminal accusations remain pending against them for a long period. That being so, there is no doubt that what is at issue in the instant case is the applicant’s right to have his case heard within a reasonable time, which is an inherent element of the right to a fair trial under Article 6 of the Convention (see

Deweer, cited above, § 48). It must therefore be concluded that Article 6 § 1 of the Convention is applicable.

B. Compliance with Article 6 § 1

1. The Chamber judgment

71. The Chamber found by four votes to three that there had been a violation of Article 6 § 1, after having held that the arrangements for implementing parliamentary inviolability and the procedure for lifting it had undermined the effectiveness of the applicant's right of access to a court to an extent that could not be considered proportionate to the legitimate aim pursued (Chamber judgment, §§ 94 and 95).

2. The parties' submissions

(a) The applicant

72. The applicant agreed that MPs must have freedom to express themselves and to act and did not dispute the legitimacy of the system of parliamentary immunity as instituted by the Turkish Constitution when that was the purpose it served. He also accepted that Parliament should enjoy a margin of appreciation in the matter. He submitted, however, that this protection was afforded by immunity in the sense of non-liability, which was not the object of his application. His application was limited to the question of immunity in the sense of "inviolability". He complained of the abuses of this system which obstructed criminal proceedings and prevented MPs from waiving their immunity in order to protect themselves against attacks on their reputation. In this case he submitted that there were no public-interest considerations and no social need that warranted the refusal to lift his immunity.

73. The applicant also criticised the parliamentary procedure for lifting immunity and in particular its length. He argued that decisions concerning parliamentary immunity were adopted in a general, automatic manner, with no consideration of the specific characteristics of each case. No objective criteria were taken into account when applications for the lifting of parliamentary immunity were examined. In his opinion such a practice was not in keeping with the principles of democracy and the rule of law as it was capable of undermining the respect owed to Parliament, and its efficacy. According to the applicant, while the failure to lift his immunity appeared to be the work of the National Assembly, it was in fact the result of government directives, issued by the parliamentary majority. The legislative, he argued, was thus under the influence of the executive.

74. Furthermore, at the hearing before the Court the applicant had pointed out the negative consequences, in terms of corruption, of the scope of parliamentary immunity in Turkey, submitting that it contributed to making Parliament a refuge from criminal conviction or prosecution. In the course of the 22nd Parliament the plenary Assembly had decided to suspend the examination of all requests for the lifting of immunity for the duration of the parliament. According to the applicant, MPs from the majority, because of personal and political apprehensions, abused their position in the majority, using parliamentary privilege to avoid any risk in the event of requests to lift their own immunity, thereby diverting immunity away from its real purpose. Lastly, in his oral submissions he had stated that his party had made an electoral promise to do away with parliamentary inviolability in so far as it protected MPs from prosecution for shameful crimes and that he intended to keep that promise.

(b) The Government

75. The Government pointed out that the Court had already acknowledged the legitimacy of parliamentary immunity, submitting that immunity helped to protect political activities, maintain pluralism in Parliament and enable Parliament to function smoothly. They submitted that the strictly narrow interpretation, adopted in the *Cordova (no. 1)* and *Cordova (no. 2)* cases cited above, of the extent of the restriction on criminal proceedings as a result of parliamentary immunity could not apply in the present case. That would amount to considering that any system of parliamentary immunity providing for the suspension of criminal proceedings violated the right of access to a court, which would leave no room at all for parliamentary immunity and would oblige the States Parties not to grant it.

76. The Government also submitted, having regard to the list of the offences at the origin of the requests to lift parliamentary immunity received during the last parliament, that immunity could not be said to be one of the major problems in the battle against corruption. They also challenged the Chamber's argument that there was a lack of criteria governing the taking of decisions concerning the lifting of parliamentary immunity, arguing that such criteria had been developed through parliamentary practice and constitutional case-law. Thus, if immunity was to be lifted the accusation had to be genuine, serious and not politically motivated; public opinion had to have been affected by the criminal proceedings and it must have become necessary to lift the immunity in order to protect the honour and dignity of the MP concerned; and lastly, the accusation must not fall within the scope of the freedom of expression and opinion guaranteed by the first paragraph of Article 83 of the Constitution.

77. Lastly, the Government submitted that the scope of parliamentary immunity in respect of acts committed prior to and during an MP's term of

office fell within the margin of appreciation of the State. When the essence of the right of access to a court was guaranteed in cases concerning parliamentary immunity, as in the present case, the limitation by the Court of the scope of that immunity would be an unjustified denial of the margin of appreciation of the States. They argued that the national parliaments were best placed to determine the scope of parliamentary immunity. The same arguments applied to decisions whether to lift an MP's immunity, and to assessing the consequences of lifting or not lifting immunity. If this were not the case, the independent discretionary powers of the national parliaments would be threatened.

78. If the Court, in its judgment, were to permit MPs individually to request and obtain the lifting of their immunity, it would put pressure on other MPs to waive their immunity, which would not be a good thing for pluralist democracy. The Government invited the Court to weigh up the negative effects of depriving MPs of their immunity, which protected them in the performance of their legislative duties.

3. *The Court's assessment*

(a) **General principles**

79. The right of access to a court secured by 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, although 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, a limitation 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). 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 (see *Tsalkitzis*, cited above, § 44).

80. The Court has already held that when a State affords immunity to its MPs, the protection of fundamental rights may be affected (*ibid.*, § 45). 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).

81. The Court has already acknowledged that the long-standing practice for States generally to confer varying degrees of immunity on parliamentarians pursues the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary (see *A. v. the United Kingdom*, cited above, §§ 75-78; *Cordova (no. 1)*, cited above, § 55; *Cordova (no. 2)*, cited above, § 56; and *De Jorio*, cited above, § 49). Different forms of parliamentary immunity may indeed serve to protect the effective political democracy that constitutes one of the cornerstones of the Convention system, particularly where they protect the autonomy of the legislature and the parliamentary opposition.

82. The Court further notes that the regulation of parliamentary immunity belongs to the realm of parliamentary law, in which a wide margin of appreciation is left to member States. That being so, the creation of exceptions to parliamentary 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).

83. However, from the point of view of its compatibility with the Convention, the broader an immunity, the more compelling must be its justification (*ibid.*, § 78). Indeed, the lack of any clear connection with parliamentary activity requires the Court 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). Thus, where a personal quarrel was involved it would not be right to deny someone access to a court purely on the basis that the quarrel might be political in nature or connected with political activities (see *Cordova (no. 1)*, cited above, § 62; *Cordova (no. 2)*, cited above, § 63; and *De Jorio*, cited above, § 53).

84. Although they were formulated in a different context and cannot be transposed as such to the present case, the Court considers that the criteria and principles thus developed in its case-law for verifying the compatibility of MPs' immunity from jurisdiction with the right to a court can guide it in its assessment of the circumstances of the instant case.

(b) Application in the present case

85. First of all, the Court notes that although the Turkish constitutional system guarantees MPs both non-liability and inviolability, the instant case concerns only the latter aspect of parliamentary immunity. It also points out that it is not for the Court to rule *in abstracto* on the compatibility of the

Turkish system of parliamentary inviolability with the Convention, but to ascertain *in concreto* what effect the application in this case of the provisions of the Constitution had on the applicant's right to a court under Article 6 of the Convention.

86. That being so, the applicant's general observations that parliamentary inviolability in Turkey hinders the fight against corruption, like his allegations of abusive extension of the scope of the inviolability to serve MPs' personal needs, have no bearing on the application before it. The same applies to the electoral promise to do away with parliamentary inviolability to which he refers.

87. It is not for the Court to rule in an abstract manner on the constitutional definition or the scope of the protection the States accord their MPs. The only thing the Court must determine here is to what extent parliamentary inviolability may be considered, in the circumstances of the present case, to amount to a legitimate and proportionate limitation of the applicant's right to have his case heard by a court as secured under Article 6 § 1.

88. The Court has already found that the inherent characteristics of the system of parliamentary immunity and the resulting derogation from the ordinary law pursue 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 (no. 1)*, cited above, § 55; *Cordova (no. 2)*, cited above, § 56; and *De Jorio*, cited above, § 49). In the instant case, however, it notes that the applicant accepts the legitimacy of parliamentary immunity only in so far as it serves to protect the freedom of speech of MPs in the performance of their duties, but rejects it in respect of actions unconnected with parliamentary duties.

89. The Court notes in this connection that the Turkish Constitutional Court has already ruled on the legitimacy of parliamentary inviolability as instituted under Article 83 of the Constitution, stating that the intention of this 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" (see paragraph 33 above).

90. In these conditions the Court considers that the finding in the cases cited above concerning the legitimacy of the aims pursued by parliamentary immunity also applies to the present case. It considers that the guarantees offered by both types of parliamentary immunity (non-liability and inviolability) serve the same need – that of ensuring the independence of Parliament in the performance of its task. Without a doubt, inviolability helps to achieve the full independence of Parliament by preventing any possibility of politically motivated criminal proceedings (*fumus*

persecutionis) and thereby protecting the opposition from pressure or abuse on the part of the majority.

91. The Court further recognises that bringing proceedings against MPs, together with the coercive measures that may entail, may affect the very functioning of the Assembly of which they are members and disrupt Parliament's work. In this sense it recognises the institutional aim of this prerogative, which is to guarantee the smooth functioning and the integrity of Parliament. In these conditions the Court cannot but recognise the legitimacy, relied on by the Government (see paragraphs 75 and 78 above), of the aim pursued by this exception to the ordinary law.

92. However, the Court agrees with the Chamber's finding (Chamber judgment, § 83) that 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. No matter how legitimate the justifications for parliamentary inviolability, in practice it protects not only the constituent powers but also individual MPs against any judicial proceedings or criminal conviction while they are members of parliament. In the particular circumstances of the present case, however, the protection concerned did not serve the interests of its beneficiary, who wanted it lifted.

93. In this context the Court must verify whether parliamentary inviolability as implemented by the Turkish Parliament has restricted the applicant's right under Article 6 of the Convention in such a way or to such a degree that its very essence is impaired. Verifying the proportionality of the measure means taking into account the fair balance which has to be struck between the general interest in preserving Parliament's integrity and the applicant's individual interests. In so doing the Court must pay particular attention to the scope of the inviolability in the instant case. In particular it is for the Court to examine whether or not the provision of the Constitution, in the circumstances of the instant case, led to a denial of justice. The Court must not lose sight of the fact that Article 6 § 1 must be read in the light of the fundamental principle which forbids the denial of justice (see *Golder v. the United Kingdom*, 21 February 1975, § 35, Series A no. 18).

94. The Court reiterates in this connection that when examining the question of the compatibility of parliamentary immunity with the rights guaranteed by the Convention it has attached importance to the extent to which the offence of which the MP is accused is linked to his parliamentary duties in their strict sense (see, among other authorities, *Cordova (no. 1)*, cited above, § 63; *Cordova (no. 2)*, cited above, § 64; and *De Jorio*, cited above, § 54). Having regard to the very nature of parliamentary

inviolability, the Court nevertheless considers that the same approach cannot be taken in the present case.

95. In most constitutional systems inviolability protects MPs against judicial proceedings in respect of acts not related to their parliamentary duties. In this case the criminal proceedings brought against the applicant concern personal acts committed prior to his election to Parliament. It must be remembered in this context that the exemptions that characterise parliamentary inviolability are intended to protect – above and beyond individual MPs – the integrity of the national parliament. That being so, it is in relation to the need to preserve the institutional purpose of parliamentary inviolability that the effect on the applicant's rights of the manner in which inviolability was applied in his case must be examined: the less the protective measure serves to protect the integrity of Parliament, the more compelling its justification must be.

96. The Court emphasises in addition that while its role is to assess the limits of parliamentary immunity with regard to the rights enshrined in the Convention, decisions whether or not to lift immunity indubitably fall within the margin of appreciation of the States and it is not for the Court to substitute its own assessment for that of the national authorities as to whether immunity is necessary or appropriate in a given case. Provided that parliamentary practice is in keeping with the imperatives of the rule of law as embodied in the Convention, it is not the Court's role to serve as a supervisory mechanism for verifying the appropriateness of the choices made by parliamentary authorities in the matter.

97. In order to make sure that the rule of law has been respected, the first step is to examine the institutional configuration of the system of parliamentary inviolability in Turkish law and the conditions of its implementation. The Court reiterates in this regard that inviolability is not a personal privilege for the benefit of the MP but rather a privilege linked to his or her status, which is why it cannot be waived by the beneficiary (see paragraphs 32 and 33 above). It is true that the inviolability enjoyed by Turkish MPs appears to be broader in many respects than that enjoyed by MPs in certain other Contracting States (see paragraphs 45-53 above). In particular, it covers criminal offences they allegedly committed before their election as well as those allegedly committed during their term in Parliament, and protects them from arrest, questioning, detention and judicial proceedings (see paragraph 30 above).

98. The Court considers, however, that the scope of the protection thus afforded cannot be deemed to be excessive in itself. Parliamentary inviolability in Turkey is relative; not only is it limited in time to the duration of the MP's term but it is also subject to an exception, in that it may be lifted. It also applies only to criminal matters, which means that Turkish MPs are not protected against civil actions. Nor does it apply in certain cases of *flagrante delicto* or specific crimes against the regime or the

State (see paragraph 30 above). Furthermore, while the scope of parliamentary inviolability in Turkey is more broadly defined, it does not seem to be at odds with the solutions adopted in most European parliamentary systems (see paragraphs 44-55 above).

99. In the circumstances of the present case, however, the institution as described has clearly had the effect of preventing criminal proceedings against the applicant from taking their full course. The applicant's interest in this respect must be weighed against his right to a court and not against any right to have his immunity lifted at his request. Such decisions are a matter for the internal proceedings of Parliament and therefore fall within that body's sphere of competence alone. The Court's role is to examine whether the parliamentary procedure followed is compatible with the rights guaranteed by the Convention.

100. In the present case the Court notes that the parliamentary procedure for examining requests to lift 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, which lay down the procedure to follow (see paragraphs 30 and 32 above). The procedure in question also appears to be subject to certain formalities which secure respect for the rights of the defence at every stage of the decision-making process and a right of appeal against the decisions taken by the relevant parliamentary bodies (see paragraphs 31 and 32 above). Indeed, in the present case the applicant had the possibility of exercising the rights thus guaranteed by filing an objection to the decisions to suspend the criminal proceedings against him (see paragraphs 15, 22 and 27 above).

101. As to the applicant's arguments that the decision-making procedure lacked clarity, the Court points out that the machinery for implementing parliamentary liability by a decision to lift or not to lift immunity is one of the ways in which Parliament exercises its autonomy. The decisions taken in the matter by parliamentary bodies, which are political bodies by definition, are therefore political decisions by nature and not court decisions, so they cannot be expected to satisfy the same criteria as court decisions when it comes to giving reasons.

102. Furthermore, the lists submitted by the parties concerning the requests for the lifting of immunity pending before the 22nd Parliament and at the start of the 23rd Parliament (see paragraphs 26 and 37 above) show the existence of a constant trend in the practice of the parliamentary bodies concerned since the election of the 22nd Parliament not to grant any request to lift an MP's immunity. As this practice is applied without distinction both to members of the majority and to those of the opposition, Parliament's decisions not to allow requests for the lifting of immunity are free of any personal considerations (*intuitus personae*), be it with regard to the personality of the interested party or to his political convictions. The

procedure followed in the present case thus seems to have been devoid of any discriminatory or arbitrary character.

103. The Court notes, nevertheless, that the applicant also complains about the time taken to examine his requests to have his immunity lifted, which amounted in his opinion to an abuse of process and led to a denial of justice. It is worth noting here, in the light of both the provisions of domestic law and parliamentary practice in the matter, that while the examination of the requests by the relevant parliamentary committees is limited in time by predefined deadlines (see paragraph 32 above), that is not the case once they have been transferred to the plenary Assembly.

104. In the instant case the Court cannot ignore the fact that the applicant has had criminal accusations hanging over him for over six years, and the situation could remain the same until he ceases to be an MP. There is therefore no denying that the uncertainty inherent in any criminal proceedings has been accentuated in this case by the impugned parliamentary procedure, as the delays it has caused have resulted in equivalent delays in the criminal proceedings.

105. However, while the Chamber found that such a delay was prejudicial to the applicant (Chamber judgment, § 91), the Grand Chamber is unable to ignore the special nature of the applicant's status and the specificity of the impugned procedure. The Grand Chamber considers that the connection between the MP's parliamentary immunity and his status is a fundamental aspect of the matter at issue.

106. It should be noted here that the criminal proceedings at the origin of the applicant's complaint were brought against him before he stood for election to Parliament. As a lawyer he could not have been unaware of the consequences his election would have on the proceedings in question. In standing for election, then standing for a second term, he was aware that his special status would delay the outcome of the criminal proceedings against him. He also knew that because of his status he would not be able to waive his inviolability or have it lifted merely at his request (see paragraph 32 above).

107. Having regard to the unusual complaint before it, in which immunity is perceived not as an advantage for the beneficiary but as a disadvantage linked to parliamentary office, the Court finds that the degree of prejudice suffered is also a factor to be taken into account in determining the impact of the delay, inherent in MP status, on the applicant's right to have his case heard by a court. Examining that factor requires analysis of the context.

108. In the present case the Court considers it important when assessing any prejudice suffered by the applicant to bear in mind that the impugned delay is the time taken by the parliamentary procedure for examining requests for the lifting of immunity and not the time taken to complete criminal proceedings as such. In the instant case there is no reason to

consider that the applicant will not be able to have a fair trial when he ceases to be an MP. The parliamentary procedure does not appear to adversely affect that possibility in any way, particularly as it has no effect on the presumption of innocence to which all accused persons are entitled. Sight should not be lost here of the fact that the decisions taken by parliamentary bodies in this connection serve no penal or repressive purpose but are aimed in principle – as the lifting of immunity is generally refused – at protecting MPs rather than harming them.

109. In the present case, not only is the obstruction to criminal proceedings as a result of parliamentary inviolability only temporary, but in principle Parliament does not intervene at all in the course of justice as such. In this case, when examining the applicant's request to lift his immunity Parliament seems only to have considered whether inviolability, as a temporary obstacle to judicial action, should be lifted immediately or whether it was preferable to wait until the end of the applicant's term in Parliament. The effect was thus merely to suspend the course of justice, without influencing it or taking part in it.

110. As to the applicant's allegations that the proceedings against him had tarnished his reputation, the Court points out that it is in the very nature of this form of prejudice to manifest itself as soon as an official accusation is lodged. In this case, however, there is no doubt in the Court's mind that the applicant's honour and reputation were protected by respect for the principle of the presumption of innocence.

111. In the light of the above, the Court considers that while the delay inherent in the parliamentary procedure did affect the applicant's right to have his case heard by a court, in delaying the proceedings it did not, in the instant case, impair the very essence of that right. As it is limited in time and covered by special rules concerning, *inter alia*, the suspension of the running of time for the purposes of limitation, the impugned immunity merely constitutes a temporary procedural obstacle to the criminal proceedings, by no means depriving the applicant of the possibility of having his case tried on the merits.

112. With regard to the requirements of the rule of law, however, the type of immunity associated with the applicant's status as an MP is valid only because of the legitimacy of the aims pursued, namely, to preserve the integrity of Parliament and protect the opposition. The Court acknowledges that the applicant's inability in this case to waive his inviolability falls within the scope of the legitimate aims thus defined (see paragraphs 90 and 91 above). In that sense it accepts that individual renunciation by the applicant is no substitute for a decision of the National Assembly.

113. Lastly, as the right to obtain a judgment in respect of criminal accusations is not absolute, in particular when there is no fundamental irreversible detrimental effect on the parties, the Court considers that in the circumstances of the instant case the failure to lift the applicant's

parliamentary immunity did not impair his right to a court to a degree disproportionate to the legitimate aim pursued.

114. Consequently, the Court finds that there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

Holds, by thirteen votes to four, that there has been no violation of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 December 2009.

Vincent Berger
Jurisconsult

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Malinverni;
- (b) dissenting opinion of Judge Bonello joined by Judges Zupančič and Gyulumyan;
- (c) dissenting opinion of Judge Power.

J.-P.C.
V.B.

CONCURRING OPINION OF JUDGE MALINVERNI

(Translation)

I found, with the majority, that there was no violation of Article 6 § 1 of the Convention in the present case; at the same time, however, I am not entirely satisfied with that finding.

If I voted for a finding of no violation it was mainly because, in my view, the scope of the immunity afforded to members of parliament (MPs) falls within the margin of appreciation left to the States and it is not for the Court to substitute its own assessment in order to determine whether or not immunity is necessary or appropriate in a given case.

Clearly, however, the inviolability enjoyed by Turkish MPs generally appears broader in scope than that enjoyed by their counterparts in most other States. In particular, it also covers acts committed prior to their election to Parliament. On this subject, however, the Court has already had occasion to say 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* [GC], no. 35373/97, § 87, ECHR 2002-X).

The conditions governing the *lifting* of parliamentary immunity also vary from one country to another. In several States the decision to lift an MP's parliamentary immunity is purely a matter of policy, which means that Parliament uses its power of discretion and it alone is able to determine what may or may not be done against its sovereignty and independence. In practice, however, certain criteria have been developed, so that the decision does not appear arbitrary.

However, a look at the provisions that regulate the procedure for lifting parliamentary immunity in Turkey, namely, Article 83 of the Constitution and Rules 131 to 134 of the Rules of Procedure of the National Assembly, reveals that no objective criteria have been established to define the conditions for lifting immunity. This void has actually been confirmed by Turkey's Constitutional Court (Chamber judgment, §§ 32 and 88). Consequently, in the light of the materials in the case file, the joint committee does not appear to have given reasons for its decision to suspend the criminal proceedings against the applicant.

The effect of this lack of reasons, combined with the lack of clearly defined objective criteria as regards the conditions for lifting immunity, was to deprive the applicant of the means of defending his rights and of the possibility of knowing on what basis the National Assembly, the body ultimately responsible for deciding whether to lift parliamentary immunity, would adopt its decision (Chamber judgment, § 89).

Furthermore, the applicant's request remained on the Assembly's agenda for a long time, without any decision being pronounced. The procedure for

lifting immunity in Turkey therefore appears not to be subject to any requirement for prompt action. The applicant may well, therefore, have seen the lack of a decision concerning the lifting of his immunity as a tactic designed to delay the court action.

The opacity of the decision-making process concerning the lifting of parliamentary immunity in Turkey is thus open to criticism. The procedure, which appears devoid of any objective criteria defining the conditions for lifting immunity, and the inertia shown by the competent authorities, who failed to reply to the applicant's request for many months, are certainly not satisfactory.

Lastly, and above all, although it is not widespread and is sometimes limited to minor offences (see paragraph 52 of the judgment), the possibility for MPs *to waive their parliamentary immunity of their own free will* is an avenue worth exploring. In a case like the present one, this possibility would afford the person concerned the benefit of two fundamental rights simultaneously – the right to be elected to Parliament, enshrined in Article 3 of Protocol No. 1, and the right to be judged, guaranteed by Article 6 – instead of them being mutually exclusive (see the dissenting opinion of Judge Bonello, joined by Judges Zupančič and Gyulumyan).

This possibility should be encouraged all the more in so far as, unlike *non-liability*, the very principle of *inviolability* is increasingly being called into question nowadays, to the point where, in some States, it has quite simply disappeared from the system of protection afforded to MPs¹.

1. See the Venice Commission's Report on the regime of parliamentary immunity of 4 June 1996 (CDL-INF (96) 7, §§ 59 et seq.).

DISSENTING OPINION OF JUDGE BONELLO JOINED BY JUDGES ZUPANČIČ AND GYULUMYAN

I believe this judgment to be the very first in which a court of human rights has inferred that a person cannot claim the concurrent enjoyment of two fundamental human rights. I hope it is also the last.

As important as establishing what this case is about, is establishing what this case is *not* about. This application does not call on the Court to determine whether parliamentary immunity is compatible with the Convention and, if so, to what extent. Unlike all previous judgments on parliamentary immunity, this case examines the far narrower issue whether a member of parliament (MP) facing criminal charges can be prevented from renouncing his parliamentary immunity in order to have those criminal charges against him determined. The majority have ruled that it is not in the general interest to allow an MP to waive his immunity voluntarily to enable him to stand criminal trial.

I disagree radically with this conclusion. Unlike the majority, I voted for finding a violation of Article 6, in as much as I perceive far, but *far* more pressing social necessities in not obstructing the course of justice, in authorising an accused person to exercise his fundamental right of access to a court and to make use of his fundamental right to be tried within a reasonable time. Far more compelling values these, in my view, than first embalming and then enthroning a system of special privileges and immunities enjoyed always arbitrarily and often abusively.

The bare facts of the case are as follows. The applicant, an elected opposition member of the Grand National Assembly of Turkey, was formally charged in 2002 with insulting a lawyer and a public officer. He requested that his parliamentary immunity be lifted in order to stand trial, but both the joint committee of the National Assembly and the plenary Assembly discarded his requests and in substance stayed the criminal proceedings against the applicant until the dissolution of the then current Parliament. In 2007 the applicant was re-elected and this had the effect of stopping the continuation of criminal proceedings at least till 2011. Should the applicant then be re-elected, the criminal charges against him could not be terminated before 2015 – some fifteen years after he was first criminally charged.

Article 6 enshrines several fair trial guarantees. Among others, the right to be tried within a reasonable time and the right of access to a court. The applicant and the Court chose to examine the case as one primarily relating to the right of access – a right which is not absolute and can be restricted by general interest considerations.

My dissent relies on what I consider two self-evident reflections: firstly, that there exist no general interest considerations sufficiently compelling to deprive the applicant of his fundamental right of access to a court. Secondly,

that the Court should have requalified the complaint as a denial of a fair hearing within a reasonable time, in view of the fact that those modest proceedings against the applicant for insult will last at least ten years and possibly much longer.

Article 6 – Right to a court v. general interest

The ‘general interest’ considerations in favour of sustaining parliamentary immunity – even when the accused himself insists on renouncing it – in practice and in the year 2009 leave me tremendously unthrilled. Parliamentary immunity was born centuries ago with the laudable intent of shielding parliamentarians from the tyranny of the powerful; it has, over the years, more often than not morphed into the tyranny of some parliamentarians over those less powerful. In modern functional democracies, where parliamentarians need no longer tremble at the retribution of despots, parliamentary immunity has become far more conspicuous for protecting dishonest politicians from honest prosecutions than for protecting honest politicians from dishonest ones.

The paper virtues of parliamentary immunity, historically quite justifiable centuries ago, are, over the years, wearing quite threadbare. In well-adjusted democracies, politicians today need fear less the divine rights of kings than themselves abusing the divine wrongs of autocrats. This privilege encourages more parliamentarians to be strong against the weak rather than it shields the weak from the strong.

In its proportionality exercise, the Court had to balance out the right of any person eager to be tried when accused of criminal offences, against an ancient institute whose actual advantages appear far more theoretical than real, but whose actual abuse seems far more real than theoretical. The Court threw its weight in favour of Parliament being the exclusive arbiter of when, and if, immunity should be lifted. The Court backed the Turkish Grand National Assembly, which has unfettered discretion whether to waive the privilege without giving reasons, whether not to waive the privilege, again without giving reasons, or whether to take the day off – the constant being always: do not give reasons. Between safeguarding this unprincipled principle and safeguarding fundamental human rights, the Court has found this *kermesse* of arbitrariness worthy of a higher level of protection – not the Court’s sharpest contribution to the rule of law, and rather unimpressive if legal certainty is anywhere on your agenda.

Again, in the proportionality exercise, the Court failed to spare a thought for the rights of the two victims of the applicant MP’s alleged insults. The frustration of the criminal proceedings against the applicant not only disregarded his own fundamental rights of access to a court and to be tried within a reasonable time, but also thwarted any expectations his alleged victims may have had of seeing some justice done. They too can wait till the

year 2011 or 2015, praying fervently that the applicant is not re-elected as otherwise their expectations of justice somehow reawakening will be relegated to 2015. The Court has condemned the applicant to the status of perpetual suspect, and his accusers to waiting for their own Godot – under a semblance of serially postponed justice. Is there a social need so pressing as to deny the accused the right to vindicate his reputation, and his accusers the right to vindicate theirs? I have searched for it anxiously, but have so far failed to detect any trace of it. It is the Court's best kept secret.

What the Court seems to have factored into the proportionality exercise, and with some reverential awe, is the fact that the Grand National Assembly refuses to lift the immunity of MPs *from both sides of the house* with criminal charges against them. An even-handedness that inhibits the prosecution and the possible punishment of all suspected delinquents, whatever their political colour. The Court finds that laudable, and I respect its appreciation. But this is a non-discrimination that earns next to no points from me. I would not applaud discrimination between good and good, but can find minimal virtue in non-discrimination between bad and bad. This is more fraternity than equality, and with some liberties thrown in as well. It is like reading “Ali Baba and the Forty MPs” as a morality play¹. We now have the good, the bad, and the Honourable.

I believe that the Court had the option to analyse the existence of a pressing social need from the other end of the telescope: had the applicant's immunity been lifted and the private proceedings for insult gone through the criminal courts, would parliamentary democracy in Turkey have received a blow so fatal that it could never have hoped to recover? Had the applicant been granted his request to face trial, would dire disaster have threatened the institutions? Had the Assembly allowed the Hon. Mr Kart to be tried, as he insisted, would a petrified world have witnessed the collapse of what good was left in a universe of evil? I have some problems with believing that Mr Kart's petty trial on charges of insult would have challenged the French Revolution for the title of political tsunami of the millennium. Ah, and those thumping hoofs in the distance? The Horsemen of the Apocalypse, methinks.

I would have voted enthusiastically with the majority had they shown that allowing Mr Kart's trial meant flirting with some Holocaust Mark II. The Court was obviously and commendably concerned with the harmful repercussions Mr Kart's trial would have had on parliamentary rule. It would have been helpful had it pointed out which.

1. According to information furnished by the Government, there are 315 requests pending for the lifting of parliamentary immunity to authorise the continuation of criminal proceedings against MPs.

Article 6 – Right to be tried within a reasonable time

This case was, in my view, improperly classified by the applicant as one calling in question the denial of his right of access to a court. The Court could, and should, have reclassified of its own motion the core issue of this case as that of denial of a fair trial within a reasonable time, rather than that of denial of access to a court. The Court has repeatedly (over fifty times) when the occasion arose, and in the interest of the protection of human rights, reclassified the substance of the issue to be determined¹. Leaving the complaint in the domain of access to a court – an Article 6 right that is not absolute – compelled the Court to indulge in balancing the right of the applicant against the general interest – an exercise which would have been avoidable had the case been examined under its ‘undue delay’ profile.

Article 6 establishes that, in the determination of *any* criminal charge, *everyone* is *entitled* to a fair hearing within a reasonable time. It is the fundamental human right of every person charged with any criminal offence to have his trial held and concluded within a reasonable time. In the applicant’s case, though he stands formally accused of criminal offences, his trial cannot be concluded before the lapse of at least ten years from the service of the criminal charges on him – possibly fifteen years and even more.

For this Court, a trial within a reasonable time from charges to final judgment has, so far, constituted a salient element in the cluster of fair trial rights. The guarantee is intended to protect any party to court proceedings against excessive procedural delays, and more specifically, in criminal matters, to avoid that a person charged should remain too long in a state of uncertainty about his or her fate². The Court has repeatedly found violations of this right in trials that dragged on for periods far shorter than ten years. And yet the applicant’s trial, lasting at least ten years and possibly much longer, effortlessly passed the Strasbourg test by default.

In paragraph 113 the majority inserted a wholly novel and, in my view, reckless and hazardous proposition:

“... the right to obtain a judgment in respect of criminal accusations is not absolute, in particular where there is no fundamental irreversible detrimental effect on the parties ...”

Even were I to accept in principle this inroad in human rights protection (which I definitely do not) the “irreversible detrimental effect” of criminal proceedings lasting at least ten years speaks so loud it requires no assistance or amplification. How reversible are ten years that have already elapsed? How undetrimental is that? Again, it would have been helpful had the Court

1. From the judgment *Handyside v. the United Kingdom* (7 December 1976, § 41, Series A no. 24) to the judgment *Errico v. Italy* (no. 29768/05, § 30, 24 February 2009).

2. *Stögmüller v. Austria*, 10 November 1969, p. 24, § 40, Series A no. 9.

listed in any detail the specific evidentiary findings of fact on which it justified such a revolutionary rejection of the “reasonable time” imperative.

General interests, however prominent, should never be allowed to override the core Article 6 rights, such as being tried by an independent and impartial tribunal or receiving a fair hearing within a reasonable time. In doing so the Court would be ‘relativising’, perhaps for the first time, those core Article 6 guarantees, subjecting them to balancing exercises and to proportionality tests. I dread to believe that the time will ever come when the Court will uphold the trial of an accused by a partial tribunal in the pocket of the authorities on general interest grounds. And I would be very wary of a court that accepted an unfair trial held at the more delightful fringe of eternity because some social need so required. This would be the beginning of the slippery slope towards ensuring that Article 6 really becomes sterile and meaningless, a headlong rush not to miss an appointment with human rights figment and platitude.

Conflict of fundamental rights

The reference to the applicant’s ‘implicit’ waiver to his core Article 6 rights contained in paragraph 106 verges on the cynical. The Court has found that in exercising his fundamental right to stand for Parliament, the applicant has waived his fundamental right to stand trial, and that, within a reasonable time.

This, I believe, is the very first time in its long history that the Court has, in substance, affirmed that to enjoy one fundamental right a person has to sacrifice the enjoyment of another. The right to be elected to Parliament is a fundamental right (enshrined in Article 3 of Protocol No. 1). So is the right to be tried within a reasonable time. Foolishly, the applicant expected to enjoy both rights, and the Court quickly disabused him of that illusion – it is either one or the other. Member of parliament? Forget about a trial. Want to be tried? Wave your parliamentary mandate goodbye¹. The Court has often had to limit the enjoyment of the human rights of one person when these come into collision with those of others. Never, in my experience, has an applicant been told implicitly that the Court applies the Convention on an *aut aut* basis. The Court has given Mr Kart a chance of trading in one birthright if he really desires to exercise the other. Wanting to enjoy one fundamental human right is tolerable; expecting to enjoy two is downright greedy.

1. See, *mutatis mutandis*, the partly dissenting opinion of Judge Spielmann joined by Judge Tulkens in *Lykourazos v. Greece*, no. 33554/03, ECHR 2006-VIII.

DISSENTING OPINION OF JUDGE POWER

I have come to the same conclusion as Judge Bonello. The restrictions upon the applicant's rights of access to a court and his right to a trial within a reasonable time are, in my view, in violation of Article 6. The vindication of such core rights, on the facts of this case, would not have undermined the importance of the principle of parliamentary immunity. I would add the following brief remarks.

The case is not about the compatibility of parliamentary immunity *per se* with the Convention; nor is it about the extensive application of this principle which the respondent State, in its discretion, affords to members of parliament – effectively placing them, with limited exceptions, beyond the reach of criminal law even in respect of matters that are wholly unrelated to their work as parliamentarians. The case concerns whether the applicant ought to be entitled to lift the mantle of immunity which his public office confers upon him in order to have determined, within a reasonable time, outstanding criminal proceedings which were pending prior to his election and which are entirely unconnected with his work as a parliamentarian.

Parliamentary immunity is an important pillar in constitutional history and I accept that a wide margin of appreciation is left to member States in this regard. Important as that institution is, however, one must never lose sight of the purpose for which it was intended. An uncritical and unnecessary extension of the principle to matters wholly dissociated from public office risks jeopardising public confidence in the system of parliamentary democracy itself¹. The more remote the shielded behaviour is from the duties of public office, the greater the justification must be for permitting the benefit of immunity to apply and, by extension, the more pressing the need to justify a refusal of its waiver where core human rights are at stake. Where the immunity operates in such a way as to afford protection from or bar access to the criminal courts in relation to matters that are entirely unconnected with public office then, in my view, the justification for refusing to waive it must be established, convincingly. Specific and objective criteria which could justify such a refusal are not to be found in this case.

I disagree with the majority's view concerning the effect of the "suspension" of justice (see paragraph 109 of the judgment) based, as it is, upon a certain blaming of the applicant for the deprivation of his rights under Article 6 (see paragraph 106 of the judgment). Essentially, he is obliged to choose between two rights. The suspension of justice is a serious matter and, in my view, should not be required unless strictly necessary.

1. This is demonstrated by the findings of the Group of States against corruption (GRECO) Evaluation Team in its Report on Turkey of 10 March 2006 and which are set out in paragraph 40 of the Chamber's judgment in this case.

Such necessity has not been established in this case. The rights of the applicant are capable of being vindicated without damaging or undermining the general interest which parliamentary immunity seeks to preserve.