



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

Information Note on the Court's case-law 246

December 2020

Selahattin Demirtaş v. Turkey (no. 2) [GC] - 14305/17

Judgment 22.12.2020 [GC]

Article 3 of Protocol No. 1

Free expression of the opinion of the people

Member of parliament excluded from parliamentary proceedings as a result of his prolonged pre-trial detention without sufficient justification: *violation*

Article 10

Article 10-1

Freedom of expression

Unforeseeable lifting member of parliament's immunity and pre-trial detention on terrorist charges for political speeches: *violation*

Article 18

Restrictions for unauthorised purposes

Member of parliament prevented from discharging his duties as a result of his prolonged pre-trial detention, for the purpose of stifling pluralism: *violation*

Article 35

Article 35-2-b

Matter already submitted to another international procedure

Complaint to specialised Committee of the Inter-Parliamentary Union not similar to Convention mechanism: *preliminary objection dismissed*

Facts – The applicant was an elected member of the National Assembly and one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016, an amendment to the Constitution was adopted whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. This reform, encouraged by the President of Turkey, had its origin in clashes in Syria between Daesh and the forces of an organisation with links to the PKK, the occurrence of serious violence in Turkey in 2014 and 2015, in the wake of the breakdown of negotiations aimed at resolving the "Kurdish question". The applicant, active in his speeches and statements on these events, was one of 154 parliamentarians (including 55 HDP members) affected by the constitutional amendment. In November 2016 he was

arrested on suspicion of membership of an armed terrorist organisation and inciting others to commit a criminal offence. Further to an additional investigation (concerning the afore-noted outbreak of violence), the applicant remains in detention awaiting trial. His parliamentary mandate expired on 24 June 2018.

In a judgment of 20 November 2018 (see [Information Note 223](#)) a Chamber of the Court held in particular, that there had been a violation of Articles 5 § 3, 18 (in conjunction with Article 5 § 3) and Article 3 of Protocol No. 1. It found that there had been no violation of Article 5 §§ 1 and 4 and did not consider it necessary to examine the case under Article 10. The case was referred to the Grand Chamber at the request of both parties.

Law –

(a) Preliminary objection under Article 35 § 2 (b)

The Court had to examine, for the first time since the Commission decision of *Lukanov v. Bulgaria*, whether a complaint to the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union (the IPU Committee) might be regarded as “another procedure of international investigation or settlement”. This term denoted institutions and procedures set up by States, thus excluding non-governmental organisations. However, even if a given mechanism had not been set up by a non-governmental organisation, that did not automatically mean that it qualified as such as “another procedure”. In that context, the main purpose of the Court’s examination was to determine whether the procedure before that body might be treated as similar, in its procedural aspects and potential effects, to the right of individual application provided for in Article 34 and whether it satisfied the following criteria. The relevant mechanism had to be public, international and judicial or quasi-judicial. The latter point necessarily implied that the examination carried out by the body in question was clearly defined in scope and limited to certain rights and standards based on a legal instrument or a “framework” by which States had authorised the body to consider and determine complaints brought against them. This was especially relevant in the context of analysing the similarities between such a mechanism and the Court. In the absence of a legal instrument that effectively delimited the powers of a particular body, it would be more difficult for the Court to ascertain the nature and functions of that body and the member States’ obligations. The mechanism in question had to further afford the institutional and procedural safeguards, such as independence and impartiality, in accordance with Article 6, and an adversarial procedure enabling each party to be informed of and to reply to the other party’s submissions. The parties also had to be informed of the measures and decisions taken. A body of this kind had to respect the parties’ right to participate in the proceedings, for example by submitting observations. In addition, the body had to respond to individual applications by making its decisions public and stating reasons for them. Furthermore, it had to be able to determine the State’s responsibility under the legal instrument on which its examination was based and to afford legal redress capable of putting an end to the alleged violation.

It was not the role of the IPU Committee to adjudicate on disputes between an individual and a State. As per its Rules and Practices, the Committee did not seek to review the observance of a State’s obligations under a specific legal instrument, but rather to prevent possible violations, put an end to ongoing ones, and/or promote State action to offer effective redress for violations by fostering a dialogue with the authorities. The Committee could not therefore be said to offer a judicial or quasi-judicial procedure similar to the one set up by the Convention.

Conclusion: preliminary objection dismissed.

(b) Article 10

There had been an interference with the applicant's right to freedom of expression through a combination of measures, namely the lifting of the applicant's parliamentary immunity, his initial and continued pre-trial detention, and the criminal proceedings brought against him on the basis of evidence comprising his political speeches. The interference also had a basis in law which was accessible: namely, the constitutional amendment and provisions of the Criminal code relating to terrorism charges. The question was whether, in particular, the interpretation and application of domestic law had been foreseeable at the time of the speeches by the applicant that had led to his prosecution.

(i) Parliamentary immunity

Article 83 of the Constitution conferred two types of parliamentary immunity on members of parliament: non-liability and inviolability. The former protected their freedom of expression in so far as they could not be subjected to judicial proceedings on account of votes cast and views expressed within the National Assembly, or their repetition or dissemination outside the Assembly, unless the Assembly decided otherwise at a sitting held on proposal by the Bureau. Non-liability was absolute, permitted of no exception, did not allow any investigative measures, and continued to protect members of parliament even after the end of their term of office. Repeating a political speech outside the National Assembly could not be construed as being limited to repeating the same words that were used in Parliament.

The impugned constitutional amendment had not amended Article 83, in so far as it concerned non-liability. The members of parliament affected by the amendment had continued to enjoy legal protection on that account. It had therefore been the task of the national authorities, and in particular the domestic courts, to determine first of all whether the applicant's political speeches had been covered by that parliamentary non-liability. The applicant had argued to this effect from the start of his pre-trial. However, the Court was struck by the lack of analysis of the applicant's argument on this point by the domestic courts at all levels.

Even assuming that the impugned speeches had not been covered by non-liability, the constitutional amendment raised an issue in itself, in terms of foreseeability. Parliamentary inviolability shielded elected representatives from any arrest, detention or prosecution during their term of office without the consent of the National Assembly. However, following the amendment, political statements by members of parliament had become punishable under criminal law, without availability of the safeguards against applications to lift their immunity provided for under Articles 83 and 85 of the Constitution. In particular, the National Assembly was no longer required to perform an individual assessment of the situation of each of the members of parliament concerned. While it had maintained the regime of immunity, it had, at the same time, made it inapplicable to certain identifiable members of parliament on the basis of general and objective wording. The Court therefore fully subscribed to the Venice Commission's clear finding that this one-off unprecedented *ad homines* amendment had been aimed expressly at specific statements by members of parliament, particularly those of the opposition, and thus had been a "misuse of the constitutional amendment procedure".

A member of parliament could not reasonably have expected that such a procedure would be introduced during their term of office, thereby undermining the freedom of expression of members of the national assembly. Having regard to the wording of Article 83 and its interpretation (or lack thereof) by the national courts, the interference had not been foreseeable.

(ii) The terrorism-related offences

The applicant's pre-trial detention had been ordered and extended on the basis of his speeches for terrorism-related offences, in particular for forming or leading an armed terrorist organisation and membership of such an organisation (Article 314 of the Criminal Code). The Court was mindful of the difficulties linked to preventing terrorism and formulating anti-terrorism criminal laws. Member States inevitably had recourse to somewhat general wording, the application of which depended on its practical interpretation by the judicial authorities. When interpreting the law in that context, the national courts had to give the individual adequate protection against arbitrary interferences.

The Criminal Code did not define the elements of the offences, which had been set out in the case-law of the Court of Cassation. In the present case, the national judicial authorities had adopted a broad interpretation of the offences. The political statements in which the applicant had expressed his opposition to certain government policies or merely mentioned that he had taken part in the Democratic Society Congress – a lawful organisation – had been held sufficient to constitute acts capable of establishing an active link between the applicant and an armed organisation. The national courts had not taken into account the requirements developed by the Court of Cassation, including the "continuity, diversity and intensity" of the applicant's acts, or whether he had committed offences within the hierarchical structure of the terrorist organisation in question. The range of acts that might have justified the applicant's pre-trial detention in connection with the serious offences in question were so broad that the content of the offences punishable under Article 314, coupled with its interpretation by the domestic courts, did not afford adequate protection against arbitrary interference by the national authorities. Such a broad interpretation could not be justified where it entailed equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link.

Conclusion: violation (sixteen votes to one).

(c) *Article 3 of Protocol No. 1*

(i) General principles

The right to free elections was not restricted simply to the opportunity to take part in parliamentary elections; the person concerned was also entitled, once elected, to sit as a member of parliament. The rule of parliamentary immunity was crucial to this guarantee. The Court had yet to rule on a complaint under Article 3 of Protocol No. 1 concerning the effects of the pre-trial detention of an elected member of parliament on the performance of their parliament duties. The imposition of a measure depriving a member of parliament or a candidate in parliamentary elections of his liberty did not automatically constitute a violation of that Article. Nevertheless, in view of the importance in a democratic society of the right to liberty and security of a member of parliament, the domestic courts had to show, while exercising their discretion, that in ordering a person's initial and/or continued pre-trial detention, they had weighed up all those relevant interests, including the freedom of expression of political opinions by the members of parliament concerned. An important element in this balancing exercise was whether the charges had a political basis. A remedy had to be offered by which a member of parliament could effectively challenge the measure and have their complaints examined on the merits. The Court's role was then to review the decisions of the national courts from the standpoint of the Convention, without taking the place of the relevant domestic authorities.

(ii) Application to the case

As a result of his pre-trial detention, the applicant had been prevented from taking part in his activities of the legislature for more than one and a half years. Although he had

retained his seat and could put questions in writing, the exercise of his rights under Article 3 of Protocol No. 1 had been interfered with.

The interdependence between Article 10 and Article 3 of Protocol No. 1 was particularly pronounced in the case of democratically elected representatives who had been kept in pre-trial detention for expressing their political opinions. It was particularly important to protect the freedom of expression of representatives of the people, especially of members of the opposition. The Court would always conduct a strict review to verify that freedom of expression remained secured, while keeping in mind its possible limits, notably to prevent direct or indirect calls for violence. From this standpoint, the Court considered that where the detention of a member of parliament could not be deemed compatible with the requirements of Article 10 (as in the present case), it would also breach Article 3 of Protocol No. 1. Moreover, the Court's finding that there had been no reasonable suspicion that the applicant had committed an offence, as required by Article 5 § 1 (see below), was equally relevant for the purposes of Article 3 of Protocol No. 1. While, as a general rule, the duration of pre-trial detention must be as short as possible, those considerations applied *a fortiori* to the detention of members of parliament, who represented their electorate, drew attention to their concerns and defended their interests.

If a State provided for parliamentary immunity from prosecution and from deprivation of liberty, the domestic courts had to first ensure that the member of parliament concerned had not been entitled to parliamentary immunity for the acts of which they had been accused. In the present case, however, and as seen, the domestic courts had not carried out such an examination, thus failing to comply with their procedural obligations under Article 3 of Protocol No. 1. Nor had it been shown that they had carried out the requisite balancing exercise, weighing up the competing interests. The Constitutional Court had not examined whether the offences in question had been directly linked to the applicant's political activities. The judicial authorities had not effectively taken into account the fact that the applicant was not only a member of parliament but also one of the leaders of the political opposition, whose performance of his parliamentary duties had called for a high level of protection. Furthermore, it had not been explained why the imposition of an alternative measure to detention would have been insufficient in the applicant's case. The fact that it had been effectively impossible for the applicant to take part in the activities of the National Assembly on account of his pre-trial detention constituted an unjustified interference with the free expression of the opinion of the people and with his own right to be elected and to sit in Parliament. The detention was therefore incompatible with the very essence of the right under Article 3 of Protocol No. 1.

Conclusion: violation (unanimously).

(d) *Article 18 (in conjunction with Article 5)*

The Court had to examine whether the applicant's pre-trial detention, in the absence of reasonable suspicion and in breach of Article 5, had in fact pursued an ulterior purpose. The Court noted the following factors: the measures to lift parliamentary immunity had only been taken after elections in which the ruling part had lost its majority in the National Assembly; the only ones who had actually been affected by the constitutional amendment had been members of the opposition parties; the applicant's detention had not been an isolated example, but on the contrary, seemed to follow a certain pattern; the timing of the applicant's detention had meant that he had been deprived of his liberty in particular during two crucial campaigns (a referendum on significant constitutional reform and a presidential election); the circumstances surrounding the applicant's return to pre-trial detention, in which an order was made in relation to a separate criminal investigation on the day of his release; and findings of other Council of Europe bodies on the independence of the judicial system in Turkey and the tense political climate which had created an environment capable of influencing certain

national court decisions – especially during the state of emergency, when hundreds of judges were dismissed, and particularly in relation to criminal proceedings instituted against dissenters. These factors enabled the Court to conclude that the purposes put forward by the authorities for the applicant's pre-trial detention had merely been a cover for an ulterior motive: namely, that of stifling pluralism and limiting freedom of political debate.

Conclusion: violation (sixteen votes to one).

The Court also held, respectively by fifteen votes to two and sixteen votes to one, that there had been violations of Article 5 §§ 1 and 3, on account of a lack of reasonable suspicion that the applicant had committed a criminal offence necessitating his initial and continued pre-trial detention. Further, it considered that a compensation claim under Article 141 § 1 (a) and (d) of the Code of Criminal Procedure could not be regarded as an effective remedy in respect of either the alleged lack of reasonable suspicion that an individual has committed an offence, or the alleged lack of relevant and sufficient reasons to justify pre-trial detention for the purposes of Article 5 §§ 1 and 3. The Court also found, by sixteen votes to one, that there had been no violation of Article 5 § 4 regarding the compliance with the "speediness" requirement by the Constitutional Court, in line with the reasoning of the Chamber and in light of the specific circumstances of the case.

Article 46: Respondent State to take all necessary measures to secure the applicant's immediate release.

Article 41: EUR 3,500 in respect of pecuniary damage; EUR 25,000 in respect of non-pecuniary damage.

(See also *Lukanov v. Bulgaria*, [21915/93](#), Commission decision of 12 January 1995)

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