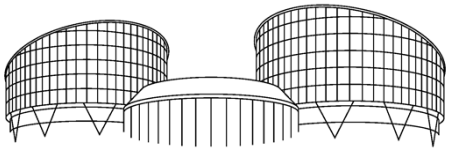

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AYETULLAH AY v. TURKEY

(Applications nos. 29084/07 and 1191/08)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 • Fair hearing • Rights of defence • Adversarial trial • Criminal proceedings against applicant relating to terrorism, with allegations of planted evidence and other procedural shortcomings • No assistance of lawyer during police custody or house search • Inconsistencies in house search findings, conducted in the absence of witnesses and based on vaguely worded warrant • Contested findings of search of applicant's person and house during pre-trial detention • Inconsistencies in evidence relating to mobile phones • Absence of procedural safeguards as regards crucial pieces of evidence • Failure of domestic courts to give sufficient reasons for conviction and to properly examine the submissions of the parties • Inability of the applicant to effectively challenge authenticity, veracity and quality of evidence

STRASBOURG

27 October 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ayetullah Ay v. Turkey,

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Saadet Yüksel,
Peeter Roosma, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 29 September 2020,

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

PROCEDURE

1. The case originated in two applications (nos. 29084/07 and 11091/08) 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 Ayetullah Ay ("the applicant"), on 27 June 2007 and 13 December 2007 respectively.

2. The applicant was represented by Ms S. Coşkun, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that he had not had a fair trial as a result of various breaches of Article 6 of the Convention.

4. On 30 January 2014 notice of the complaints concerning the alleged unfairness of the proceedings against the applicant was given to the Government and the remaining parts of applications nos. 29084/07 and 1191/08 were declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and is detained in Kırıkkale.

A. Background to the cases

6. On 30 August 2004 the Diyarbakır police force received intelligence that the PKK (the Kurdistan Workers' Party, an illegal organisation) was planning a bomb attack on the Victory Day parade scheduled for that day, which would be attended by high-level State officials. A search conducted in the vicinity of the parade route managed to locate a mobile telephone-

operated bomb, which was wrapped in a black plastic bag. The bomb was deactivated on the spot and the telephone was sent to a police criminal laboratory for further investigation. The owner of the SIM card found inside the telephone was identified as a certain M.Ç.

7. On the same day, the criminal laboratory at the Diyarbakır Security Directorate issued a report regarding the telephone found earlier that morning. The report indicated that the model of the telephone was a Nokia 3310 and its IMEI number[1], which was partially legible, was 350101/91/25042 (3 or 5)/5 (hereinafter referred to as "telephone no.1"). The report furthermore noted that only one fingerprint had been detected on the black plastic bag containing the bomb.

8. On 1 September 2004 the Diyarbakır police questioned the owner of the shop where the SIM card used in the apparatus had been purchased, in order to ascertain the date of purchase and the identity of the purchaser. The invoice furnished by the owner of the shop established that the SIM card in question had been sold to M.Ç. on 28 August 2004 – that is to say two days before the attempted attack. However, the shop owner had no recollection as to who the purchaser was, and was not able to identify M.Ç.

9. At an unspecified time on the same day M.Ç. was taken into custody at the Diyarbakır Security Directorate for questioning. M.Ç. told the police officers that he was a farmer. When the police informed him that the mobile telephone (telephone no.1) and the SIM card found on the deactivated bomb on 30 August 2004 had belonged to him, M.Ç. asserted that approximately one month before, while returning from his orchards, he had been stopped by four armed men, dressed as militants, who had said that they were with the PKK. After questioning him, one of them had taken his identity card and mobile telephone, together with the SIM card inside. That man had been blond (with a moustache and beard), well built, and approximately 1.75 metres tall, and had been carrying a Kalashnikov rifle, two hand grenades and four magazines. He had been around 25 to 27 years old and had spoken Kurdish with a Diyarbakır accent. M.Ç. asserted that he had not mentioned this incident to anyone, nor had he officially reported it to the police, for fear of reprisal by the militants. He stated that he had had nothing to do with the attempted attack of 30 August 2004 and suggested that the same militants who had robbed him might have planned to use his identity card and SIM card in carrying out the bombing.

10. On 2 September 2004 M.Ç. was questioned by the Diyarbakır public prosecutor, when he continued to deny his involvement with any terrorist organisations. He repeated his previous account of events, but this time did not provide a physical description of the militant who had spoken to him. During the questioning M.Ç.'s lawyer also stated that the signature on the

1. Also known as the "International Mobile Station Equipment Identity", usually found printed inside the battery compartment of the phone and used to identify a mobile phone.

invoice for the SIM card did not match M.Ç.'s signature, which corroborated M.Ç.'s argument that the SIM card used in the bomb apparatus must have been purchased with the identity card stolen from him.

11. On 9 September 2004 M.Ç. was indicted for aiding and abetting terrorists.

12. At the first hearing of his trial (2004/387 E.), held on 12 October 2004 before the Seventh Division of the Diyarbakır Assize Court, the trial court requested Turkcell, the network provider of the SIM card in question, to give details of calls made over the cellular network in July and August in respect of the telephone which had allegedly been extorted from M.Ç. by the terrorists.

13. According to the information in the case file, the response sent by Turkcell on 3 November 2004 gave details in respect of telephone serial no. 350 10 19 12 60 42 60 (hereinafter referred to as "telephone no.2"). The report indicated the numbers called, the places where the calls had been made from, and the duration of the calls, but not the identity of the caller or of the persons contacted. According to that document, the number "8090" was called on 29 August 2004 from that mobile telephone using the SIM card belonging to the number 0537 551 59 35, and the duration of the call was twenty-three seconds.

14. Following the permanent closure of the Seventh Division of the Diyarbakır Assize Court, the case file was transferred to the Sixth Division of the same court. At the second hearing held on 14 April 2005 before that court, the trial court noted that the third incident noted in the bill of indictment against the applicant before the Fifth Division of the Diyarbakır Assize Court also concerned the handing over of a mobile telephone by M.Ç. to the terrorists and that the indictment stated that that mobile telephone had been extorted from M.Ç. (see paragraphs 53 and 76 below) Accordingly, the trial court decided to obtain the opinion of the Fifth Division of the Diyarbakır Assize Court regarding whether the two cases should be joined in the light of the factual and legal link between the two cases.

15. On 10 May 2005 the trial court decided to join the criminal proceedings initiated against M.Ç. to the applicant's case (case no. 2005/24 E. before the Fifth Division of the Diyarbakır Assize Court) on account of the interrelationship between the two cases.

B. The applicant's detention in police custody

16. On 29 October 2004 at 5.15 pm, while distributing some commercial flyers in the street, the applicant was taken into police custody by officers from the Anti-Terrorism Branch of the Istanbul Security Directorate, within the context of an operation carried out against the illegal organisation PKK/KONGRA GEL. At the time of his apprehension, the applicant was in

possession of a false identity card bearing the name of a certain M.M.K. and a Nokia 6220 telephone (hereinafter referred to as "telephone no.3).

17. The arrest report did not indicate the applicant's real name, so it is not clear whether the police were aware at the time of his apprehension of the applicant's identity. According to the arrest report, the applicant was reminded of his rights (that is to say, the officer read them out to him at the time of his apprehension).

18. At 6 p.m. the applicant was examined by a doctor at the Istanbul branch of the Forensic Medicine Institute. The doctor noted no signs of ill-treatment, although he did observe redness on both of his cheeks. The report gave the applicant's name as M.M.K.

19. The applicant was subsequently taken to the Istanbul Security Directorate, where he was informed of his rights as a detainee, which included the right to request the assistance of a lawyer. Upon the applicant requesting legal assistance, the police contacted the Istanbul Bar Association in order to secure the appointment of a lawyer. They also conducted a preliminary interview with him in the absence of a lawyer, during which it appears that the applicant divulged his address but not his real identity. There are no records in the case file regarding the content of that interview.

20. Between at least 9 p.m. and 10.15 p.m. on the same day police officers escorted the applicant to his apartment for a house search, without waiting for the arrival of the lawyer assigned by the Istanbul Bar Association. No prior court order authorising the search was issued, but only a search-and-seizure warrant issued by the deputy director of the Istanbul Security Directorate Anti-terrorism Branch. The warrant, which was issued at 9.30 p.m., was a printed one-page-long document that had been filled in by hand to indicate the applicant's name and the address of the place to be searched; the reason for the search was indicated as "to carry out a search of the home of Ayetullah AY, a member of the terrorist organisation PKK/KONGRA-GEL". The part entitled "Risk in postponing the search and seizure [pending a court order]" was entered by hand as "Tampering with evidence".

21. According to the applicant, two successive searches were conducted in the applicant's apartment that night. The initial search was carried out by the police, in the applicant's presence, and was completed without any findings being reached. A superior officer was notified of the result over the telephone, and the officers requested permission to leave the premises. However, as the applicant was being escorted out of the apartment, he saw three other officers coming in, dressed in plain clothes, who announced that there would be a new search. A second search was therefore conducted while the applicant was kept outside the apartment. After a short while, one of the newly arrived officers emerged from the apartment with a mobile telephone in his hand. The applicant immediately denied ownership of the

telephone and refused to sign any records indicating that such a telephone had been found in his house.

22. According to the search-and-seizure record issued after the search at 10.15 p.m., the police seized one Nokia 3310 mobile telephone (IMEI no. 351342/80/413945/0) (hereinafter referred to as "telephone no.4"), one camera and one SIM card from the applicant's apartment as evidence. The same record also indicated the applicant's name as "Ayetullah Ay, with a false identity card bearing the name M.M.K." and that the applicant had given the address of his apartment when interviewed by the police before the search (mülakat). The applicant refused to sign the record, asserting that the telephone in question did not belong to him and that it had been planted in his house by the officers who had conducted the second search. In response, upon their return to the Security Directorate, the police drew up another record, which made no mention of evidence found and seized in the apartment and which the applicant therefore agreed to sign. According to the applicant, however, this revised report was never included in the case file. The parties did not produce a copy of this second document in the proceedings before the Court.

23. The applicant did not meet with a lawyer during his detention in Istanbul. There are two conflicting reports in the case file to account for this: according to the first report, prepared on 29 October 2004 at 9.10 p.m., the lawyer assigned by the Istanbul Bar Association reported to the Security Directorate at around 9 p.m. but was not able to see the applicant, who was at the house search at that time; according to the second report, which was drawn up on 30 October 2004 at 5 a.m., however, despite the request, the Bar Association did not dispatch a lawyer to provide legal assistance to the applicant. The reports were drawn up and signed by the same two officers.

According to a document entitled "Suspects' and accused persons' rights form", which was drawn up at 3.20 a.m. on 30 October 2004 and signed by the applicant, he was apprised of his rights, and a copy of that document was given to him. However, the part of the report dedicated to the offence on the basis of which the applicant was arrested and the facts related thereto was left blank.

24. On 30 October 2004 at 5 a.m. the applicant was examined by a doctor at the Istanbul branch of the Forensic Medicine Institute, who noted no signs of ill-treatment. In the doctor's report, the applicant's name was given as Ayetullah Ay; the doctor noted that he had been brought before him earlier, at 6 p.m., with an identity card belonging to M.M.K. Subsequently, the applicant was handed over to officers from the Anti-terrorism Branch of the Diyarbakır Security Directorate, on the grounds that he was suspected of having committed the terrorist offences within its territorial jurisdiction. It appears that the applicant's real identity was known, at the latest, at the time of his transfer to Diyarbakır because the report recording the applicant's handover to the police officers gave his

name as "Ayetullah Ay, with a false identity card bearing the name M.M.K.".

25. Later on the same day the Istanbul Assize Court upheld as lawful the search-and-seizure warrant issued earlier by the deputy director of the Istanbul Security Directorate Anti-terrorism Branch. The decision, however, noted that no "crime or criminal element" had been detected in the apartment and did not refer to the mobile telephone and the other items allegedly seized from the applicant's house.

C. House searches conducted in Diyarbakır

26. Concurrently with the applicant's detention in Istanbul, searches were conducted, on the order of the Diyarbakır public prosecutor, in the houses of some of the applicant's relatives in Diyarbakır, who were suspected of having an "organisational connection" with the applicant.

27. At 4.30 a.m. on 30 October 2004 the Diyarbakır police raided the house of Y.Y., the applicant's cousin, and found some money, three cartridge clips, some eighty cartridges, handwritten notes on bomb-making – as well as other training notes and meeting notes from PKK training camps and photos of members of that organisation, together with a photo of the applicant's late father – hidden in various places in the house and in the chicken coop in the garden. The items confiscated from the house as evidence were sent to the police criminal laboratory for fingerprint and handwriting examination.

28. Later on the same day the Diyarbakır Assize Court upheld the house search as lawful.

29. According to a report issued by the criminal laboratory at the Diyarbakır Security Directorate on 2 November 2004, the handwriting in some of the documents confiscated from Y.Y.'s house matched those of the applicant. Although their content was not specified in the report, notes that were later accepted by the applicant as belonging to him contained, *inter alia*, information on bomb-making.

30. According to a further fingerprint report dated 8 December 2004, none of the fingerprints found on the confiscated articles belonged to Y.Y., his wife or the applicant. However, fingerprints found on a six-page document entitled "meeting notes" were identified as belonging to a certain R.T.

D. The questioning of the applicant, Y.Y. and R.T. at the Anti-terrorism Branch of the Diyarbakır Security Directorate

31. On 2 November 2004 the applicant was questioned at the Anti-terrorism Branch of the Diyarbakır Security Directorate in the presence of a lawyer appointed by the Diyarbakır Bar Association. The applicant, who by

that point had confirmed his real identity, did not respond when asked why he had been using a false identity card. He likewise refused to answer any questions regarding the telephone found (telephone no.4) in his apartment, except for denying that he was its owner. He was then given a list of the material confiscated from Y.Y.'s house (but not presented with the material itself physically) and was asked whether any of it belonged to him. He denied any organisational connection with Y.Y., but admitted on several occasions that the notes and the other items found in Y.Y.'s house, except for the money and the cartridges, were his. He furthermore acknowledged that it was he who had placed those documents in the chicken coop in Y.Y.'s garden. When asked about his relationship with R.T., whose fingerprints had been detected on one of the documents recovered from Y.Y.'s house, he stated that he knew R.T. from his home village, but had not seen him in the previous six years. The police also informed the applicant of the arrest and questioning of M.Ç. in connection with the attempted bomb attack of 30 August 2004, and explained to him that telephone no.4 seized from his apartment bore the same IMEI number as the telephone stolen from M.Ç. in early August by PKK militants. He was asked whether he was one of the four militants who had allegedly robbed M.Ç. The applicant responded that the telephone allegedly recovered from his apartment (telephone no.4) did not belong to him and that he had had nothing to do with the said attack.

32. In the meantime, on 1 November 2004 Y.Y. was also questioned at the Anti-terrorism Branch of the Diyarbakır Security Directorate. Y.Y., who was accompanied by a lawyer, denied any connection with the PKK. He chose to remain silent in response to questions about the material recovered from his house and garden. However, he later stated before the Diyarbakır public prosecutor and the Diyarbakır Assize Court that he did not know how that material had found its way into his house.

33. Similarly, on 1 November 2004 the Diyarbakır police sought to question R.T. with regard to whether he had any connection with the material seized from Y.Y.'s house. R.T. refused to answer any questions put to him. However, before the Diyarbakır public prosecutor and the Diyarbakır Assize Court he subsequently acknowledged that he had seen and briefly read those meeting notes at the house of the applicant's parents when he had been there for a family visit a couple of months previously, which he said accounted for the fingerprints. He furthermore stated that the applicant had not been on the premises at the time of his visit.

34. According to a report drawn up and signed by the police officers on 2 November 2004 at 9 a.m., the applicant admitted being the sole perpetrator of the murder of two security officers on 7 September 2004 and stated that he could show them where the incident had taken place. However, the same report, which was not signed by the applicant, also

stated that he had changed his mind on the way to the scene of the incident and had decided not to participate in the reconstruction of events.

35. The applicant underwent a medical examination in Diyarbakır at 3.32 p.m. at the end of his period in police custody on 2 November 2004; the doctor who examined him concluded that that there were no signs of ill-treatment on his body. The doctor noted the applicant's name as "Ayetullah Ay (according to his statement) (M.M.K.)" and opted to record his physical assessment of the applicant in the section of his report entitled "Medical description of the person examined", which was the part to be filled in in cases of persons not holding a valid identity card.

According to that description, the applicant was around 1.74 cm tall, weighed about 65 to 70 kilograms, and had green eyes, a "wheat" complexion (*buğday tenli*) and light chestnut brown/caramel brown (*kumral*) hair and stubble.

36. On 2 November 2004 the applicant, accompanied by his lawyer, was questioned by the Diyarbakır public prosecutor, to whom he largely reiterated the statements that he had previously given to the police. He was asked again whether he was one of the militants who had robbed M.Ç. In response, he acknowledged that he loosely fitted the description of the person who had taken M.Ç.'s telephone and identity card, but repeated that he had had no involvement in that incident (or with the PKK, for that matter).

37. Later on the same day, the applicant was brought before the Diyarbakır Assize Court for questioning. The judge asked the applicant whether he had availed himself of his right to remain silent during police questioning; the applicant replied that he had done so. The applicant added that he had been using a fake identity card because he was trying to avoid being conscripted to serve in the army. When he was shown the documents recovered from Y.Y.'s house, which he had acknowledged ownership of previously, he stated that he had no recollection of them. Thereafter, the applicant's lawyer requested the court to terminate the questioning, as the applicant was acutely tired, not having been allowed to sleep for the past four days in police custody. The lawyer repeated that the applicant denied all the accusations against him. The judge then ended the questioning and ordered the applicant's pre-trial detention.

38. The deputy director of the Anti-terrorism Branch of the Diyarbakır Security Directorate drew up a three-page-long document entitled "Criminal file" and sent it to the public prosecutor in charge of the case. In that document, which was dated 2 November 2004, it was specified that the mobile telephone forcibly taken by the applicant from M.Ç. must have been the same as that (telephone no.4) found in the search of the applicant's house in Istanbul, given the fact that the IMEI number pertaining to each of those telephones had been one and the same.

39. An expert report dated 3 January 2005 indicated that the applicant's fingerprints did not match the sole fingerprint detected on the bomb apparatus deactivated on 30 August 2004.

40. On an unspecified date the applicant lodged several complaints with the prosecution authorities, one of which was that the police had not shown him any warrant authorising the search of his house on 29 October 2004.

41. On 6 April 2005 the Diyarbakır public prosecutor took statements from the legal-aid lawyer appointed by the Diyarbakır Bar Association to represent the applicant during the course of his questioning in Diyarbakır. The lawyer stated that the applicant had looked extremely tired and sleep-deprived, and had had a very hard time collecting his thoughts, for which reasons he had requested the Diyarbakır Assize Court to end his questioning prematurely.

E. The applicant's body search in the prison and the ensuing investigation

42. On 5 April 2005 the applicant, who at that point was being held in pre-trial detention at Diyarbakır High Security Prison, was subjected to a routine body search prior to being taken to the prison visiting area to see his mother. According to the applicant, the search was conducted without any problems and he was allowed to proceed to the visiting area.

43. However, approximately nine days after the visit, he was informed by the prison administration that a disciplinary decision had been taken against him for carrying coded notes to the visiting area. The two small hand-written notes found on his person before the visit had been confiscated and handed over to the prosecutor. The first note read as follows:

> "Hello: Burn this note after reading [it]. Be very careful when you go with 'Hoca' to return the materials. They will be following you. But you will not be [aware of it]. Don't panic, act naturally, just do your job; this is not an offence. They can't do anything to you.
>
> 1) Check all the materials, they opened some of them – separate the ones that are open.
>
> 2) Check one of the open ones, [one of] the big ones that has [the word] 'vanilla' on it (act very secretly, be alert and do not trust anybody). It has a chocolate thing on top; underneath, however, it has a dough-like substance. Destroy that dough by throwing it into the toilet in small pieces. This is the first and the most important thing you need to do. Do it as soon as you go to the house. Keep calm thereafter; act calmly.
>
> 3) Everything will be ruined if you have anybody else with you when doing this.
>
> 4) If it is possible, get this finished in one day.
>
> 5) Before going home, Hoca must resign by means of a notarised document and hand the letter of resignation over to the company. The necessary information about this subject is written in the booklet. The company may not accept the resignation, [in which case] force them to give reasons. There must be an invoice at home – bring the purchase invoice [which is at home]; if the invoice has been taken away, you may

return the items [indicated] on the invoice [at home]. The invoice was [issued] under the name of "Hatice". Ask whether she needs to be present or not and try not to be seen by her; especially you – you should never be seen by her. In the event that you are seen by her, you may tell her that you are returning the products in exchange for the money you loaned me. You shouldn't tell [her] that I am your brother.

6) If Hoca tells you that he can't [return the products] on the grounds that the invoice has been issued under somebody else's name, you may tell him that I am your sponsor. If that doesn't work, you must have Hatice present. She owes me 200 million [Turkish liras]. If you see her, you will get it. Don't defer to them; be stubborn, because they are devious people.

7) At most, 10% of the purchase price will be withheld. This amounts to something between 500 to 600 million. Do your sums and make the calculation too.

8) When you are done with the products, it would be good if you bring my television, sandals, bags, shoes, clothes and all my stuff here. If you bring them, keep the keys. If they ask you why, tell [them] that I have my stuff at home. Do not give the key to anybody else.

9) Be very careful – point 2 is secret and must stay between you and me until death. Destroy [the dough-like material] and I will be at peace.

10) I am handing the products that are here to Hoca. [Hoca] will get the rest [himself]. It is Hoca's business to decide whether to sell them or give them away for free. [Hoca] should take them all away. [Hoca] should take the ones you have too. Read this note alone. Do not let anyone else see [you]. If available, Hoca should also read [it]. Burn [this note] after reading it."

44. The second note read as follows:

"(Nobody except you should read this). Only you should read this. Then burn and destroy it. You should be very careful. Do not trust anybody easily. You should gradually establish control over the family. Everybody should get instructions from you. But consult the people around you before doing something. If you do so, they will draw closer to you and they will confide in you. Do not undertake official dealings and transfer the assets under your name or Murat's – it is dangerous. You may do so under the name of other members of the family (who are trustworthy). [This way] you will be managing everything, although they are in official records under somebody else's name.

I am going to tell you a secret now. But you shouldn't go against what I am going to tell you, or else my plans will be turned upside down. It is necessary that you act wisely.

I had suspected Fahri before I was arrested. I didn't take into account [the fact that] he would give me away this quickly. I did actually take precautions, but...

1) His chief did not do what I had told [him or her to do]; I was shocked when I heard that my materials had been seized – I was confused.

2) In reality, Fahri did not know where I was staying. I went to Adana three days before my arrest. Although I told Murat not to tell Fahri that I had come to Adana, he (Murat) called Fahri in without my knowledge. I was pissed off at Murat at that time, but it was too late. I was arrested two or three days after that. In fact, had they not caught me that day, they would never have caught me, because I was about to change my location [around that time]. I am angrier with Murat than with Fahri. Every time he wangles words out of me, he passes them on to somebody else (for example to

Şaziye or Fahriye). You are going to enquire into this issue, but without showing your true colours. I think Fahri is certain, but I suspect Murat too. I don't know whether [Murat acted] deliberately or not. I am going to clarify this with the information you will pass on to me. Because I am the one who knows these issues the best.

The only thing we need to do is to wangle words out of them without showing your true colours. Keep their words in your mind, even if they seem meaningless to you. Don't rush, be silent like you used to be, but try to worm information out of them. For that [to work], you have to be very canny. Don't go against what I am telling you. I wasn't able to figure Murat's situation out; from my own viewpoint, it is because of his foolishness. As I see it, I don't think he is [a] malicious [person]. But I have to approach [this issue] scientifically. For me, everybody is a suspect until the situation is uncovered. Enquire within the family too – learn who is who and what they are up to. For example, Şahabettin. Even if you reveal that Fahri is an agent, don't let on; act like you used to [act]. In fact, get close to [Şahabettin] and sometimes talk to him negatively about me or curse me with a view to sounding him out. See who says what. Even if one of them curses me, keep silent and report what they say to me. I only want to know what is being talked about. Look, be careful. Even if one of them is an agent, he or she shouldn't know that you know that he or she is an agent. Because they will become very dangerous once they know you know who they are. You and I, we will both get hurt. They wouldn't hesitate [for even a second] to even kill. Do not think of them as relatives or brothers; you don't know about these issues. That is why you have to be very crafty and careful."

45. In the meantime, on the basis of the information in the above notes, a court order was obtained on 6 April 2005 for another search to be conducted of the applicant's apartment in Istanbul. Neither the applicant nor his lawyer was notified of that search, which was, moreover, not supervised by the public prosecutor. The following material was found and seized during that search: 830 grams of plastic explosives (C4) hidden at the bottom of a box of diet food products; a handgun, a cartridge clip, and approximately thirty cartridges sewn inside a sofa bed; some handwritten notes hidden inside the sofa bed; four electric detonators tucked inside a table leg; a 5-metre copper wire and copper coil; a 2-metre soldering wire and soldering machine; fourteen tablets of potassium permanganate; one alarm clock; and a box of thumbtacks. The search-and-seizure record bore the signatures of the mayor of the neighbourhood (*muhtar*) and the locksmith who had secured entry to the apartment. The search was apparently recorded on video and photographed.

46. According to reports provided by the criminal laboratory at the Diyarbakır Security Directorate dated 7, 8 and 12 April 2005, no fingerprints were detected on the material seized from the applicant's apartment. Moreover, a ballistic examination of the handgun suggested that it had not been used in any prior incidents. The police criminal laboratory also confirmed that the potassium permanganate found in the applicant's house was a type of disinfectant that could also be used in manufacturing bombs.

47. On 12 April 2005 the criminal laboratory at the Diyarbakır Security Directorate issued another report indicating that the writing on the

confiscated notes matched the applicant's handwriting. The examination was made on the basis of the copies of the handwriting samples obtained from the applicant at the time of his detention in police custody.

48. On 19 September 2005 the applicant was questioned for the first time by the Diyarbakır public prosecutor in charge of the investigation regarding the notes found in prison and the illicit material subsequently recovered from his house. The applicant denied the allegation that any notes had been found on him by the prison guards. He requested that the guards who had searched him be questioned regarding the relevant date and that the video recordings of the search be examined. When asked to comment on the police criminal laboratory's report matching his handwriting to the writing on the notes, he stated that he did not know how the criminal laboratory staff had been able to make the comparison as they had not asked for any samples of his handwriting. He requested that the relevant notes be submitted to the Forensic Medicine Institute for examination. He moreover denied any connection to the material recovered from his house and emphasised that none of it had been found to bear his fingerprints. He added that his apartment had already been thoroughly searched by the police on 29 October 2004, and that that search had not located any such illicit material. He confirmed that no one else had stayed in his apartment in the meantime and that the only set of keys to his apartment was kept in the safe in the prison.

49. On 21 September 2005 the Diyarbakır public prosecutor took evidence from the two prison guards, namely H.A. and F.Y., who had witnessed the applicant's body search on 5 April 2005. They both stated that they had been present at the place where the search had taken place and that another prison guard, namely S.Ç., had told them that he had found the notes in question on the applicant's person and that the incident had been recorded on security cameras. On an unspecified date S.Ç. gave evidence to the Diyarbakır public prosecutor, to whom he stated that he had searched the applicant's person and had found the impugned notes.

50. In response to an enquiry from the Diyarbakır public prosecutor, on 23 September 2005 the governor of Diyarbakır High Security Prison informed the latter that no other prison officer or prisoner had witnessed the applicant's body search. Moreover, in response to an enquiry from the public prosecutor on 22 September 2005, the prison governor stated in a letter dated 27 September 2005 that the video surveillance record of the body search was no longer available, as the prison's tapes were recorded over every five months owing to a scarcity of resources.

51. On 12 October 2005 the Diyarbakır public prosecutor's office sent the notes in question, together with some samples of the applicant's handwriting taken from the school at which he had studied, to the Specialised Chamber of the Forensic Medicine Institute (*Adli Tıp Kurumu Fizik İhtisas Dairesi*) for further examination. On 21 December 2005 the

Forensic Medicine Institute, despite having in its possession the writing samples of the applicant that had been examined by the police criminal laboratory, informed the public prosecutor that in order to be able to conduct an accurate examination it needed samples of the applicant's previous "sincere" handwriting (*samimi yazılarını içeren belgeler*), such as that he had used in exams, petitions, or personal letters. Likewise, it furthermore held that the applicant should be required to rewrite the impugned notes quickly and without having previously been shown them. It appears from the documents in the case file that the requests of the Forensic Medicine Institute were not met.

52. On an unspecified date the applicant lodged a criminal complaint with the Diyarbakır public prosecutor against the staff of Diyarbakır High Security Prison, whom he accused of misconduct on account of their having falsely accused him of carrying coded notes. On 16 January 2008 the Diyarbakır public prosecutor decided not to prosecute the accused staff for lack of evidence indicating the commission of the alleged offence. On 17 April 2008 the Siverek Assize Court dismissed an objection lodged by the applicant against that decision.

F. Criminal proceedings against the applicant

53. On 9 February 2005 the Diyarbakır public prosecutor filed a bill of indictment against the applicant with the Diyarbakır Assize Court, charging him under Article 125 of the former Criminal Code with carrying out activities aimed at bringing about the secession of part of the national territory. The applicant was accused of involvement in three specific incidents: the killing of two police officers at a police checkpoint on 7 September 2004 ("incident 1"); an armed attack against a battalion command post in Hani, Diyarbakır on 7 June 2004 ("incident 2"); and the forcible seizure of M.Ç.'s telephone and identity card in early August 2004 ("incident 3"). According to the public prosecutor, the telephone that had been taken from M.Ç. by force was the same one as that seized during the search of the applicant's house on 29 October 2004 – namely, a Nokia 3310 mobile telephone (telephone no.4 with the IMEI no. 351342/80/413945/0). That indictment did not contain any allegation as regards the applicant's alleged involvement in the attempted bombing of the 30 August 2004 Victory Day parade. Nor did it mention any other mobile telephone that the applicant was alleged to have used in relation thereto.

54. By a letter dated 24 February 2005, the applicant's lawyer asked the trial court to summon M.Ç. to hear him as a witness and to arrange a physical confrontation between him and the applicant.

55. At the first hearing held on 8 March 2005 the applicant denied giving self-incriminating statements to the Anti-terrorism Branch of the Diyarbakır Security Directorate – in particular statements accepting

ownership of certain notes found in Y.Y.'s house. The applicant argued in that regard that despite the presence of a lawyer during the questioning, his statements had been misrepresented, which he had failed to notice at the time owing to the fact that he had been suffering from serious sleep deprivation. He also repeated his allegations regarding the conduct and the outcome of the house search on 29 October 2004, including the claim that two mutually contradictory search-and-seizure records had been drawn up that night.

56. At the same hearing, the applicant's lawyer requested that the handwritten notes found in Y.Y.'s house be sent to the Forensic Medicine Institute for an examination aimed at determining whether they had been written by the applicant. The trial court refused that request on the grounds that the police criminal laboratory's report of 2 November 2004 had already sufficiently established that they did in fact belong to him. The applicant's lawyer also brought to the trial court's attention the paradoxical fact that only a couple of months prior to his arrest, the mobile telephone allegedly seized from the applicant's house (telephone no.4) had been identified as having been used in a bomb apparatus found at the Victory Parade. The trial court also noted that there was a criminal case against M.Ç. pending before another chamber of the Diyarbakır Assize Court that had been initiated on the basis of a bill of indictment dated 9 September 2004 in which it had been alleged that M.Ç. had given to four armed men his mobile telephone (telephone no.2), which had later been used by the latter in the mobile telephone-operated bomb apparatus in the 30 August 2004 Victory Parade. At the end of the hearing, the trial court directed that M.Ç. be heard as a witness.

57. At the hearing of 3 May 2005 the trial court noted that it had received the evidence collected within the context of the criminal investigation against the applicant initiated on the basis of the two notes found on him in prison on 5 April 2005, and adjourned the hearing to 28 June 2005.

58. On 10 May 2005 the criminal proceedings against M.Ç. before the Sixth Division of the Diyarbakır Assize Court were joined to those against the applicant and thereafter continued before the trial court (the Fifth Division of the Diyarbakır Assize Court).

59. At the hearing on 28 June 2005 M.Ç. was confronted with the applicant. M.Ç. was not able to identify the applicant as one of the armed men who had stolen his telephone and identity card, as he said he had been too scared to scrutinise their faces closely at that time.

60. At the same hearing the applicant's lawyer challenged the second search conducted in the applicant's house on 6 April 2005 and alleged that had the material obtained during that search really belonged to the applicant, it would have been discovered during the initial search conducted thoroughly on 29 October 2004.

61. On 19 January 2006 the Diyarbakır public prosecutor filed another indictment against the applicant with the Diyarbakır Assize Court (case no. 2006/10 E.) in connection with the notes found on him in the prison and the material seized from his apartment in the subsequent house search on 6 April 2005. The public prosecutor requested that the case be joined to the main case against the applicant (2005/24 E.) and that the applicant be convicted on one count under Article 125 of the then Criminal Code of seeking to destroy the unity of the Turkish State and to remove part of the country from the State's control, on the basis of the material found during the search of his house on 6 April 2005. That indictment also did not contain any allegation as regards the applicant's alleged involvement in the attempted bombing of the 30 August 2004 Victory Day parade. Nor did it mention any other mobile telephone that the applicant was alleged to have used in relation thereto.

62. At the hearing on 27 December 2005 the trial court entrusted one of the members of its bench, namely Judge O.Y., with the task of (i) examining a CD containing the recording of the applicant's confession during his time in police custody to the killing of two police officers at a police checkpoint on 7 September 2004 and (ii) drawing up a report on the content of that CD.

63. On 27 January 2006 the Diyarbakır Assize Court decided to join the two cases against the applicant under the initial case number (2005/24 E) initiated following the filing of the first bill of indictment.

64. According to a report dated 6 February 2006, which was drawn up by Judge O.Y. and the clerk of the trial court, the judge watched the video recording of the applicant's unofficial interview with the police officers and the video recording of the house search conducted at the applicant's house on 6 April 2005. In respect of the first recording, the judge noted that although the sound level of the recording had been very low and had thus hindered comprehension, after playing it through a couple of times he had been able to observe that it concerned the explanations given by the applicant concerning his position in the PKK and the way he had killed two police officers in Diyarbakır on 7 September 2004. The judge furthermore noted that the applicant's bearing had been relaxed – as if he had been chatting with a friend – and the fact that he had been making jokes during his conversation with the police officers.

As for the search, the judge, after describing the exterior and interior of the apartment that the police officers had entered and noting that the number of the apartment had not been discernible, observed that items listed in the search record had been found in the flat which, according to him, might have been used as a "safe house", given the state that it had been in.

65. At the hearing on 7 February 2006 the applicant denied that any notes had even been found on him during his body search on 5 April 2005. He similarly denied any connection to the material allegedly retrieved from his apartment subsequently, and stressed that his house had already been

searched on 29 October 2004. The applicant's lawyer requested that the Forensic Medicine Institute carry out a handwriting analysis of the notes in question. The trial court read out the earlier report of the Forensic Medicine Institute requesting more samples of the applicant's handwriting, and decided that the lawyer's request for a further handwriting analysis would be entertained after it had viewed the video recordings of the body search in the prison. It furthermore ordered, following a request by the public prosecutor, that the video recordings of the applicant's body search in prison on 5 April 2005 be collected as evidence.

At the same hearing, the applicant's lawyer asked the trial court to exclude from the case file the CD recording of the applicant's alleged confession during his time in police custody to the killing of two police officers at a police checkpoint on 7 September 2004, arguing that it had been obtained by unlawful means. Subsequent to this request, the trial court played the above-mentioned CD in the presence of the parties and ruled that the video recording had been obtained in breach of the procedure provided under Article 148; it therefore held that it could not be considered as evidence against the applicant when reaching its future judgment.

66. At the hearing on 7 March 2006 the trial court accepted as evidence colour photocopies (i.e. not originals) of two group photographs of PKK militants, holding that one of the men resembled the applicant, despite the applicant's objection. The applicant argued that on account of the distance from which the photograph had been taken, it was very hard to make out individual features of the photographed persons. Significantly, one of the individuals among the group of PKK militants was identified as Murat Karayılan, the so-called head of the executive council of PKK/KONGRA GEL.

67. At a hearing on 11 April 2006 the trial court was informed that the video recordings of the applicant's body search on 5 April 2005 had not been preserved, as videotapes were recorded over every five months owing to a scarcity of resources. In response to a request made by the applicant's lawyer that a further expert examination be carried out of the notes found on the applicant, the court that held that the results of such an analysis would not be material to its conclusions.

68. On 9 May 2006 the prosecutor from the Diyarbakır public prosecutor's office who prosecuted the case before the trial court ("the trial prosecutor") presented his opinion on the merits of the case. The prosecution claimed that the applicant had left Turkey in 1999 for Russia, from where he had probably gone to Northern Iraq and joined PKK camps, where he had received training in the use of guns and explosives. That assertion was corroborated by the training notes confiscated in Y.Y.'s house, which had borne the applicant's handwriting. According to the prosecution, the applicant had subsequently re-entered Turkey in May 2004, from where he had carried out activities and had organised attacks for the

PKK in the Diyarbakır area, such as an armed attack against a battalion command post in Hani, Diyarbakır on 7 June 2004 (incident 2); the seizure of M.Ç.'s identity card, SIM card (no. 0535 786 91 30) and mobile telephone (telephone no.4 with the IMEI no. 351 342 804 139 450) on 13 August 2004, which telephone had later been found in his apartment (incident 3); the attempted bombing of the 30 August 2004 Victory Day parade, for which he had used a SIM card (no. 0537 551 59 35) and telephone no.2 (with the IMEI no. 350 10 19 12 60 42 60) purchased with the identity card taken from M.Ç. (an incident not mentioned in the indictment); and the killing of two police officers at a police checkpoint on 7 September 2004 (incident 1).

69. Following the delivery by the trial prosecutor of his opinion on the merits on 9 May 2006, the applicant was invited to make his final defence statement. On 5 June 2006 the applicant's lawyer brought the applicant a copy of the case file to assist him in the preparation of that statement. However, the prison administration retained some of the documents in the file, without giving any justification. At the hearing on 6 June 2006 the applicant's lawyer informed the trial court of that development, and on 9 August 2006 the applicant lodged a complaint with the Diyarbakır public prosecutor. The public prosecutor in charge of that complaint referred the matter to the Enforcement Court, which referred it back to the public prosecutor. It appears that the applicant was never given access to the retained material, as the public prosecutor did not take any action in respect of the matter. According to a document dated 20 July 2007 and issued by the prison governor, the documents in question concerned statements given by three witnesses – apparently, the three prison guards involved in the discovery of the notes on the applicant. The prison governor noted that although the prison administration had seized those documents and sent them to the relevant prosecutor for a decision to be made as to whether they would be handed to him, no reply had been received from the public prosecutor's office.

70. In the meantime, on an unspecified date the applicant submitted his defence statement in response to the trial prosecutor's opinion on the merits. In addition to reiterating his previous arguments, he made the following claims: he had not been allowed to see a lawyer during his detention in Istanbul; the house search of 29 October 2004 had been unlawful, and had been neither based on a prior search warrant nor authorised *ex post facto*; the accusations against him were based on false evidence manufactured by the police – in fact he suspected that the plain-clothes policemen who had conducted a second search in his apartment on 29 October 2004 had planted the Nokia mobile telephone (telephone no.4) in his apartment and that to cover that up, they had made him sign a search-and-seizure record that had not mentioned that telephone; various expert reports relied on as evidence against him had been prepared by the police criminal laboratory, which was

a party to the proceedings; the police criminal laboratory had somehow been able to establish that the notes allegedly found in the prison had been written by him, whereas the Forensic Medicine Institute, staffed by specialised doctors, had not been able to reach the same conclusion on the basis of the same material, and the trial court had inexplicably disregarded the Forensic Medicine Institute's request for further sample material for a conclusive handwriting analysis; interestingly, none of the material allegedly seized from his house on 6 April 2005 had been found during the previous search; it was illogical and unrealistic that no other prison inmates or officers had witnessed his body search on 5 April 2005, and even more shocking that the video recordings of the search had been deleted; if any notes had been found on him, as alleged, his visiting rights would have been suspended immediately, whereas he had been allowed to see his mother on the date of his body search; the claims of the prosecution that he had been trained by the PKK and that he had been active as a terrorist in the Diyarbakır area were pure speculation; there was no shred of evidence to attribute the attempted bomb attack of the Victory Day parade to him, and by holding him responsible for that attack – which was not included in the indictment – the trial prosecutor had changed the nature of the accusations without giving him prior warning to submit additional defence arguments; he had witnesses to attest to his presence in Istanbul at the time of M.Ç.'s encounter with the PKK militants in Diyarbakır; and his right to defend himself had been curtailed by the prison administration, which had arbitrarily prevented him having access to certain documents in his case file. In his closing remarks, the applicant argued that the investigating authorities were deliberately overcomplicating the case.

71. On 17 April 2007, in response to a request by the trial court, Turkcell submitted a breakdown of the call records of the mobile telephone recovered from the applicant's house (telephone no.4) for the dates between 5 August and 11 September 2004. The report indicated that the telephone had been used to make calls from two different telephone numbers (one of them belonging to M.Ç.) until 13 August 2004 and from a third number after that date. The owners of the other two numbers, however, were not identified.

G. Judgment of the Diyarbakır Assize Court and the applicant's appeal

72. On 24 April 2007 the Diyarbakır Assize Court delivered its judgment on the case. It held that there was insufficient evidence in the case file to establish the applicant's guilt (as presented in the indictment) in relation to incidents 1 and 2, (that is to say the killing of two police officers and the armed attack on a battalion command post). However, having regard to the content of the case file as a whole, it nevertheless concluded that the

applicant had, as charged, committed the crime (under Article 125 of the former Criminal Code) of seeking to destroy the unity of the Turkish State and to remove part of the country from the State's control.

73. In its reasoned judgment, the court firstly reproduced the content of the indictments on the basis of which the applicant had been tried, summarised the statements made by the applicant before the police, the public prosecutor, the investigating judge and the trial court, and listed thirty-one pieces of evidence in the part of its judgment entitled "Evidence", which included, *inter alia*, a report from the police criminal laboratory dated 31 August 2004 (report number 2004/654), which noted that the deactivated bomb had contained traces of trinitrotoluene (TNT) and nitroglycerin.

The Nokia 3310 mobile telephone with the IMEI number 350 101 912 604 260 (telephone no.2, which would later be accepted to have been used in the bomb apparatus on 30 August 2004) was not listed as evidence, and the IMEI number of the other Nokia 3310 mobile telephone (telephone no.4, which had allegedly been found at the applicant's house in Istanbul on 29 October 2004) was indicated as 351 342 180 / 413 395 10 (as opposed to 351 342 804 139 450).

After citing the trial prosecutor's opinion on the merits of the case, the trial court made its assessment, which comprised (a) "The substance of the case"; (b) "The organisation of which the applicant is a member"; (c) "[The applicant's] entry into the organisation and his position and activities therein"; and (d) "The applicant's actions". The following part of the reasoned judgment, entitled "Assessment of the legal situation of the applicant" was almost identical to the above-mentioned section (c):

> " ... [it has been understood] that the defendant has been trained by the organisation in bomb making, arms and explosives; that certain notes and explosives belonging to the defendant were seized during the search of Y.Y.'s house; that the defendant entered Turkey in May and has been active in the rural parts of Kulp-Lice-Hani as a combatant; that on 13 August 2004, [together with three members of the organization], he forcibly took, in the name of the organisation, ... M.Ç.'s identity card, his Nokia 3310 mobile telephone with the IMEI number 351342804139450 [telephone no.4] and his SIM card with the GSM no. 0535 786 91 30 ...; that in order to avoid being caught he obtained a false identity card on 25 August 2004 from the Adana-Seyhan Civil Registry Office by using the identity information of M.M.K.; that on 28 August 2004 a SIM card with GSM no. 0537 551 59 35 and a Nokia 3310 mobile telephone with the IMEI number 350101912604260 [telephone no.2] were purchased, a remotely controlled handmade pressure and cluster bomb [*parça tesirli uzaktan kumandalı bomba*] was manufactured using that telephone, and the bomb in question was placed under a stone near ... Selahattin Yazıcıoğlu Boulevard on 30 August 2004, where the Governor of Diyarbakır], the Head of the Diyarbakır Security Directorate and the local military commander would be marching; that the search conducted at the defendant's house revealed one 9 mm Browning handgun with the serial number 245 PX 02040, one cartridge clip, thirty-three 9 mm. cartridges, four electric detonators (which were destroyed after being examined), 830 grammes of explosives, 5 metres of copper wire, 3 metres of soldering wire, one soldering machine, and one alarm clock; [and that] having regard to the fact that the

> acts and activities that were committed by the defendant within [the context of] an organisational commitment and within the organic integrity throughout the country [*örgütsel bağlılık ve ülke genelindeki organik bütünlük içinde*] were "directed acts" [*matuf fiil*] that were capable of posing a danger of the intended outcome being realised, and having further regard to the fact that these acts were serious, in view of the manner and the timing of the commission of the offence and its effects on society (the acts in question were capable of having devastating and drastic repercussions on society), the defendant committed the imputed offence of `bringing about the secession of part of the national territory` set out in Article 125 of the Turkish Criminal Code (Law no. 765)..."

74. Under subsection (d) ("The applicant's acts") and under the part concerning incident no. 3, the trial court went on to hold as follows:

> "... it has been concluded that the offence attributed to the defendant was established [after] assessing [the following] facts in their entirety: the fact that the SIM card [which had been] purchased with the identity card belonging to M.Ç. was used in the ... bomb found under a stone near ... Selahattin Yazıcıoğlu Boulevard on 30 August 2004, as specified in the police criminal laboratory's expert report dated 30 August 2004 and numbered 2004/654; and the fact that a telephone call was made on 29 August 2004 with the SIM card purchased on behalf of M.Ç. ..."

75. On the basis of its aforementioned conclusion, the Diyarbakır Assize Court sentenced the applicant to aggravated life imprisonment without the possibility of parole (*ağırlaştırılmış müebbet hapis cezası*). In response to the applicant's defence submissions, the trial court only stated that the Nokia 3310 mobile telephone (telephone no. 4 with the IMEI number 351 342 804 139 450) had been found during the search of the applicant's house, which had been carried out in accordance with the law and the search order dated 6 April 2005 (despite the fact that the search order in respect of the search of the applicant's house that had yielded the impugned mobile telephone was dated 29 October 2004). It did not respond to any of the challenges raised by the applicant against the evidence on which his conviction was based. By the same judgment, the trial court also convicted Y.Y. of aiding and abetting members of the PKK, but acquitted M.Ç. of the same charge.

76. On 12 January 2008 the applicant lodged an appeal against the judgment of the Diyarbakır Assize Court. Largely reiterating his previous allegations and objections, he claimed that his conviction had been based on unilateral allegations (*tek yanlı iddialar*) that had failed to take into account his requests, objections, evidence and witnesses. He lastly contended that the judgment was ambiguous as to whether he had been convicted for robbing M.Ç., for the attempted bombing of the Victory Day parade, or for both. In any event, there was no reliable evidence to prove that he had committed either of those offences, or any other offences for that matter.

H. Developments arising after the trial court's judgment

77. Following the conclusion of the criminal proceedings against the applicant before the Diyarbakır Assize Court, the Security Directorate sent a letter addressed to the Diyarbakır public prosecutor's office; it would appear that the letter was also seen by the trial court, despite the fact that the top-right corner was signed (by way of confirmation that he had read it) by a judge who had not been involved in the applicant's trial. The letter explained that following an armed clash between the security forces and terrorists on 13 January 2007, a "registry book" (*örgüt sicil defteri*) containing the names of members of the terrorist organisation had been seized in the vicinity of the area where the clash had taken place, in which the following information had been written: "Code: Mervan Zoğros, Name: Ayetullah Ay, Name of [his] father and mother: H. and A., Address: village of Kulp Yanık, Diyarbakır – Arrested." In view of the fact that the case file was awaiting examination by the Court of Cassation following the delivery of the trial court's judgment, the trial court did not conduct any examination of that piece of evidence.

78. On 11 February 2008 the Court of Cassation upheld the Diyarbakır Assize Court's judgment, ruling that the applicant's participation in various activities of the PKK with the aim of bringing about the secession of part of the national territory had been proved in the light of the evidence assessed by the trial court. The Court of Cassation did not respond to the objections lodged by the applicant before it delivered its judgment (see paragraph 70 and 76).

II. RELEVANT DOMESTIC LAW AND PRACTICE

79. The relevant provisions of the former Code of Criminal Procedure (Law no. 1412) concerning searches in force at the time of the searches carried out in the applicant's house read as follows:

> Search of places or things belonging to a suspect, [his or her] accomplice and accessory
>
> **Article 94**
>
> "While searches may be conducted at the houses or any other places [belonging to] a person who is under suspicion of committing an offence or participating therein as an accomplice or accessory, [his or her] person or [his or her] belongings may also be searched.
>
> Such a search may be conducted with the purpose of apprehending a person who is under suspicion or where it is hoped to unearth evidence."
>
> Search of persons other than the suspect, [his or her] accomplice and accessories

Article 95

"Personal searches of persons other than those mentioned in the above provision, or searches of their houses or any other place, may be conducted only for the purposes of apprehending the suspect, following up signs of an offence (*suçun izlerinin takibi*), or seizing goods.

Conducting a search in such cases is subject to the existence of facts from which it can be deduced that the pursued person or the signs [to be investigated] (*takip edilen izlerin*) or the goods to be seized may be found on the person or at the place to be searched.

This restriction is not applicable to places at which the suspect is held or which [he or she] enters while being pursued or to places in which persons who are under the supervision of the General Security Directorate reside."

A search that is to be conducted at night; determination of the hours of night time

Article 96

"No search of dwellings, business premises or any other enclosed spaces shall be conducted at night, with the exception of cases involving flagrant offences, [cases] where delay is [considered to be] prejudicial [to the advancement of the investigation in question] and [in cases involving the] re-arrest of a detainee or a convict who has escaped.

Such a degree of scrupulousness [*takayyüt*] is not applicable in respect of places in which persons who are under the supervision of the general directorate of security reside, or places that may be entered by any person at night, or places known to the police to be such as those in which convicts gather or take shelter or [those] where the objects derived from [the commission of] offences are kept, or secret gambling places or brothels."

Authority to issue search warrants

Article 97

"The authority to issue search [warrants] lies with the judge. In cases where it is anticipated that delay [would be] prejudicial [to the advancement of the investigation in question], public prosecutors, or police officers who have been authorised to execute the orders of the prosecutors in their capacity as their proxies, may carry out searches.

In order to be able to carry out searches without the presence of a judge or a public prosecutor at residences, places reserved for doing businesses or in enclosed spaces, two persons from neighbouring dwellings or council of elders (*ihtiyar heyetinden veya komşulardan iki kişi*) of the place [where the search is to be carried out] shall be present [at that place]."

80. Moreover, section 5 of the Regulation on Judicial and Preventive Searches (no. 25117, which entered into force on 24 May 2003) stipulates that written search orders issued by public prosecutors or police officers of a certain rank must be submitted within twenty-four hours for approval to the duty judge, who in turn must make a decision within forty-eight hours.

81. Further information regarding searches carried out pursuant to the former Code of Criminal Procedure may be found in *Erduran and Em*

Export Dış Tic A.Ş. v. Turkey (nos. 25707/05 and 28614/06, §§ 51-6, 20 November 2018), *Aydemir v. Turkey* (no. 17811/04, §§ 58-9, 24 May 2011), *Işıldak v. Turkey* (no. 12863/02, §§ 18-9, 30 September 2008), *Taner Kılıç v. Turkey* (no.70845/01, §21-5, 24 October 2006) and *H.E. v. Turkey* (no. 30498/96, § 26, 22 December 2005).

THE LAW

I. JOINDER OF THE APPLICATIONS

82. The Court decides to join the applications and examine them in a single judgment, pursuant to Rule 42 § 1 of the Rules of Court, regard being had to the similarity of the legal issues and the factual circumstances giving rise to the two applications.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

83. The applicant complained that various aspects of his right to fair trial had been violated. The relevant parts of Article 6 of the Convention read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal established by law. ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

84. The Government contested that argument.

A. Admissibility

85. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It furthermore notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

86. In his application no. 29084/07, the applicant alleged that he had been denied a fair trial and raised the following complaints under Articles 6 §§ 1 and 3 (a), (b) and (c) of the Convention:

- he had been denied access to legal assistance during his detention in police custody in Istanbul and a false report had been drawn up by the police to cover up that failure;

- he had been accused and convicted on the basis of false evidence that had been obtained unlawfully or manufactured, in order to frame him for certain crimes committed by unknown persons; he contested in particular the evidence obtained as a result of the searches conducted in his house and Y.Y.'s house, as well as his body search in the prison on 5 April 2005;

- the trial court had refused to consider all his requests and objections – including his requests for witnesses to be called and for certain evidence to be submitted for examination by the Forensic Medicine Institute in order to secure unbiased findings – and had disregarded all evidence favourable to him;

- the nature and cause of the accusations against him had changed during the course of the proceedings, given that while he had been accused of only three acts in the bill of indictment, the trial prosecutor had later ascribed to him responsibility for four criminal acts; moreover, he had not been given the opportunity to prepare an additional defence in respect of the new accusation;

- the relevant statements and documents from M.Ç.'s case file had not been read out or otherwise provided to him following the joinder of the cases;

- the factual grounds for his conviction could not be ascertained from the wording of the judgment of the Diyarbakır Assize Court.

87. In so far as the search of his house on 29 October 2004 and the mobile telephone (telephone no.4) allegedly found therein are concerned, the applicant vehemently denied that the mobile telephone had belonged to him, and made detailed submissions to the domestic courts in that regard. In that connection, he alleged that after the first search, which had been carried out in his presence, had yielded no findings, three other officers dressed in plain clothes had conducted another search immediately thereafter in his absence; only then had the police allegedly found the Nokia 3310 mobile telephone (telephone no.4 with the IMEI no. 351342/80/413945/0), which had later been central to his conviction. It was the applicant's contention that when he had refused to sign the search-and-seizure record, which had noted the finding of that mobile telephone, the police had drawn up another

record that did not refer to the impugned mobile telephone; the applicant had signed the latter report. Nevertheless, the case file before the Court did not contain the search-and-seizure record signed by the applicant.

88. The applicant furthermore argued that the searches had been carried out contrary to the domestic legal provisions in force at the material time, as they had been performed during the night, in the absence of a judicial warrant and without the presence of the two independent witnesses.

89. In the same vein, the applicant alleged that the search-and-seizure report had been bogus, submitting that the police officers had drawn it up retrospectively in order to be able to include the Nokia 3310 mobile telephone (telephone no.4) in the list of items found at his home. To support that contention, the applicant drew the Court's attention to the fact that all the documents drawn up by the police during his period of custody in Istanbul indicated his name as M.M.K., given the fact that at that time he had not revealed his true identity to the police. The only document in which his real name had been used was the search-and-seizure record in respect of the search of his house dated 29 October 2004, which, moreover, did not bear his signature. The applicant inferred from the foregoing that the search-and-seizure record was bogus and had been prepared retrospectively by the police, who had planted the Nokia 3310 mobile telephone (telephone no.4) in his house.

90. As regards the search carried out at the house of Y.Y. and the finding that the handwritten notes so obtained had allegedly belonged to him, the applicant argued that those notes had borne neither his fingerprints nor those of his relatives. Pointing out that that search had also been conducted in the absence of any independent witnesses, the applicant denied that the seized notes had belonged to him.

91. As for the search of his person carried out by the prison guards on 5 April 2005 and the handwritten notes so obtained, the applicant asserted that no notes had been found on him, as indicated by the fact that he had been allowed to see his mother on that very same day. Only nine days after the visit had the applicant had been apprised of the information that those notes had allegedly been found on him and that disciplinary proceedings had been initiated against him on that basis. When the public prosecutor had taken his statements in relation to that event, the applicant had denied that any notes had been found on him and had asked the public prosecutor to obtain the recordings of the security cameras in the prison and to obtain samples of his writing and to send them to the Forensic Medicine Institute for analysis. However, both the public prosecutor and the trial court had been informed by the prison authorities that the impugned recordings had been erased. In his view, the fact that the public prosecutor had taken further writing samples from him illustrated that the samples taken and assessed by the police had been insufficient. Likewise, the Forensic Medicine Institute had concluded (on the basis of the same documents as those examined by

the police criminal laboratory, which had found that the notes had been written by him) that further samples were required for an accurate examination. Giving a detailed description of how visits at the prison are organised, the applicant submitted that other inmates had also been present on 5 April 2005 and asked the public prosecutor to hear evidence from them. He complained that except for the two above-mentioned prison guards, no other persons had been heard as witnesses. Lastly, although he had brought all those points to the trial court's attention, the latter had only interpreted them in a manner detrimental to him.

92. As for the search of his house on 6 April 2005 and the material found therein following the discovery of the notes on his person, the applicant denied that those items had belonged to him, arguing that had they been his they would have been discovered during the search carried out on 29 October 2004. That was also demonstrated by the fact that two police officers had been present during both searches; thus, it was inconceivable that they had not found all the material at the same place during the first search. To support his argument, the applicant also pointed out that his fingerprints had not been found on any of the items allegedly found by the police on 6 April 2005.

93. In application no. 1191/08, the applicant alleged that he had been denied adequate facilities to prepare his defence and that he had also been denied the right to defend himself in person, on account of the unlawful restriction imposed by the prison administration on his access to certain documents in his criminal case file.

94. In his observations in reply to those of the Government, a summary of which may be found below, the applicant stated that the Government had merely submitted general explanations with a view to avoiding answering the questions put to them in the communication report. The applicant furthermore criticised the Government for constantly referring to the CD recording of his allegedly admitting to the killing two police officers (incident 1), arguing that the trial court had not only excluded that piece of evidence from the case file, finding that it had been obtained in a manner contrary to Article 148 of the Code of Criminal Procedure, but that it had also acquitted him of that charge. In the applicant's view, the Government, instead of providing clear answers to the questions contained in the communication report or producing the documents and the recordings requested therein, had attempted to divert the Court's attention to irrelevant points that did not constitute the subject of the present application.

95. In respect of the trial court's failure to give sufficient reasons for his conviction under Article 125 of the then Criminal Code, the applicant pointed out that the Government had not given a direct answer regarding that issue and instead had provided the Court with the relevant parts of the reasoned judgment. In his view, it seemed that the Government had accepted that there had been a violation of his right to a reasoned judgment.

96. As for the documents that the Court had invited the Government to submit, the applicant averred that the Government had only submitted the call records of the telephone no.4 (the one that had allegedly been found during the first search of his house on 29 October 2004 and had allegedly belonged to M.Ç.) and the mobile telephone that had been found on his person at the time of his arrest on the same day (telephone no.3). Crucially, the Government had failed to submit the call records belonging to the telephone no.2, which had, according to the domestic courts, been used in the attempted bombing of the 30 August 2004 Victory Day parade and had later been found to have been linked to the bomb apparatus found therein.

97. In the same vein, the applicant furthermore argued that the Government had failed to submit the statements made by S.Ç. (one of the three prison guards who had carried out the search of him in prison on 5 April 2005).

98. Likewise, the Government had failed to provide the Court with a copy of the video recordings of the search carried out at his home on 6 April 2005 for the sole reason that they had claimed to have been unable to obtain the impugned record, without explaining in any way why that had been the case. In his view, the Government should have provided convincing reasons for the deletion of the video recording of his search in prison and the "loss" of recordings related to the search of his house on 6 April 2005.

99. As regards the search of his house on 29 October 2004, the applicant asserted that the report drawn up following the search of his house, which had noted the finding of a mobile telephone (telephone no.4), had been bogus.

100. In response to the Government's argument that the police had not taken a statement from him in Istanbul, the applicant maintained that although his written testimony had not been taken, the police had questioned him, which was evidenced by the house search report dated 29 October 2004 (the veracity of which was contested by the applicant), according to which the police had conducted an oral interview (*mülakat*) with the applicant prior to the search.

(b) The Government

101. In their observations, the Government submitted certain factual information entitled "Assessment of the facts in respect of the complaints", which related particularly to certain investigative measures taken during the pre-trial stage and developments that had arisen during the trial stage. They did not submit any explicit and individualised case-specific objections in respect of the applicant's complaints. As regards the alleged lack of reasoning in the trial court's judgment, the Government provided a translation of the relevant parts of the trial court's judgment (which have been added to the facts of the case), without making any further comments.

As for the remaining complaints, the following may be inferred from their submissions.

102. In respect of the applicant's claims concerning the search of the applicant's house in Istanbul on 29 October 2004, the Government submitted that the search report drawn up the same day indicated the finding of a Nokia 3310 mobile telephone (telephone no.4) and had been signed by the applicant.

103. As for the applicant's complaints under Article 6 § 3 (c) of the Convention, the Government submitted that they were aware of the Court's case-law in respect of that provision. They argued, however, that there had been no report indicating that the applicant's statements had been taken at the Istanbul Security Directorate. The Government furthermore pointed out that the applicant had not been able to meet his lawyer on account of his participation in the search conducted in his house.

104. As regards the applicant's contention that his witnesses had not been heard by the trial court, the Government maintained that the public prosecutor had heard M.Ç. as a witness on 8 March 2005.

105. Regarding the complaint about the trial court's refusal to submit for examination certain evidence to the Forensic Medicine Institute in order to secure unbiased findings, they maintained that the trial court had already deemed at a hearing held on 8 March 2005 that the report by the criminal laboratory at the Diyarbakır Security Directorate was sufficient.

106. Moreover, the Government submitted the following documents in response to the Court's request that certain information and documents be produced: (i) copies of three photographs showing the material seized during the second search of the applicant's house on 6 April 2005; (ii) the minutes of the criminal proceedings against M.Ç.; (iii) two reports issued by mobile telephone operators concerning the mobile telephone allegedly taken from M.Ç. and the mobile telephone found on the applicant at the time of his apprehension (the reports gave details of the numbers called, the places from where the calls were made and the duration of the calls); and (iv) copies of the notes found on the applicant in prison, of his disciplinary sanction and of his statements to the prison authorities.

107. With regard to the applicant's allegation that he had not been allowed to access certain documents from the case file owing to their seizure by the prison administration, the Government maintained that neither the applicant nor his lawyer had ever raised that matter after the hearing held on 6 June 2006.

108. Moreover, the Government submitted further factual information in relation to incident 1, namely the killing of two police officers at a police checkpoint on 7 September 2004, in respect of which the national courts had acquitted the applicant. They submitted that according to the record dated 2 November 2004, the applicant had admitted being the sole perpetrator of the killing of two members of the security forces on 7 September 2004;

however, he had changed his mind on the way to the scene of the incident and had decided not to make any statements. Moreover, the confessions that the applicant had made in the course of his being held in police custody concerning the killings had also been recorded on camera by the police officers. Regarding the content of the police video recording of the applicant's alleged confession, they referred to the report drawn up by Judge O.Y.

The Government furthermore brought to the Court's attention "the registry book" captured by the security forces following an armed clash with the terrorists, which had contained information about the applicant and his parents, his code name and the fact that he had been detained.

2. The Court's assessment

(a) The scope of the case

109. At the outset, the Court makes the following observations in relation to the applicant's conviction with a view to elucidating the circumstances surrounding his above-mentioned complaints. The Diyarbakır public prosecutor filed two different bills of indictment against the applicant on 9 February 2005 and 19 January 2006, respectively. In the first bill of indictment, three different accusations were levelled against the applicant under Article 125 of the then Criminal Code for seeking to destroy the unity of the Turkish State and to remove part of the country from the State's control: the killing of two police officers at a police checkpoint on 7 September 2004 (incident 1); an armed attack against a battalion command post in Hani, Diyarbakır on 7 June 2004 (incident 2); and the forcible seizure of M.Ç.'s telephone (telephone no.4) and identity card in early August 2004 (incident 3 – see paragraph 53 above). In the second bill of indictment, which was filed following the discovery of the notes on the applicant's person in prison, the public prosecutor requested that the applicant be tried and convicted under Article 125 of the then Criminal Code on one count on the basis of the material found during the search of his house on 6 April 2005 (see paragraph 61 above). Neither of the two bills of indictment contained any accusation against the applicant concerning his alleged involvement in or criminal liability for the attempted bombing of the 30 August 2004 Victory Day parade.

110. The Court furthermore observes that while the trial court acquitted the applicant in respect of incidents 1 and 2, it found the applicant guilty under Article 125 of the then Criminal Code for attempting to bring about the secession of part of the national territory on the basis of two incidents: firstly, it held that the applicant had taken through coercion M.Ç.'s identity card, SIM card (no. 0535 786 91 30) and telephone no.4 (with the IMEI no. 351 342 804 139 450) on behalf of the illegal organisation on 13 August 2004; secondly, it held that another Nokia 3310 (telephone no.2 with the

IMEI no. 350 101 912 604 260) and another SIM card (no. 0537 551 59 35) had been purchased and used in the mobile telephone-operated bomb apparatus at the 30 August 2004 Victory Day parade, which had later been deactivated on the spot; lastly, when concluding that those acts had been capable of realising the aims proscribed by Article 125 of the then Criminal Code (a material element of the offence defined therein), the trial court also referred to the weapons, detonators, explosives and other material seized during the second of the searches of the applicant's home in Istanbul on 6 April 2005, which had been conducted on the basis of the two small hand-written notes found on his person following the body search conducted on him on 5 April 2005 in prison prior to his mother's visit.

111. In so far as the Government may be understood to argue that the applicant confessed to killing the two police officers by pointing to certain pieces of evidence contained in the case file, the Court reiterates at the outset that it is not its task to examine whether the probative value of evidence was sufficient or not to convict or acquit an applicant of a given accusation. In the instant case, the domestic courts not only acquitted the applicant of the killing of two police officers but also found that the applicant's secretly recorded interview with the police officers had been unlawful and thus excluded it from its examination on the merits of the case. In the present case, the practical ramifications of that approach create a constraint on the Court's examination in so far as the Government's above argument regarding incident no. 1 is concerned.

112. Furthermore, the scope of a case before the Court remains circumscribed by the facts, as presented by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 123, ECHR 2018). It is not disputed between the parties that the applicant's complaint regarding the killing of the two police officers had been limited to the admission of the video recording (including his self-incriminating statements), which was declared inadmissible by the Court at the time that the present application was communicated to the Government on 30 January 2014, pursuant to Article 24 § 2 of the Convention. In any event, the Court reiterates its well-established case-law to the effect that an applicant cannot be considered as a victim within the meaning of Article 34 of the Convention for complaints lodged by him under Article 6 of the Convention relating to criminal proceedings that ended in with his acquittal, save for any complaints that he may have concerning the length of those proceedings under Article 6 § 1 of the Convention, or the presumption of his innocence under Article 6 § 2 of the Convention in connection thereto. That not being the case in this instance, the Court concludes that it is not called upon to examine the incidents in respect of which the applicant was acquitted by the national courts.

113. Similarly, the Court should refrain from assessing any evidence that was not examined during the trial, such as "the registry book" brought to its

attention by the Government, which was obtained by the security forces from a hideout used by PKK terrorists and in which the applicant's name had been recorded. First and foremost, that document was discovered following the delivery of the trial court's reasoned judgment; thus, it did not form part of the trial court's examination, as reflected in its judgment (compare *Natig Jafarov v. Azerbaijan*, no. 64581/16, § 49, 7 November 2019). Moreover, no reference was made by the Court of Cassation to that evidence when upholding the applicant's conviction. In any event, the Government did not submit any proof showing that the "registry book" had been duly submitted to the Court of Cassation before the delivery of its judgment. Therefore, it would not only be contrary to the Court's task under Article 6 of the Convention, but also to the guarantees of adversarial proceedings and the principle of equality of arms if it were to embark upon an assessment of evidence that had not been duly presented to or assessed by the national courts.

114. In view of the foregoing considerations, the Court's examination under Article 6 of the Convention will be confined to the applicant's conviction by the domestic courts.

(b) Preliminary comments

115. The Court starts by noting that an important part of the applicant's complaints essentially give rise to different but interrelated issues, namely (i) the allegedly flawed collection of evidence, (ii) the resulting use of such unreliable and (according to him) manufactured evidence, (iii) the domestic courts' failure to implement the necessary procedural safeguards *vis-à-vis* such evidence and to address his pertinent objections in relation thereto, (iv) their failure to conduct a proper examination of the submissions, arguments and the evidence and to provide him with the relevant information from M.Ç.'s case file or to read it out during the hearings, and (v) their failure to adequately state their reasons when sentencing the applicant to the heaviest penalty allowed by the Turkish criminal-law system (see *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, § 211, 16 November 2017).

116. Moreover, given the intertwined nature of the applicant's complaints regarding the collection, examination and quality of the different pieces of evidence and the issue of safeguards at different stages of the proceedings as well as the factual complexity of the overlapping procedural steps giving rise to the discovery of such evidence, the Court finds it appropriate to examine those complaints in respect of each relevant piece of evidence and in a chronological order.

117. The Court will first examine the "collection" of evidence and the existence of procedural safeguards during the investigation stage, which concerned (i) the alleged denial of access to a lawyer at the time of the

applicant's detention in Istanbul, and (ii) the house search carried out at the applicant's home in Istanbul on 29 October 2004.

118. Next, the Court will address the complaints concerning the "collection" and "examination" of (i) the notes recovered in the prison; (ii) the second house search on 6 April 2005; and (iii) the operation of the relevant safeguards in that context.

119. Finally, the Court will turn to the trial court's assessment vis-à-vis (i) the telephone no.4 allegedly found during the search of the applicant's house on 29 October 2004; (ii) the telephone no.2 and (iii) the inextricably linked issues relating to the domestic courts' duty to properly examine the submissions, arguments and evidence before them and their duty to give reasoned judgments in respect of the applicant's conviction under Article 125 of the Criminal Code.

120. In sum, the Court will proceed with examining, in turn, the different categories of evidence in detail with a view to ascertaining whether that evidence was taken and examined in a fair manner (see *Mirilashvili v. Russia*, no. 6293/04, § 173, 11 December 2008).

121. In so doing and for the purposes of its wider assessment of the overall fairness of the criminal proceedings against the applicant, the Court will duly take into consideration, where relevant, the applicant's remaining complaints related to his defence rights, namely (i) the trial court's alleged failure to summon witnesses favourable to him and (ii) his alleged inability to defend himself on account of the prison administration's refusal to hand him certain documents from the case file and the alleged change in the nature of and cited grounds for the accusations against him after the lodging of the bill of indictment and his resulting inability to defend himself effectively.

122. It follows that even though each of the different complaints under Article 6 §§ 1, and 3 (c), (d) of the Convention would in principle be capable of raising a separate issue under the Convention, in the present case it is appropriate to treat the specific allegations as relating to elements of general fairness, while having due regard to the guarantees provided under paragraph 3 of Article 6 of the Convention (see *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, § 102 *in fine*, 23 February 2016).

(c) The general principles

123. In deciding whether applicants have received a fair hearing the Court does not take the place of the domestic courts, who are in the best position to assess the evidence before them, establish facts and interpret domestic law (see, among other authorities, the above-cited case of *Navalnyy and Ofitserov*, § 97 with further references therein, and *Nemtsov v. Russia*, no. 1774/11, § 87, 31 July 2014).

124. Similarly, the Court reiterates that as a principle the weight attached by the national courts to particular items of evidence or to findings

or assessments submitted to them for consideration are matters that fall within the remit of the national courts, unless and in so far as they may have infringed rights and freedoms protected by the Convention or their findings can be regarded as arbitrary or manifestly unreasonable, and provided that the proceedings as a whole were fair, as required by Article 6 § 1 of the Convention (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017, and *Nemtsov*, cited above, § 92). Therefore, its task under Article 6 of the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.

125. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 149, 17 October 2019). The Court notes, however, that there is a distinction between the admissibility of evidence (that is to say the question of which elements of proof may be submitted to the relevant court for its consideration) and the rights of the defence in respect of evidence which in fact has been submitted to the court (see *SA-Capital Oy v. Finland*, no. 5556/10, § 74, 14 February 2019 and the references therein). There is also a distinction between the latter (that is to say whether the rights of defence have been properly ensured in respect of the evidence taken) and the subsequent assessment of that evidence by the court once the proceedings have been concluded. From the perspective of the rights of the defence, issues under Article 6 may therefore arise in terms of whether the evidence produced for or against the defendant was presented in such a way as to ensure a fair trial (see, for instance, *Horvatić v. Croatia*, no. 36044/09, § 78, 17 October 2013, and *Barım v. Turkey* (dec.), no. 34536/97, 12 January 1999).

126. In determining whether the proceedings as a whole were fair, regard must be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009; *Zhang v. Ukraine*, no. 6970/15, § 57, 13 November 2018; and *Erkapić v. Croatia*, no. 51198/08, § 72, 25 April 2013). The burden of proof is on the prosecution, and any doubt should benefit the accused (see *Ajdarić v. Croatia*, no. 20883/09, § 35, 13 December 2011, with further references).

127. The Court furthermore reiterates that, in view of the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly "heard" – that is to say, properly examined by the tribunal

(see *Carmel Saliba v. Malta*, no. 24221/13, § 65, 29 November 2016, with further references therein, and *Fodor v. Romania*, no. 45266/07, § 28, 16 September 2014). In examining the fairness of criminal proceedings, the Court has also held in particular that by ignoring a specific, pertinent and important point made by the accused, domestic courts fall short of their obligations under Article 6 § 1 of the Convention (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 280, 21 April 2011).

128. Moreover, according to the Court's established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (see *Moreira Ferreira (no. 2)*, cited above, § 84). The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to arguments that are decisive for the outcome of those proceedings (see, among other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A, and *Higgins and Others v. France*, 19 February 1998, §§ 42-43, *Reports of Judgments and Decisions* 1998-I).

129. As the Court has reiterated in *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 252, 13 September 2016), the general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue, and there can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism. Having said that, the Court does not lose sight of the difficulties associated with the fight against terrorism and the challenges that States face in the light of the changing methods and tactics used in the commission of terrorist offences (see *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 77, 3 December 2019). In these challenging times, the Court considers that it is of the utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law by ensuring respect for, *inter alia*, the guarantees of Article 6 of the Convention (see *Ibrahim and Others*, cited above, § 252).

130. Furthermore, the Court reiterates that in matters of criminal justice it attaches significant importance to appearances, as what is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Lisica v. Croatia*, no. 20100/06, § 56, 25 February 2010).

(d) Application of those principles to the present case

(i) The alleged denial of access to a lawyer at the time of the applicant's detention in Istanbul

131. The Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, as guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 121, 12 May 2017). Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence (see *Pishchalnikov v. Russia*, no. 7025/04, § 69, 24 September 2009). The right to a lawyer also contributes to the prevention of miscarriages of justice (see *Beuze v. Belgium* [GC], no. 71409/10, § 125, 9 November 2018).

132. Turning to the circumstances of the present case, the Court notes that the starting point in respect of the applicant's right of access to a lawyer should be considered as 29 October 2004 at 5.15 p.m. – that is to say, the date and time of the applicant's arrest.

133. In that connection, the Court takes note of the existence of two conflicting reports in the case file: according to the first report drawn up on 29 October 2004 at 9.10 p.m., the defence lawyer appointed by the Istanbul Bar Association, arrived at the Security Directorate around 9 p.m. but was not able to meet the applicant, who was, according to the report, present at the house search at that time; however, according to the second report drawn up by the same police officers on 30 October 2004 at 5 a.m., despite the police's request for a lawyer to be appointed by the Bar Association for the applicant, the Bar Association had not dispatched a lawyer to provide legal assistance to the applicant and as a result he was not able to meet a lawyer, as he was handed over to the police officers from the Diyarbakır Security Directorate so that the necessary investigative measures could be carried out.

134. Nevertheless, the Court does not lose sight of the fact that the police chief authorised the house search by means of a document bearing 9.30 p.m. as its time of issuance, which makes it difficult to understand how the applicant could have been at the house search at 9 p.m. – the time at which, according to the first report, the lawyer allegedly arrived at the Security Directorate. When invited to shed light on these two mutually contradictory reports (prepared by the police at the Istanbul Security Directorate on 29 and 30 October 2004, respectively) regarding the arrival of the Bar-appointed lawyer, the Government submitted that upon the applicant requesting legal assistance following his placement in custody, the lawyer had been appointed by the Istanbul Bar Association on 29 October

2004 at around 9 p.m. and that he had subsequently arrived at the Security Directorate; however, the applicant had not been able to meet with his lawyer as he had been taken to the house that was being searched. However, be that as it may, the Court notes that the two conflicting reports were drawn up by the same police officers; those officers were not heard by the trial court with a view to clarifying that matter.

135. The Court considers that it need not resolve this issue (compare *Šebalj v. Croatia*, no. 4429/09, § 262, 28 June 2011) because it finds in any event that the applicant was not afforded the assistance of a lawyer at the time of his custody in Istanbul – either before, during or after the contested house search during which the impugned mobile telephone was found (see *Melnikov v. Russia*, no. 23610/03, § 79, 14 January 2010). Reiterating the applicant's concerns regarding the house search (most of which could have been alleviated had the applicant been assisted by a lawyer), and stressing the important role that an accused's lawyer may serve as the "watchdog of procedural regularity" (see *Ensslin, Baader and Raspe v. Germany*, nos. 7572/76, 7586/76 and 7587/76, Commission decision of 8 July 1978, Decisions and Reports (DR) 14, p. 64), the Court observes that the fact that the defence lawyer was not present at the house search conducted on 29 October 2004 constituted a serious procedural shortcoming capable of undermining the overall fairness of the proceedings against the applicant (see *Sakit Zahidov v. Azerbaijan*, no. 51164/07, § 54 in fine, 12 November 2015).

136. Moreover, the Government were also requested to indicate whether the applicant was interviewed by the police while in Istanbul, and if so, to submit the relevant records. In response to that request, the Government maintained that there was no report indicating that an interview with the applicant had taken place at the Istanbul Security Directorate.

137. Nevertheless, the Court observes that it follows from the search report drawn up the same day at 10.15 p.m. that the police indeed conducted an informal interview with the applicant following his arrest but before his house had been searched, in the course of which he told the police the address of his house. At this juncture, the Court reiterates its well-established case-law that any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as informal questioning or interview (*mülakat*), as was indicated in the search-and-seizure report dated 29 October 2004 in the instant case (see *Titarenko v. Ukraine*, 31720/02, § 87, 20 September 2012). There is also no indication that the applicant validly waived his right to be assisted by counsel for the purpose of the above talks with the officers (see, *mutatis mutandis*, *Pavlenko v. Russia*, no. 42371/02, § 111, 1 April 2010).

138. Lastly, the effects of the aforementioned scenario are further exacerbated by the complete lack of scrutiny in respect of this issue on the

part of the trial court, which simply did not address it and gave no reply to the applicant's arguments in that regard.

(ii) The house search carried out at the applicant's home in Istanbul on 29 October 2004

139. The Court notes firstly that the applicant maintained that two consecutive searches were conducted in his house on the night of 29 October 2004 on the basis of a search warrant issued by a police chief. According to the applicant, when the initial search, which the applicant was allowed to observe, did not reveal any evidence, a group of plain-clothes policemen arrived and searched the house once again, while the applicant was kept outside. This second group found a mobile telephone (telephone no.4) in the house, which they wanted to seize as evidence, and which later constituted one of the main items of incriminating evidence against the applicant.

140. Still according to the applicant, the police then drew up another search-and-seizure record, which made no mention of the telephone and which the applicant agreed to sign. However, it appears that that second copy was never placed in the case file. The Court observes that the applicant adamantly denied ownership of telephone no.4 (a Nokia 3310 with the IMEI number 351 342 80 413945 0) from the very beginning and refused to sign the search-and-seizure record reporting its seizure (compare *Topić v. Croatia*, no. 51355/10, § 43, 10 October 2013).

141. The Court furthermore notes that although the Government alleged that the search report containing the finding of a mobile telephone in the applicant's house in Istanbul had also been signed by the applicant, they failed to provide any documentary evidence capable of proving that that was indeed the case, as the report relied on by the Government in support of that contention did not contain the applicant's signature.

142. The Court reiterates that in principle carrying out several searches of the same premises is not contrary to the principles of a fair trial, provided that each of those searches complies with the minimum requirement that the defendant in the criminal proceedings be given an adequate opportunity to be present during the search (see *Lisica*, cited above, § 56). However, it appears that the applicant, without any reasons having been given, was not allowed to be present during the second search, in the course of which telephone no.4 was found.

143. Moreover, the Court cannot but note that under the domestic legal provisions in force at the material time, a search warrant as a general rule had to be issued by a judge. Nevertheless, in exceptional circumstances – namely, where delay would be prejudicial to the advancement of an investigation – public prosecutors or police officers of a certain rank were also entitled to conduct a search, subject to the condition that they submit the relevant search order for the approval of a judge within twenty-four

hours (see paragraph 80 above). In that connection, the Court furthermore notes that the warrant issued by the deputy director of the Istanbul Security Directorate Anti-terrorism Branch only contained scant reasoning as to why it was imperative to carry out the search so urgently, without prior judicial scrutiny. Indeed, the reasoning used in the warrant – that is to say, "Tampering with evidence" (see paragraph 20 above), without any individualised assessment of the circumstances of the case – is not sufficient to demonstrate the exigency of the situation, and hence constitutes far from satisfactory justification for dispensing with any judicial scrutiny prior to the search (see *Özgün Öztunç v. Turkey*, no. 5839/09, § 35, 27 March 2018).

144. Be that as it may, it also appears that the search order was executed in disregard of another statutory procedural safeguard – that is to say, the presence of the two independent witnesses stipulated by Article 97 § 2 of the then Code of Criminal Procedure, which appears to be particularly important in the instant case in view of the applicant's allegation that telephone no.4 was planted in his house by police officers (see *Aydemir v. Turkey*, no. 17811/04, § 99, 24 May 2011; also compare *Kobiashvili v. Georgia*, no. 36416/06, §§ 62-4, 14 March 2019). The Court attaches importance to the fact that the search order was executed in the absence of the two independent witnesses.

145. Moreover, when the police applied to the Istanbul Assize Court the next day for approval of the lawfulness of the house search, the assize court endorsed the search as requested, but noted in its decision that "no [indication of any] crime or criminal elements" had been found in the applicant's apartment; that decision did not mention telephone no.4 seized as evidence. In the view of the Court, this omission in the assize court's decision raises doubts as to the content of the search-and-seizure record submitted to that court, particularly in view of the applicant's allegations that two mutually contradictory records were prepared in the aftermath of the house search.

146. In view of the foregoing considerations, the Court concludes that serious doubt was cast on the reliability and accuracy of the evidence alleged to have been discovered during the house search on 29 October 2004.

147. Crucially, the trial court did not address any of the above-mentioned points, despite the repeated objections raised by the applicant (see *Sakit Zahidov*, cited above, § 57; also compare *Dragoş Ioan Rusu v. Romania*, no. 22767/08, § 53, 31 October 2017, and the further references cited therein). The Court observes that the trial court merely stated in its reasoned judgment that the above-mentioned telephone no.4 had been found during the search, which had been conducted in line with "the law and the [prescribed legal] procedure" pursuant to the search order dated 6 April 2005. This line of reasoning appears to indicate confusion on the part of the trial court, given that the mobile telephone in question had been found

during the search carried out on 29 October 2004, pursuant to the search order, whereas in its reasoned judgment it referred to the search conducted on 6 April 2005 and concluded that the house search carried out on 29 October 2004 had been in compliance with the law.

148. Be that as it may, the Court considers that such generic reasoning on the part of the national courts is not sufficient, regard being had to the applicant's specific and pertinent objection related to the legality of the house search (see, *mutatis mutandis*, *Kırdök and others v. Turkey,* no. 14704/12, § 53, 3 December 2019).

149. As telephone no.4 formed the basis of the trial court's finding that the applicant had forcibly taken M.Ç.'s mobile telephone and was thus central to his conviction, the Court finds it difficult to accept the trial court's passive approach *vis-à-vis* this significant piece of evidence (contrast *Bykov*, cited above, §§ 95-6, and *Lee Davies v. Belgium*, no. 18704/05, §§ 49-50, 28 July 2009).

150. That being the case, the Court concludes that the applicant was not able to challenge the authenticity and veracity of that evidence, on which his conviction rested, in an effective manner that was commensurate with the requirements of Article 6 of the Convention.

(iii) The notes recovered in the prison, and the second house search on 6 April 2005

(1) The notes found on the applicant's person in prison on 5 April 2005

151. The Court notes that while the applicant was in pre-trial detention, another search was conducted in his apartment on 6 April 2005 in Istanbul, apparently on the basis of information derived from coded notes found on him in the prison on 5 April 2005 (see paragraphs 43 and 44 above). The search yielded a handgun, explosives and bomb-making material hidden in various areas of the apartment that had already been searched by the police on 29 October 2004. The Court will address in turn the issues related to the search of the applicant in prison, the notes obtained thereby and the subsequent house search.

152. As regards the search of the applicant's person, the Court observes that two prison guards testified to having heard that S.Ç. had found the notes on him, whereas he persistently contested that allegation, submitting counter-evidence (see paragraph 70 above). The Court furthermore notes that the guards stated that the incident had also been recorded on video cameras. When the trial court requested the relevant video recording, after an unexplained delay of ten months, it was informed that the recording had not been preserved owing to a scarcity of video tapes (the prison authorities had to record over cassettes at five-month intervals – see paragraphs 65 and 67 above). Similarly, the public prosecutor in charge of the investigation into the impugned notes only instructed the prison authorities

to provide him with the video recording after five months had elapsed since the discovery of the notes on the applicant's person (see paragraph 50 above). As a result, the only evidence capable of definitively resolving the dispute between the parties as to whether the personal search of the applicant had in fact been carried out by the prison guards on 5 April 2005 and if so whether the impugned notes discovered on the applicant had vanished through no apparent fault of the applicant. Hence, the recording was not produced during the trial.

153. Moreover, the Court also observes that although two prison guards (H.A. and F.Y.) stated that S.Ç. had told them that he had found the notes on the applicant, the trial court did not find it necessary to hear evidence from S.Ç., who appears to be the individual who actually found the impugned notes.

154. As a result, the Court finds that the applicant was placed in a disadvantageous position from which to contest the authenticity and veracity of the impugned notes, in view of the erasure of the video and the trial court's unqualified reliance on the statements of the guards. In the Court's view, this is particularly troubling, given that the incident took place in a prison within the exclusive knowledge and control of the authorities of the State, and the trial court did not discuss any of the above-mentioned issues in its reasoned judgment.

155. As far as the authenticity of the notes and the question as to whether they were written by the applicant are concerned, the Court reiterates that it is not its task to review *in abstracto* the manner in which forensic evidence is assessed by the domestic courts (see *Rostomashvili v. Georgia*, no. 13185/07, § 58, 8 November 2018). Moreover, it is a matter for the domestic judge to assess the relevance and evidentiary value of all available evidence (including expert opinions), the Court's competence in this area is very limited (see *Mirilashvili*, cited above, § 174 *in fine*). Thus, the mere fact that the trial court preferred the opinion of a particular expert does not reveal any "unfairness", within the meaning of Article 6 of the Convention. Nevertheless, it must be borne in mind that despite the national courts' discretion when choosing arguments in a particular case and admitting evidence in support of parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions (see *Shabelnik v. Ukraine (no. 2)*, no. 15685/11, §§ 51-2, 1 June 2017, and *S.C. IMH Suceava S.R.L. v. Romania*, no. 24935/04, § 40, 29 October 2013, within the context of the admissibility and the assessment of evidence).

156. Turning to the circumstances of the present case, the Court observes that the police criminal laboratory, which based its examination on the photocopies of the writing samples given by the applicant during his time in police custody, identified the writing on the notes as belonging to the applicant. However, the Forensic Medicine Institute, which also had in its possession the photocopies of the same writing samples provided by the

applicant as those that were examined by the police criminal laboratory, concluded that, to make an accurate finding, the originals of the writing samples that the applicant had given during his time in custody, as well as more material and samples, would be needed. In that connection, it requested samples of the applicant's previous "sincere" handwriting, such as that he had used in exams, petitions, or personal letters. Likewise, it furthermore held that the applicant should be required to rewrite the impugned notes quickly and without having previously seen them.

157. The Court notes that the supplementary material requested by the Forensic Medicine Institute was never supplied, despite the applicant's repeated requests. The Court does not lose sight of the fact that it was those impugned notes that led to the search and the subsequent seizure of a number of items that were relied on by the trial court in convicting the applicant. It therefore considers that given the circumstances of the instant case, the authenticity of those notes did not constitute an ancillary or insignificant issue (see *Brandstetter v. Austria*, 28 August 1991, § 49 *in fine*, Series A no. 211, and *Deryan v. Turkey*, no. 41721/04, §§ 39-41, 21 July 2015).

158. However, when that issue was raised by the applicant's lawyer at the hearing held on 11 April 2006, the trial court dismissed it, merely stating that it was not material to its examination. Subsequently, in its judgment the trial court stated, without giving any reasons, that according to the police criminal laboratory's report, the notes had been written by the applicant (see *Huseyn and Others v. Azerbaijan*, nos. 35485/05 and 3 others, § 172, 26 July 2011, and compare *Krasulya v. Russia*, no. 12365/03, § 49, 22 February 2007).

159. Given these circumstances, the trial court's unqualified reliance on the police criminal laboratory's report gave rise to a situation in which its acceptance that the notes had been written by the applicant rested on an analysis of the photocopies of his writing samples, a situation which is capable of arousing doubts in the eyes of an objective observer (see *Georgios Papageorgiou v. Greece*, no. 59506/00, §§ 38-9, ECHR 2003-VI (extracts)).

160. Nevertheless, it appears that the trial court did not sufficiently allay that concern by taking the necessary steps; notably, it failed to state the reasons on the basis of which it had opted not to comply with the Forensic Medicine Institute's request for (i) the originals of the handwriting samples that the applicant had given during his time in custody, (ii) further documents containing examples of his handwriting, and (iii) a rewritten version of the applicant's above-mentioned notes, with a view to resolving the forensic question in a scientific manner before the trial court assessed the authenticity and veracity of the notes alleged to have been written by the applicant and on which the trial court eventually relied when convicting him (see, *mutatis mutandis, Erdinç Kurt and Others v. Turkey*, no. 50772/11,

§ 69, 6 June 2017; see also, for the important role played by the Forensic Medicine Institute in Turkish law, *Aydoğdu v. Turkey*, no. 40448/06, § 45, 30 August 2016). Neither did the trial court provide any reasoning, even briefly, by way of demonstrating that it had indeed assessed the findings contained in the two reports (compare *Kuparadze v. Georgia*, no. 30743/09, § 72, 21 September 2017). Nor did the Court of Cassation remedy this shortcoming in the course of its appeal examination.

161. In view of the above, the Court cannot conclude that the trial court addressed in an appropriate manner the applicant's arguments challenging the prosecution's case that the impugned notes had been written by him; had it done so it would have given him an opportunity to effectively challenge the authenticity and relevance of those notes.

(2) The search of the applicant's house on 6 April 2005 and the material seized

162. The Court takes note at the outset of the very serious and dangerous nature of the material found in the applicant's house, which consisted of, *inter alia*, plastic explosives, a handgun, cartridges and electric detonators. That said, the Court also notes that the applicant consistently denied that they belonged to him, submitting several arguments aimed at challenging the authenticity and veracity of that evidence and the way that those items had been discovered, collected and examined by the trial court. In order to dispel any doubts regarding the quality of that evidence, the Court deems it necessary to examine the way in which those submissions were addressed by the trial court and will seek to verify whether the trial was accompanied by sufficient safeguards as to exclude any such doubt, while bearing in mind that they were eventually used by the trial court in convicting the applicant.

163. In that connection, the Court cannot but note the following shortcomings in the way the State agents conducted the house search and the manner in which the trial court examined the evidence found therein. Firstly, the search was carried out by the police in the absence of the applicant and his lawyer, and no reasons at all were put forward for this course of action. While it might have been legitimate to limit the applicant's participation in the search owing to the fact that he was detained in a prison in Diyarbakır at the material time, the Court discerns no reason justifying the failure to ensure the presence of his lawyer during the search. The Court furthermore notes that the participation of a lawyer in investigative measures during which the accused is not present may be crucial in safeguarding the latter's rights – in particular by providing adequate protection against a possible planting of evidence, thereby contributing to the wider aim of ensuring equality of arms between the investigating or prosecuting authorities and the accused (see, in respect of identity parades, *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 67, 20 April 2010); see also, in respect of reconstructions, *Savaş v. Turkey*, no. 9762/03,

§ 67, 8 December 2009; *Karadağ v. Turkey*, no. 12976/05, § 47, 29 June 2010; and *Galip Doğru v. Turkey*, no. 36001/06, § 84, 28 April 2015).

164. Neither did the Government put forward any other reason capable of justifying the curtailment of a crucial procedural guarantee in the course of an investigative measure during which important pieces of evidence were discovered, regard being had not only to the fact that they constituted virtually the only evidence forming the basis of the second bill of indictment dated 19 January 2006, but also to the applicant's allegation that those pieces of evidence had been planted.

165. Regarding the applicant's contention that the evidence had been planted, the Court notes that the search was not carried out by the public prosecutor, contrary to the statutory requirements provided by Article 97 § 1 of the then Code of Criminal Procedure. Be that as it may, carrying out a search in the absence of the public prosecutor was not entirely excluded by the domestic legal provisions in force at the material time, which required the presence of two independent witnesses (Article 97 § 2 of the then Code of Criminal Procedure). Indeed, according to the search-and-seizure record dated 6 April 2005, the mayor of the neighbourhood and the locksmith employed to gain access to the applicant's home were present at the time of the search (see paragraph 45 above). In the Court's view, that was particularly important, given that their testimony could have shed light on the applicant's argument that the material had been planted by the police. However, the trial court did not attempt to hear evidence from those two witnesses with a view to clarifying the circumstances and indeed addressing the applicant's allegations concerning the manner in which the impugned search had been executed.

166. The Court attaches importance to the fact that the trial court did not hear evidence from any of the police officers either, despite the applicant's argument that two of the police officers who had carried out the search of his house on 6 April 2005 had also taken part in the first search on 29 October 2004 (compare *Kobiashvili*, cited above, § 70).

167. Likewise, the trial court does not seem to have given any consideration to the applicant's submission that the fact that the impugned material had somehow not been found in the first two searches of the same house gave rise to suspicions that it may have been planted. There was also no examination as to whether the material found in the applicant's house had been used in the bomb apparatus targeting the Victory Day parade.

168. Furthermore, the applicant's submission that the material did not bear his fingerprints (which appears to be supported by the police criminal laboratory's reports dated 7, 8 and 12 April 2005) did not receive a response either.

169. In view of the above, it appears that the only possible safeguard against abuse was the video recording and photographing of the search (see *Layijov v. Azerbaijan*, no. 22062/07, § 69 *in fine*, 10 April 2014, and *Lisica*,

cited above, § 56). Significantly, when invited to submit the video recording in question, the Government were also unable to do so, stating that they could not obtain it (see *Sakit Zahidov*, cited above, § 53 *in fine*), although they provided the Court with three photographs showing all the material seized from the applicant's house. In the Court's view, however, those photographs are not sufficient to rule out any doubts surrounding the circumstances in which that evidence was obtained. In any event, no assessment has been made by the trial court on that point either.

170. The Court furthermore observes that the impugned video recording was not played during the hearings held before the trial court either, contrary to the requirements of adversarial proceedings under Article 6 § 1 of the Convention (see *Ter-Sargsyan v. Armenia*, no. 27866/10, § 63 *in fine*, 27 October 2016; also compare *Ünel v. Turkey*, no. 35686/02, § 46, 27 May 2008). Be that as it may, it does not escape the Court's attention that according to a report dated 6 February 2006, Judge O.Y. (who sat on the trial court's bench prior to the change of the entire panel on 19 September 2006) watched the video recording in question and drafted a report summarising his observations in that respect. However, the fact remains that the trial court did not even assess the findings contained in those observations; had it done so it might have afforded a certain level of procedural safeguards to the applicant, despite the fact that his objections *vis-à-vis* the evidence seized during the second house search rested not so much on the legality of the search *per se*, but on the argument that that material did not belong to him.

171. In any event, the Court reiterates that it is not its task to ascertain what would have been the most appropriate way for the domestic courts to deal with that argument (see *Pronina v. Ukraine*, no. 63566/00, § 25, 18 July 2006). Nevertheless, by failing to assess the important, pertinent and specific allegations aimed at challenging the quality of the evidence, the trial court encroached upon the applicant's defence rights to an extent that deprived him of the opportunity to effectively challenge the collection and the use made by the trial court of the evidence seized in the course of the second search of his house following the discovery of the notes on his person on 5 April 2005.

(iv) The alleged shortcomings regarding the examination and use as evidence of telephone no.4 found during the search of the applicant's house on 29 October 2004 and of the telephone no.2 with the IMEI number 350 101 912 604 260

(1) Telephone no.4 (the Nokia 3310 with the IMEI number 351 342 80 413945 0)

172. The Court notes at the outset that the prosecution argued that the telephone no.4 seized during the search of the applicant's apartment on 29 October 2004 had belonged to a certain M.Ç., a farmer, who had earlier

informed the authorities that his telephone, SIM card and identity card had been forcibly taken by four PKK militants in August 2004.

173. It appears that prior to the applicant's arrest, the investigating authorities believed that M.Ç.'s stolen telephone and SIM card had been used in the construction of a mobile telephone-operated bomb intended to attack the 30 August 2004 Victory Day parade; the bomb was deactivated and seized by the police before it exploded. That belief may be deduced from the questions put by the police to M.Ç. in his interview on 1 September 2004 (see paragraph 9 above). However, the deputy director of the Anti-terrorism Branch of the Diyarbakır Security Directorate indicated in his report dated 2 November 2004, which was addressed to the public prosecutor in charge, that the mobile telephone that had forcibly been taken from M.Ç. was the same one as that (telephone no.4) which had been found during the search of the applicant's house on 29 October 2004 (see paragraph 38 above). The Court observes that those two versions must have been mutually exclusive, as the same mobile telephone that was found and seized by the police in the attempted bombing of the Victory Day parade on 30 August 2004 could not be found again during the search of the applicant's house on 29 October 2004. However, neither the trial court nor the Court of Cassation analysed this important issue.

174. The Court furthermore observes that after the applicant's detention, the prosecution changed its argument: it still maintained that it had been intended that a SIM card in M.Ç.'s name would be used to detonate the Victory Day bomb apparatus; however, the mobile telephone used in that mechanism (telephone no.2 – also a Nokia 3310) – did not belong to M.Ç., as M.Ç.'s telephone (telephone no.4) had rather been found in the applicant's house. According to the prosecution, that indicated that the applicant was one of the PKK militants who had robbed M.Ç. Significantly, the trial prosecutor asked the trial court, for the first time on 9 May 2006, to punish the applicant for the attempted bombing of the 30 August 2004 Victory Day Parade, in view of the fact that he had, using M.Ç.'s identity, bought a new mobile telephone (telephone no.2) and a SIM card, and had subsequently used them in the attempted bombing of the Victory Day parade on 30 August 2004.

175. In the Court's view, the prosecution may not be reproached solely because it changed its arguments after the emergence of new evidence (that is to say, telephone no.2), the quality of which will be examined below (see *G.B. v. France*, no. 44069/98, § 60, ECHR 2001-X), all the more so in view of the absence of any complaint from the applicant that that change had not complied with the procedural requirements provided under the Code of Criminal Procedure.

176. As for the trial court, the Court notes that (echoing the trial prosecutor's opinion on the merits of the case) it found it established that the applicant had committed an act of extortion by forcibly taking on

13 August 2004 M.Ç.'s identity card and telephone no.4, which had later been found during the search of the applicant's house in Istanbul on 29 October 2004.

177. As regards the link between the applicant and M.Ç.'s mobile telephone (telephone no.4), the trial court noted that: (i) M.Ç. had given a description of one of the militants who had taken his identity card and telephone when he had first been questioned by the police (see paragraph 9 above), (ii) the applicant had also admitted in his statements to the public prosecutor on 2 November 2004 that the above description had indeed been similar to his, which it deemed sufficient to conclude that the description given by M.Ç. matched that of the applicant. However, no mention was made of the fact that M.Ç. had not been able to physically identify the applicant later, during the criminal proceedings. Nor did the trial court attempt to analyse the differences in the respective descriptions given by M.Ç. and the doctor who had medically examined him on 2 November 2004 (see paragraphs 9 and 35 above). Moreover, it is also not clear whether sufficient efforts were made to determine the applicant's whereabouts around the time that M.Ç. was robbed, despite his requests to that effect (contrast *Rostomashvili*, cited above, § 56).

178. Be that as it may, the Court accepts that the discovery of telephone no. 4 at the applicant's house was central to the trial court's finding that the applicant had forcibly taken it from M.Ç., given that if that mobile telephone had not been linked to the applicant, his conviction would have been difficult, if not impossible, to achieve in view of the general nature of the description given by M.Ç., his failure to identify the applicant, and the absence of any other direct or corroborating evidence (see, *mutatis mutandis*, *Horvatić*, cited above, § 85). In any event, the fact remains that none of the above issues was either addressed or scrutinised by the national courts.

179. Moreover, the Court reiterates that it has already found above that the circumstances in which telephone no. 4 was found in the applicant's house on 29 October 2004 cast doubt on its reliability and accuracy as an item of evidence and that the national courts did not carry out any examination in respect of those points, thereby depriving the applicant of his right to effectively challenge the evidence on which his eventual conviction rested. Accordingly, the resulting use as evidence of telephone no. 4 under those circumstances fell short of the requirements of a fair trial, thus breaching Article 6 of the Convention.

(2) Telephone no.2 (the second Nokia 3310 with the IMEI number 350 101 912 604 260

180. The Court notes that the trial court stated – in relation to incident no. 3 and under subsection (c) of the judgment, entitled "The applicant's participation in the illegal organisation, his position and activities therein"

and in the part of the reasoned judgment in which it examined the applicant's individual criminal responsibility – that telephone no.2 (with the IMEI number 350 101 912 604 260) had been purchased with the identity card of M.Ç. and used in the apparatus of the bomb set to go off during the 30 August 2004 Victory Day Parade.

181. In that connection, the Court observes that no mention was made of that mobile telephone in either of the two bills of indictment on the basis of which the applicant stood trial before the Diyarbakır Assize Court. It is equally important to note that the bills of indictment did not contain any accusation against the applicant concerning his criminal liability in respect of the attempted bombing of the Victory Day parade. The first time that mention was made of the telephone no.2 was at the hearing held at 9 May 2006, when the trial prosecutor submitted his opinion on the merits of the case wherein he also called again for the first time for the applicant to be convicted for his involvement in the attempted bombing of the Victory Day parade.

182. Yet, the reasoning contained in the trial court's judgment regarding the factual grounds for the applicant's conviction under Article 125 of the then Criminal Code was not clear. As a result, the Court invited the Government to submit an explanation as to whether the applicant had been found criminally liable for the attempted bombing of the 30 August 2004 Victory Day parade or whether he had been merely implicated in that attack. In response, the Government provided a copy of the relevant part of the trial court's judgment without, however, submitting any comments.

183. The Court notes that the difficulty in the present case stems from the trial court's sudden switch to the passive voice in that particular part of the verdict ("... he forcibly took ... M.Ç.'s mobile telephone" as opposed to "... a remotely controlled bomb ... was manufactured using that telephone and the bomb in question was placed under a stone ...") (see paragraph 73). In that connection, the Court furthermore notes that (in the absence of any concrete evidence directly linking the applicant to other acts of terrorism) his conviction for the gravest terrorism-related offence contained in the then Criminal Code, and his resulting life sentence without the possibility of parole, hinges to a significant degree on his implication in this particular attempted bomb attack. Therefore, the ambiguity in that crucial part of the judgment cannot be ignored as a mere linguistic mishap, as it leaves unanswered a fundamental question that goes to the heart of the applicant's conviction. The Court finds the trial court's failure to state the reasons for the applicant being found criminally liable for the attempted bombing of 30 August 2004 to be particularly troubling, given the extremely serious nature of the accusations against the applicant and what was at stake for him.

184. This omission on the part of the trial court is further exacerbated by the fact (which is not disputed between the parties) that the trial prosecutor

did accuse the applicant of having organised the said attack. What is more, the trial court did not expressly dismiss that accusation and in fact discussed it in the aforementioned fashion in the part of its judgment relating to the applicant's activities within the illegal organisation. Accordingly, the Court accepts that it constituted an integral part of the trial court's judgment and that the trial court took it into consideration when convicting the applicant under Article 125 of the then Criminal Code, without having established in a precise manner the applicant's individual criminal responsibility in respect of the attempted bombing.

185. As a result, even though the foregoing considerations in the instant case made it all the more necessary to give sufficient reasons for the applicant's conviction, the trial court failed to fulfil its duty to give reasons for its verdict, in accordance with the requirements of a fair trial under Article 6 of the Convention.

186. Regardless of the above conclusion, the Court considers that the following points, some of which were raised by the applicant during the trial, were also left unanswered, even though they were crucial for the purposes of reasonably establishing the facts, (see *Nikolay Genov v. Bulgaria*, no. 7202/09, § 32, 13 July 2017).

187. Firstly, the IMEI number of telephone no.2 that the trial court accepted as having been used in the attempted bombing (350 101 912 604 260) and the IMEI number of telephone no.1 found on the deactivated bomb on 30 August 2004 were different (350 10 1/91/ 250 42 (3 or 5)/5). However, the trial court concluded that the two mobile phones had been the same, without attempting to clarify this point, and appears to have referred to the police criminal laboratory's report (number 2004/654) in its reasoned judgment, notwithstanding the fact that according to the same judgment, that report merely stated that residues of TNT and nitro-glycerine had been found on the bomb mechanism.

188. At this juncture, it is also worthwhile noting that the forensic examination conducted in the course of the criminal proceedings established that the only fingerprints found on the black plastic bag containing the bomb did not belong to the applicant. However, the trial court's judgment does not appear to have explored this point either.

189. Likewise, while the Seventh Division of the Diyarbakır Assize Court, which heard M.Ç.'s case before it was joined to that of the applicant, indicated that M.Ç.'s mobile telephone (accepted as the one with the IMEI no. 350 101 912 604 260) was the one that had been taken by terrorists, the trial court found it established that that telephone (telephone no.2) had been the same one as that used in the attempted bombing; however, it did not explain in any way how those two phones had been viewed differently by the prosecuting authorities and the other divisions of the Diyarbakır Assize Court in different sets of criminal proceedings, despite the fact that it was the Seventh Division's duty to subject this issue to a thorough examination

with a view to finding out exactly how telephone no.2 had been found and associated with the applicant, given what was at stake for the applicant.

190. The presumed association of telephone no.2 with the applicant was further weakened by the absence in the two bills of indictment lodged against him of any detailed information or accusation against him regarding the attempted bombing. In any event, no comprehensive research appears to have been undertaken regarding the call records and ownership details of the telephone in question with a view to tracing the users.

191. Bearing in mind the above, the Court finds that the trial court failed to show that he had any connection with telephone no.2, which was, according to its judgment, used in the attempted bombing of the Victory Day parade. In other words, the Court is of the view that the trial court did not exert efforts to shed light on the facts before it, and thus failed in its duty to properly examine the submissions of the parties and the evidence, thereby failing to establish the relevant facts in so far as they concern the applicant's association with telephone no.2. Neither did the Court of Cassation attempt to examine any of the above points (see *Zhang*, cited above, § 73).

192. Accordingly, the Court considers that the national courts' failure to (i) address the salient issues, which were at the heart of the present case, (ii) provide reasons justifying their decisions, and (iii) implement the appropriate safeguards vis-à-vis the crucial pieces of evidence, amounted to a failure to fulfil their duty to properly examine the submissions of the parties and deliver reasoned judgments, thereby undermining the confidence that courts in a democratic society must inspire in the public and breaching the fairness of the proceedings under Article 6 of the Convention.

193. In view of the above findings, the Court considers that it is dispensed from examining further whether the trial court carried out a proper examination of the applicant's remaining submissions or his other complaints related to the unfairness of his trial – namely the trial court's refusal to summon the witnesses to testify in his favour and the alleged restriction of his defence rights arising from the prison authorities' refusal to deliver to him certain documents from the case file.

(v) Conclusion

194. The Court emphasises that it does not overlook the existence of evidence that is of a very serious nature, such as the notes concerning the bomb-making or the similarity between applicant's alleged photograph and that of one of the highest-ranking members of the PKK. Nevertheless, the Court's task under Article 6 of the Convention is not to pronounce on the probative value or sufficiency of evidence for a particular outcome, but to assess whether the overall fairness of the proceedings was ensured through the lens of the procedural and institutional safeguards and the fundamental principles of a fair trial inherent in Article 6 of the Convention.

195. Consequently and regard being had to its considerations above, the Court holds that the applicant's specific and detailed arguments regarding the authenticity, veracity and quality of the evidence on the basis of which he was sentenced to the heaviest penalty possible under the Turkish criminal justice system did not receive a sufficient response from the national courts, which either failed to address them at all or rejected them without giving sufficient reasoning. Similarly, the trial court failed in its duty to give reasons as to whether (and why) it had found the applicant guilty of the attempted bombing of the 30 August 2004 Victory Day parade and to properly carry out an examination of the parties' submissions and the evidence, notably in relation to the facts regarding the applicant being linked to telephone no.2. Such a situation evidently fell short of the elementary requirements of a fair trial, prejudiced the appearance of the fair administration of justice and undermined the confidence that the courts in a democratic society must inspire in the public.

196. Accordingly, there has been a violation of Article 6 §§ 1 and 3 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

197. In his submissions dated 13 November 2014, the applicant lodged complaints under Articles 3, 5, 6, 13 and 14 of the Convention.

198. It follows that this part of the application was introduced out of time and must be rejected, in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

199. Article 41 of the Convention provides:

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

A. Damage

200. The applicant claimed 120,000 euros (EUR), plus interest due, in respect of pecuniary damage and EUR 600,000 in respect of non-pecuniary damage.

201. The Government considered that there was no causal link between the alleged violations of the Convention and the requested award in respect of pecuniary damage. With regard to the applicant's claim for an award in respect of non-pecuniary damage, the Government argued that it was excessive and did not correspond to the case-law of the Court.

202. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim (see *M.T.B. v. Turkey*, no. 47081/06, § 68, 12 June 2018 and further references therein).

203. As regards non-pecuniary damage, the Court considers that the most appropriate form of redress would be the retrial of the applicant, in accordance with the requirements of Article 6 of the Convention, should he so request. It furthermore considers that given the circumstances of the instant case, the finding of a violation constitutes in itself sufficient just satisfaction, given the possibility under Article 311 of the Code of Criminal Procedure to have the domestic proceedings reopened in the event that the Court finds a violation of the Convention (see *Daştan v. Turkey*, no. 37272/08, § 44, 10 October 2017). Thus, the Court makes no award under this head.

B. Costs and expenses

204. The applicants also claimed EUR 6,100 for the costs and expenses incurred before the Court. This sum corresponds to the legal services provided by his lawyer (EUR 5,000), postal and translation expenses (EUR 250 and EUR 450 respectively) and other miscellaneous items (EUR 400). In support of these claims, the applicant submitted a legal-fee agreement, numerous invoices for postal expenses and two separate invoices for translation expenses.

205. The Government maintained that the claimed amount in legal fees did not reflect the truth, as they considered them to be high compared to similar proceedings. They furthermore pointed out that the applicant had failed to submit documentation in support of his claims related to costs and expenses.

206. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,500, covering costs for the proceedings before the Court (see *Aydın Çetinkaya v. Turkey*, no. 2082/05, § 122, 2 February 2016).

C. Default interest

207. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible with the exception of the complaints the applicant raised in his submissions dated 13 November 2014;

3. *Holds* that there has been a violation of Article 6 §§ 1 and 3 of the Convention;

4. *Holds* that there is no need to examine the applicant's remaining complaints under Article 6 of the Convention;

5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amount, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 5,500 (five thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Jon Fridrik Kjølbro
Deputy Registrar	President