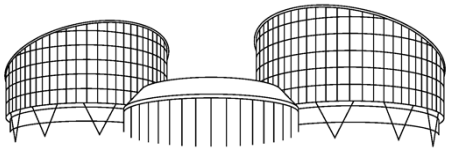

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ORHAN ŞAHİN v. TÜRKİYE

(Application no. 48309/17)

JUDGMENT

Article 6 § 1 (criminal) • Fair hearing • Failure of domestic court which ultimately convicted the applicant to hear evidence from a witness on whose statements it mainly relied on • Resulting prejudice not remedied by higher courts • Domestic courts' failure to comply with the principle of immediacy

Prepared by the Registry. Does not bind the Court.

STRASBOURG

12 March 2024

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 Orhan Şahin v. Türkiye,

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

Arnfinn Bårdsen*, President*,
Jovan Ilievski,
Egidijus Kūris,
Saadet Yüksel,
Lorraine Schembri Orland,
Diana Sârcu,
Davor Derenčinović*, judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 48309/17) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Orhan Şahin ("the applicant"), on 10 May 2017;

the decision to give notice to the Turkish Government ("the Government") of the complaint concerning the principle of immediacy as guaranteed under Article 6 § 1 of the Convention and to declare inadmissible;

the parties' observations;

Having deliberated in private on 6 February 2024,

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

INTRODUCTION

1. The application concerns the alleged unfairness of criminal proceedings against the applicant owing to his inability to examine a witness, A.Y., in person before the court which ultimately convicted him.

THE FACTS

2. The applicant was born in 1990 and lives in Ağrı. He was represented by Mr A. Artuk, a lawyer practising in Ağrı.

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

4. The facts of the case may be summarised as follows.

I. THE BACKGROUND TO THE CASE

5. According to an incident report dated 17 December 2011, following an attack perpetrated by the PKK (Workers' Party of Kurdistan) in the Çukurca municipality in Hakkari – which claimed the lives of twenty-four soldiers – the Turkish Armed Forces conducted military operations in the Kazan valley

in the same region, which resulted in the killing of numerous terrorists. Funerals of six of those terrorists became shows of force for the PKK and gave rise to serious disturbances, including attacks against the security forces and public property using stones, fireworks, Molotov cocktails and bombs. According to a news item published on the website of the Firat News Agency on 14 December 2011, Selahattin Demirtaş, the then co-chair of the Peace and Democracy Party ((BDP) a pro-Kurdish political party) criticised the Ministry of Justice for failing to honour its promise to establish the identities of the corpses of "guerrillas" and to hand them over to their families for burial. In the face of the Ministry's failure, he called on the people to stand by the families of the deceased and to show greater resistance. In that context, the Doğubayazıt branch of the BDP called on the tradesmen of the district to close their shops on 16 December 2011 in protest against the authorities' stance *vis-à-vis* the said burials. When the authorities refused authorisation for the funerals to be held in Doğubayazıt, the local branch of the BDP held a demonstration on 17 December 2011, in which certain BDP Members of Parliament, including Mr Demirtaş, and approximately 1,500 other people participated. In the run up to a planned speech by Mr Demirtaş, some of the participants displayed posters of two of the terrorists killed during the operation, chanted illegal slogans, waved PKK flags, sang PKK anthems, carried posters of its leader, hurled stones at the security forces and dismantled barriers. Shortly after Mr Demirtaş' speech, a certain individual, A.Y. was seen lighting the fuse of an improvised explosive device with a view to throwing it at the police officers stationed in the garden of the Doğubayazıt Security Directorate. However, the device exploded in A.Y.'s hand, blowing off his fingers, and he was later admitted to hospital for treatment.

6. On 20 December 2011 A.Y. was interviewed by the police in the presence of his lawyer. He stated that he had frequented a "Democratic Solution" tent in which young people had been given political-ideological instruction about the PKK and had been indoctrinated with its propaganda, which had aroused sympathy in him for the PKK. A.Y. had then pursued his training in the Doğubayazıt branch of the BDP, where a certain E.O. had previously organised a bomb-making workshop lasting for two or three days. There had been several attendees, one of whom, F.A., had told A.Y. about the workshop. In the course of his statements, A.Y. named all the persons associated with the events he had recounted, save for the applicant.

7. The interview resumed the following day in the presence of A.Y.'s lawyer. When asked about his involvement in the events of 17 December 2011, A.Y. stated that, three days prior to the demonstration, F.A. had told him, in the presence of E.E. and the applicant, that Selahattin Demirtaş would give a speech on 17 December 2011. A.Y. stated that he did not know the name of the applicant, but he identified him from photographs shown by the police. A.Y. stated that E.E. had told him that they ought to perform some bold act when Mr Demirtaş came, and had then removed from his pocket "a

hand-made bomb" packed with nails, which he had handed over to F.A. He, in turn, had given it to A.Y.. When A.Y. refused to use the bomb, E.E. told him that they suspected him of being a police informant because he had been attending party events without actually taking part in any of its actions. E.E. had subsequently grabbed A.Y.'s throat, slapped him and said "Why the hell won't you do it? You're going to throw the bomb. Don't you dare not throw [it]" (*"Nasıl yapmazsın lan? Bu bombayı atacaksın. Hele bir atma da görelim bakalım"*). F.A. had also told A.Y. that it would be his first and last action, that he would be free not to attend party events afterwards and that he would be rewarded for his service when Kurdistan was founded. At that moment, E.E. had warned A.Y. that he would have to throw the bomb no matter what, and advised him to do so at the end of the demonstration in order to show how powerful they were. The applicant had told A.Y. "You will do it. You will do it. You will do it very well." Lastly, F.A. had explained that A.Y. would have to light the fuse and throw the bomb on the day of the demonstration and threatened to beat A.Y. to death, with E.E.'s help, if he refused to do so.

8. A.Y. further explained that, under the circumstances, he had taken the bomb, hidden it in his garden and told his friend S.B. about the incident as they strolled together near the Doğubayazıt Security Directorate the next day (15 December 2011). On the day of the bombing, A.Y. had bumped into his father at the demonstration. He had been obliged to drink tea with him at a patisserie before slipping away to meet F.A., who told him that he would be following him. When A.Y. lit the fuse, the bomb had detonated suddenly while he was still holding it, and he had fallen to the ground with serious injuries to his hand. F.A. had immediately approached A.Y., bandaged his hand with a piece of cloth, assisted him to a taxi and told him that things would go very badly for him were he to speak to the police. Thus, A.Y. had been made to throw the bomb as a result of threats and deceptive acts on the part of E.E., F.A. and the applicant.

9. On 21 December 2011 A.Y. took part in a photographic identification procedure with his lawyer and identified twenty-eight individuals, including E.E., F.A. and the applicant, from the photographs shown to him.

10. On 22 December 2011 A.Y., accompanied by his lawyer, made statements to the public prosecutor and the investigating judge, in which he essentially reiterated and acknowledged the statements he had made to the police. On the same day he was placed in pre-trial detention on suspicion of having committed the offences of membership of an armed terrorist organisation, under Article 314 § 2 of the Criminal Code (hereinafter "the CC"), and of obstructing a public officer in the execution of his duty, under Article 265 of the CC.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

A. The investigation stage

11. On 28 December 2011 the police received an anonymous tip-off from a man who called their hotline and reported that a PKK member by the name of H.E., who had been in contact with F.A. and who had bombs in his possession, had travelled from the mountain to the Doğubayazıt district to carry out an armed attack. The man also stated that H.E. had been driving in a white Dacia vehicle on the main road with the applicant, and that they had been on their way to the neighbourhood of Yenimahalle.

12. At around 3.45 a.m. on 29 December 2011 the applicant was arrested at his home and questioned by the police in the presence of his lawyer at 8 p.m. the next day. The applicant denied knowing A.Y. and having taken part in the demonstration, and stated that he had merely been hanging around in the city centre on 17 December 2011. The applicant also denied knowing any of the people whose names had been given by A.Y., having ever visited the "Democratic Solution tent", having received training in bomb-making, or been given any other ideological or political instruction. The applicant further submitted that the photograph used by A.Y. to identify him had not in fact been of him.

13. A police report analysing video footage of a demonstration held on 24 July 2011 indicated that the applicant had been standing in front of a tent erected at the centre of the event in question, which had been organised to present the electoral candidates of the Democratic Society Congress. In the course of the event, demonstrators had chanted slogans in favour of the PKK and its so-called leader, unfurled a banner of him, and attacked certain public buildings.

14. On 1 January 2012 the applicant gave statements to the Doğubayazıt public prosecutor in the presence of his lawyer, and said that he had never even seen A.Y. before, let alone given him any instructions. When shown a photograph of an individual standing in front of the "Democratic Solution" tent on 24 July 2011, the applicant acknowledged that the photo might have been of him, but alleged that it might have been taken while he was passing in front of the tent. When shown a photograph taken of him at the demonstration of 17 December 2011, the applicant acknowledged that he was indeed the individual pictured, but argued that he had been passing along the street on the way to his office, which was nearby. He also denied knowing E.E. or F.A. or having perpetrated an attack against the security forces. Later on the same day, the applicant was brought before the investigating judge, together with E.E. and F.A., and gave evidence in the presence of his lawyer, reiterating the statements he had previously made to the public prosecutor. Again on the same day, the investigating judge placed E.E., F.A. and the

applicant in pre-trial detention on suspicion of membership of an armed terrorist organisation under Article 314 § 2 of the Criminal Code.

15. On 17 February 2012 the Erzurum public prosecutor's office lodged a bill of indictment against the applicant with the Fourth Division of the Erzurum Assize Court, which had special jurisdiction to try a number of aggravated crimes, which were enumerated in Article 250 § 1 of the Code of Criminal Procedure as in force at the material time. The public prosecutor charged the applicant, mainly on the basis of his involvement in the events of 17 December 2011, with the following offences: (i) undermining the unity of the State and its territorial integrity (Article 302 of the CC); (ii) attempted killing of a public official by bombing (Article 82 § 1 (c) and (g) of the CC); (iii) membership of an armed terrorist organisation (Article 314 § 2 of CC); and (iv) unlawful possession of hazardous materials (Article 174 of the CC). In doing so, the public prosecutor relied on (i) video footage of a demonstration held on 24 July 2011, showing that the applicant and H.E. had taken part in a demonstration following the election of members of a body called Congress for a Democratic Society, which had turned into a show of force by the PKK; (ii) video footage of the event of 17 December 2011, which showed the applicant wandering around with S.Ö., an individual who had allegedly held meetings with the PKK's military wing; and (iii) A.Y.'s statements, from which the prosecutor inferred that the applicant had incited the former to throw a bomb at the police.

16. A police report dated 17 December 2011, analysing video footage of the demonstration held on that date, indicated that the applicant had been part of the group of demonstrators who had thrown stones at the security forces when passing by the Doğubayazıt Security Directorate.

B. The applicant's trial before the different divisions of the Erzurum Assize Court

17. The applicant was committed for trial before the Fourth Division of the Erzurum Assize Court, which, in its preparatory report, joined the case against the applicant with those against A.Y., E.E., E.T. and F.A.

18. At the first hearing, held on 14 March 2012, all the defendants gave evidence in person, including A.Y. Having observed that A.Y. was anxious in the presence of the other defendants, the court decided to remove the other defendants from the hearing room and heard A.Y. solely in the presence of the lawyers. Reiterating that he had told the police and the judicial authorities everything he knew, A.Y. accused the court of putting his life in danger by sharing his statements with the defendants, adding that, had he known that his statements would be communicated to the defendants, he would never have testified, even on pain of life imprisonment or the death penalty.

19. With regard to the applicant, A.Y. stated that he had been one of those who received ideological and political instruction at the "Democratic

Solution" tent; that he had been selected by the instructors to receive training on bomb making; and that they had not talked to each other about the bombing on 17 December 2011. When asked about his police statements, A.Y. confirmed them, except in so far as they concerned the applicant, explaining that the applicant had not been present when E.E. and F.A. had handed him the bomb and that the words he had attributed to the applicant in his police interview had actually been said by E.E. A.Y. then changed his statement, saying that the applicant had in fact been present on that occasion, but that he had only witnessed the bomb being handed over and had not said anything or engaged in any discussion as to where or how the bomb should be thrown.

20. The applicant also gave evidence at the first hearing, in which he stated that he did not know A.Y., the other defendants or H.E. The applicant further denied having ever been to the "Democratic Solution" tent, received any instruction there or taken part in any other actions. When shown the photographs alleged to be of him, taken at different demonstrations, the applicant claimed that they were not of him. E.E., in his evidence, contested the accuracy and veracity of the statements made by A.Y., submitting that he could not understand how he could have stored the bomb in his pocket or how he, who was 1.57 metres tall, could have grabbed the throat of A.Y., who was 1.8 metres. F.A. also challenged the accuracy of A.Y.'s statements and denied the charges against him, submitting that he had had no connection with the bombing. The applicant's lawyer submitted that A.Y.'s testimony in court had established that the applicant had not threatened A.Y. or incited him to use a bomb, or otherwise inculcated him with such an idea. At the end of the hearing, the Fourth Division of the Erzurum Assize Court decided to commission an expert to analyse the video footage of the events of 17 December 2011, with a view to ascertaining whether the defendants had taken part in them.

21. A police report dated 7 May 2012 concluded, on the basis of the video footage of the demonstration of 17 December 2011, that all the defendants had taken part in it.

22. At the second hearing, held on 11 May 2012, the applicant's lawyer submitted that the applicant had already explained why he had been present at the beginning of the demonstration on 17 December 2011, and argued that the police report had not found that the applicant had been present when the explosion took place, which was evidence that he had not been involved in the bombing. At that hearing and a subsequent hearing on 25 May 2012, the applicant's lawyer argued that there was no incriminating evidence against the applicant apart from A.Y.'s statements to the police, which had later been retracted, and asked the court, in consequence, to order the applicant's release; the court, however, refused.

23. Law no. 6352 repealed, as of 5 July 2012, Articles 250-252 of the Code of Criminal Procedure, divesting the Fourth Division of the Erzurum

Assize Court – before which the applicant was being tried – of its special jurisdiction under those provisions. Accordingly, the applicant's trial continued before the Second Division of the Erzurum Assize Court.

24. At a hearing on 2 August 2012 the Second Division of the Erzurum Assize Court convicted the applicant, by two votes to one, of membership of an armed terrorist organisation under Article 314 § 2 of the CC and sentenced him to thirteen years and six months' imprisonment. The court unanimously decided to acquit the applicant of the remaining charges. The minority judge was the only judge on the bench to have taken part in the first hearing, during which A.Y. and the defendants had given evidence in person. In his dissenting opinion, he argued, *inter alia*, that the applicant should have been acquitted in view of the absence of sufficient conclusive evidence showing beyond reasonable doubt that he had committed the offence in question. The judge took the view that the only such evidence had been A.Y.'s police statements, which had later been retracted, since the remaining evidence was not sufficient to warrant a conviction.

25. In establishing the fact of the case, the Second Division of the Erzurum Assize Court based itself on A.Y.'s consistent statements throughout the proceedings, taking the view that his submissions had been taken in the immediate aftermath of the bombing, that their general outline had not changed, and that they had been corroborated by the other evidence, such as the incident report and the police report on the video footage of the demonstration. In doing so, the Erzurum Assize Court had regard to: (i) the personality of A.Y., which it had observed during the entirety of the hearings; (ii) the fact that he had been susceptible to manipulation and psychological pressure owing to his youth, physical situation and social standing, which the court stated "had been ascertained as a result of the principle of immediacy"; (iii) his sincere statements; (iv) his repentance, as shown by his remark that he had been punished by losing his hand; and (v) his strong commitment to maintain his statements during the trial, despite having been subjected to pressure in the prison in which he had been placed.

26. The Second Division of the Erzurum Assize Court stated that it had decided to attach weight to A.Y.'s original statements to the police, even though A.Y. had to a certain extent amended them in respect of the applicant. It found, therefore, that the applicant had been present when F.A. and E.E. had handed over the bomb to A.Y., and that he had encouraged A.Y. by saying "You will do it. You will do it. You will do it very well." Nevertheless, the court took the view that the applicant had merely supported F.A. and E.E., who had been the ones who had actually planned the bombing, and that his acts had not therefore attained such a degree as to be regarded as incitement to the offences of undermining the unity of the State and its territorial integrity and the attempted killing of a public official by bombing. Accordingly, the trial court acquitted the applicant in respect of those charges. It also acquitted

him of the charge of unlawful possession of hazardous materials – for lack of sufficient evidence, since the explosive device had been procured by E.E.

27. In finding the applicant guilty of membership of the PKK, the trial court took into consideration (i) A.Y.'s statements to the effect that the applicant had taken part in "organisational meetings", had received bomb-making training at the local branch of the BDP, and had been present when the improvised explosive device had been handed over to A.Y., encouraging with the words quoted above; (ii) his participation in the events on 24 July 2011, as supported by the video footage, which also showed that he had been there with H.E., who, according to intelligence reports, had been a member of the PKK's military wing; (iii) photographs showing his participation in Newruz celebrations in 2011, which resulted in his being placed in pre-trial detention; and (iv) a police video-analysis report dated 19 April 2011, which showed that the applicant had taken part in a demonstration in support of members of the urban wing of the PKK against whom criminal proceedings had been instituted.

C. The first appeal stage

28. On 13 September 2012 the public prosecutor who had participated in the final hearing of 2 August 2012, acting on behalf of the Erzurum public prosecutor's office, lodged an appeal against the judgment of 2 August 2012, arguing that the applicant should have been convicted of the remaining offences because his role in the bombing had been that of inciting A.Y. to use the bomb.

29. In an opinion dated 31 October 2013, the Chief Public Prosecutor's office asked the Court of Cassation, among other things, to dismiss the appeal lodged by the Erzurum public prosecutor's office and to quash the applicant's conviction for membership of an armed terrorist organisation, in view of the abstract nature of A.Y.'s statements which he had, in any event, retracted.

30. On 7 March 2014 the Court of Cassation quashed the trial court's judgment in so far as it concerned the applicant, taking the view that he should be found guilty of the offences of (i) undermining the unity of the State and its territorial integrity; (ii) attempted killing of a public official by bombing; and (iii) unlawful possession of hazardous materials, on the grounds that the applicant had been involved in the events of 17 December 2011 "in unity of thought and action" with the other co-defendants. The Court of Cassation upheld the convictions of the other co-defendants. It remitted the case to the lower courts.

D. The applicant's ensuing trial before the Doğubayazıt Assize Court

31. Following a legislative change which brought about the closure of the specially authorised assize courts, the applicant's case was allocated to the

Doğubayazıt Assize Court, which held several hearings between 7 August 2014 and 4 December 2014 and was composed of a bench of three judges, none of whom had sat in the Second Division of the Erzurum Assize Court.

32. At a hearing held on 23 September 2014 the applicant and his lawyer requested that evidence be heard from A.Y., arguing that he had been the key figure in the case and had been heard only by judges of a court which had since been abolished. The Doğubayazıt Assize Court dismissed that request on the ground that this circumstance would have no impact on the merits of the case.

33. On 4 December 2014 the Doğubayazıt Assize Court found the applicant guilty in respect of all the above-mentioned offences and sentenced him to life imprisonment for undermining the unity of the State and its territorial integrity (Article 302 of the CC); to sixteen years and eight months' imprisonment for the attempted killing of a public official by bombing (Article 82 § 1 (c) and (g) of the CC); and to four years, two months and five days' imprisonment and a fine for the unlawful possession of hazardous materials (Article 174 of the CC). However, the court did not convict him of membership of a terrorist organisation, considering that that charge was included in the offence set out in Article 302 of the Criminal Code, since the former was a constituent element of the latter offence. In its reasoning, the Doğubayazıt Assize Court reproduced, almost verbatim, the reasoning adopted by the Erzurum Assize Court, including the above-mentioned five items observed by the judges of that court about A.Y. in the course of the proceedings as a result of the principle of immediacy, and adopted that court's position that it would base its findings on the police statements of A.Y. In so doing, however, the Doğubayazıt Assize Court removed from the reasoning the phrase of the Erzurum Assize Court which read "...[as] had been ascertained as a result of the principle of immediacy".

E. The second appeal stage

34. On 3 February 2016 the Court of Cassation upheld the Doğubayazıt Assize Court's judgment, but held that its decision to convict the applicant of incitement was erroneous and found that he had acted as a co-perpetrator of the offence of attempted killing of a public official by bombing.

F. Individual application to the Constitutional Court

35. On 16 June 2016 the applicant lodged an individual application with the Constitutional Court. On 9 January 2017 the Constitutional Court examined, among other points, the applicant's complaint regarding his inability to examine A.Y. before the Doğubayazıt Assize Court and declared it inadmissible, finding that the trial court had relied on evidence other than A.Y.'s statements, such as the police report drawn up after the attempted

bombing and the reports concerning video recordings of the incident. In the Constitutional Court's view, the applicant's complaint concerned the outcome of the criminal proceedings against him and, in the absence of any arbitrariness in those proceedings, it had to be considered as manifestly ill-founded.

THE LAW

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

36. The applicant complained that he had not had a fair trial owing to a breach of the "natural judge" principle, since the court which had ultimately convicted him had not heard evidence from A.Y., who had only been heard by a court which had since been abolished. The applicant relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

37. The Government argued that the Constitutional Court had scrupulously examined the complaints that the applicant had subsequently raised before the Court and found them inadmissible for being manifestly ill-founded. Since the Constitutional Court's examination had been in line with the Court's case-law and the principles enunciated therein, contained adequate reasoning and could not be regarded as arbitrary, the Government contended that there was no reason to depart from those findings and invited the Court to dismiss the present application as manifestly ill-founded. In any event, the Government took the view that the applicant's complaint mainly concerned the outcome of the proceedings and was thus of a fourth-instance nature, and that it should therefore be dismissed because the domestic courts' judgments had not been arbitrary or lacked reasons.

38. The applicant did not comment on the Government's preliminary objections.

39. The Court notes that it is called upon to assess whether the principle of immediacy as guaranteed under Article 6 § 1 of the Convention was respected in the present case, which is a different task from that described and perceived by the Government, namely evaluating the evidence or assessing the outcome of the proceedings against the applicant. Accordingly, the Court dismisses the Government's preliminary objection, based on the allegedly fourth-instance nature of the application. The Court further considers that the first limb of the Government's preliminary objection raises complex issues of facts and law which cannot be determined without an examination on the

merits. It accordingly joins the first limb of the Government's preliminary objection to the merits.

The Court further notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

40. The applicant submitted that he had been denied a fair hearing, in that the Doğubayazıt Assize Court had neither collected nor heard evidence from A.Y., who had been the key figure in the criminal proceedings. Instead, the Doğubayazıt Assize Court had simply accepted the evidence collected and assessed by the Erzurum Assize Court (which had since been abolished), with the result that he had been deprived of his right to be heard by a competent judge.

(b) The Government

41. The Government submitted that A.Y., had given evidence in the presence of the applicant and his lawyer before the Erzurum Assize Court, which had enabled them to cross-examine him before the judges of that court. Nevertheless, neither the applicant nor his lawyer had asked him any questions with a view to testing the accuracy of his statements. Moreover, the applicant had had access to the case file and had been given a chance to raise his arguments and to give his version of events throughout the entirety of the proceedings, in line with the principle of equality of arms and adversarial proceedings. In any event, the Doğubayazıt Assize Court had had the necessary means to examine adequately A.Y.'s statements, which it possessed in the form of transcripts. The Government further stressed that A.Y. had identified the applicant as the person who, with F.A. and E.E., had forced him to carry out the bomb attack, and that the expert report had established that they had been present at the scene of the incident on 17 December 2011.

42. Moreover, in quashing the applicant's first conviction, the Court of Cassation had not made any assessment of the accuracy or reliability of A.Y.'s statements, but had found that the applicant was not to be regarded as having incited to the crime, but rather as a co-perpetrator of it; it had thus found that the Erzurum Assize Court had duly established the offence of membership of an armed terrorist organisation, but that it had erred in other elements of its legal classification. The Court of Cassation had not ordered the lower court to hear evidence from A.Y.; nor had the applicant contested his credibility. In any event, the trial court based its decision to convict the

applicant on concrete evidence and A.Y.'s evidence had not been crucial in such circumstances.

43. Applying the test for summoning defence witnesses developed in *Murtazaliyeva v. Russia* ([GC], no. 36658/05, §§ 139-68, 18 December 2018), the Government further maintained that the applicant had failed to satisfy the three steps of that test. In their view, hearing A.Y. again would not have contributed to the proceedings because of the objective evidence in the case, which showed that the applicant had committed the acts attributed to him. Therefore, the applicant's request that A.Y. be heard again was in fact a stratagem aimed at prolonging the trial and preventing justice from being done. Moreover, the applicant had neither complied with the statutory time-limit to submit his request for A.Y. to be heard, nor had he explained which questions he would wish to ask A.Y. were he to be re-examined, contrary to the domestic statutory provisions. Taking into account the case as a whole, the trial court had dismissed the applicant's request on duly reasoned grounds.

2. The Court's assessment

(a) Scope of the case

44. The Court notes at the outset that it is aware of the very serious and dramatic nature of the incident forming the basis of the criminal proceedings under consideration, in which A.Y. had attempted to throw an improvised explosive device at police officers with a view to killing them, but was unable to do so as the device unexpectedly detonated in his hand and caused him serious injury. The Court further notes that after hearing evidence from the defendants and A.Y., the Erzurum Assize Court initially convicted the applicant of membership of an armed terrorist organisation on the basis of, among other things, his involvement in the above-mentioned events, but decided to acquit him of certain other, mostly more serious, offences. Subsequently, however, the Court of Cassation quashed that judgment and the applicant was ultimately found guilty of the offences of which he had initially been acquitted. The Doğubayazıt Assize Court, which was composed of judges who had not been on the bench of the Erzurum Assize Court and who had not heard evidence from A.Y., imposed a life sentence for undermining the unity of the State and its territorial integrity, and, in respect of the remaining offences (see paragraph 33 above), a total sentence of twenty years, ten months and five days' imprisonment and a fine.

45. The question therefore arises whether the Doğubayazıt Assize Court acted in conformity with the principle of immediacy under Article 6 § 1 of the Convention, in view of the fact that it convicted the applicant of certain serious offences without hearing evidence from A.Y. – whose statements played a key role in the proceedings – in respect of which another court, which had heard A.Y., had initially acquitted the applicant.

46. Having thus determined the legal issue that it is called upon to examine, the Court considers that the test developed in *Murtazaliyeva* (cited above) for assessing complaints concerning domestic courts' refusal to summon defence witnesses – to which the Government referred – is not applicable to the present case. In any event, A.Y. cannot be regarded as a defence witness, since he was a prosecution witness who had made incriminating statements in respect of, *inter alia*, the applicant, and on that basis the Court cannot uphold the Government's contention that the applicant should have explained why A.Y. ought to have been heard again by the judges of the Doğubayazıt Assize Court which ultimately convicted him.

47. Lastly, the Court notes that, given (i) the nature of the applicant's complaint with reference to the general right to a fair hearing in Article 6 § 1 of the Convention, and (ii) the fact that no reference was made to the right to hear witnesses under Article 6 § 3 (d) of the Convention, it is not required to examine any part of the complaint under Article 6 § 3 (d) of its own motion, as the application does not concern the right to hear witnesses "on the same conditions" as the prosecution, but rather the scope of the general right to a "fair hearing" under Article 6 § 1. Thus, the Court considers that the complaint may suitably be dealt with under that provision (see *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, § 31, 16 July 2019).

(b) The general principles

48. The Court reiterates that an important aspect of fair criminal proceedings is the ability for the accused to be confronted with the witnesses in the presence of the judge who ultimately decides the case. The principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused (see *Beraru v. Romania*, no. 40107/04, § 64, 18 March 2014; *Cutean v. Romania*, no. 53150/12, § 60, 2 December 2014; and *Cerovšek and Božičnik v. Slovenia*, nos. 68939/12 and 68949/12, § 43, 7 March 2017).

49. The Court notes that, according to the principle of immediacy, a decision in a criminal case should be reached by judges who have been present throughout the proceedings and the evidence-gathering process (see *Cutean*, cited above, § 61). However, this cannot be deemed to constitute a prohibition of any change in the composition of a court during the course of a case (see *P.K. v. Finland* (dec.), no. 37442/97, 9 July 2002). Very clear administrative or procedural factors may arise rendering a judge's continued participation in a case impossible. The Court has indicated that measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available, where the credibility of the witness concerned is not in issue, or by arranging for a rehearing of the relevant arguments or of

important witnesses before the newly composed court (see *Cutean*, cited above, § 61, and *Škaro v. Croatia*, no. 6962/13, § 24, 6 December 2016).

50. The Court further reiterates that it is in the face of the heaviest penalties that respect for the right to a fair trial must be ensured to the highest possible degree by democratic societies (see, *mutatis mutandis*, *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 126, 12 May 2017).

(c) Application of the principles to the instant case

51. In the present case, the Court notes that the applicant was initially convicted of membership of an armed terrorist organisation under Article 314 § 2 of the Criminal Code by the Erzurum Assize Court on the basis of (i) his meeting with an individual who was later prosecuted for membership of the PKK (H.E.), (ii) his involvement in certain demonstrations, bomb-making workshops and protests, and (iii) his involvement in the attempted bombing of 17 December 2011 (see paragraph 27). At the same time, the Erzurum Assize Court acquitted the applicant of the offences of undermining the unity of the State and the territorial integrity of the country, attempted killing of a public official by bombing, and unlawful possession of hazardous materials (see paragraph 26)

52. In determining the factual basis of the accusations against the defendants, including the applicant's involvement in the bombing of 17 December 2011, the Erzurum Assize Court mainly relied on the statements made by A.Y.. In doing so, it found, in view of the apparent sincerity of A.Y.'s statements and his personality – which had both been on display at the trial and which the Erzurum Assize Court asserted it had observed in accordance with the principle of immediacy – that he had been a young person who was open to manipulation and could easily be influenced by psychological pressure. However, it took the view that A.Y.'s statements should be regarded as credible, since he had demonstrated his sincere remorse during the trial, and had firmly reiterated the statements he had made and his request that those who were involved in the bombing, including himself, be held criminally liable. Thus, the Erzurum Assize Court stated that it had based its conclusions on A.Y.'s police statements and found that the applicant had been present when the handmade bomb had been given to A.Y. and had encouraged A.Y. by saying that he was capable of carrying out the bomb attack (see paragraph 26). However, it took the view that the applicant's involvement in the bombing had not reached the threshold of inciting A.Y. to carry out a bomb attack. Nonetheless, the trial court found the applicant guilty of membership of an armed terrorist organisation on the basis of, among other evidence, his presence when the bomb was handed over to A.Y. and his encouragement of A.Y.

53. One of the judges of the three-judge panel of the Erzurum Assize Court – who was the only judge to have observed A.Y. when he had given detailed evidence at the first hearing on 14 March 2012 – dissented, stating

that the applicant should have been acquitted also in respect of the offence of membership of an armed terrorist organisation, since A.Y. had retracted the relevant statement concerning the applicant, maintaining that it was E.E. who had told him that he would carry out the bombing "very well".

54. The public prosecutor, who had only taken part in the final hearing, subsequently lodged an appeal against that decision and asked the Court of Cassation to quash the Erzurum Assize Court's decision to acquit the applicant, since A.Y.'s statements had shown that the applicant had incited A.Y. to carry out the bomb attack (see paragraph 28). However, the Chief Public Prosecutor's office at the Court of Cassation took a diametrically opposite view with regard to the credibility of A.Y.'s statements and asked the Court of Cassation not only to dismiss the public prosecutor's appeal but also to quash the applicant's conviction and acquit him of the charge of membership of an armed terrorist organisation (see paragraph 29). Agreeing with the local public prosecutor, the Court of Cassation quashed the judgment of the Erzurum Assize Court only in so far as the applicant was concerned, holding that he should be convicted of the offences of (i) undermining the unity of the State and the territorial integrity of the country; (ii) the attempted killing of a public official by bombing; and (iii) unlawful possession of hazardous materials – in respect of all of which he had initially been acquitted – on the grounds that he had been involved in the bombing by acting "in unity of thought and action" with the other defendants, and remitted the case for re-examination (see paragraph 30).

55. In the Court's view, the Court of Cassation gave its own interpretation to A.Y.'s evidence in concluding that the applicant should be convicted of the offences in respect of which he had been acquitted by the Erzurum Assize Court on the basis of its own interpretation of that same evidence (see *Júlíus Þór Sigurþórsson*, cited above, §§ 41-42, and *Mischie v. Romania*, no. 50224/07, §§ 36-37, 16 September 2014). The fact that the Erzurum Assize Court used A.Y.'s statements and other evidence to find the applicant guilty of membership of an armed terrorist organisation does not lessen the degree of re-interpretation undertaken by the Court of Cassation, which ultimately resulted in reversal of the applicant's acquittal of the offences listed in items (i) to (iii). Nor does that fact render the Court of Cassation's re-interpretation a mere correction of the legal characterisation of the offences in question, as alleged by the Government, or even a mere technicality (compare *Famulyak v. Ukraine* (dec.), no. 30180/11, § 42, 26 March 2019).

56. In the same vein, the Court is unable to conclude that the credibility of A.Y., whose statements played a key role in the applicant's prosecution and who later retracted parts of his statements concerning the applicant, was of no importance in the proceedings before the Doğubayazıt Assize Court. In that connection, the Government's contention that the Court of Cassation had not called into question the accuracy and validity of A.Y.'s statements has no decisive bearing on the Court's examination under Article 6 § 1 of the

Convention, as the requirements of Article 6 § 1 of the Convention are autonomous in relation to those of national legislation or practice (see, *mutatis mutandis*, *Mtchedlishvili v. Georgia*, no. 894/12, § 36, 25 February 2021).

57. The Court further notes that in the ensuing trial, the Doğubayazıt Assize Court mainly relied on A.Y.'s statements in ultimately convicting the applicant of undermining the unity of the State and the territorial integrity of the country, attempting to kill a public official by bombing, and unlawful possession of hazardous materials, and imposed a severe sentence. Nevertheless, none of the judges on the three-judge bench of the Doğubayazıt Assize Court had taken part in the earlier stages of the criminal proceedings against the applicant or had heard evidence from A.Y., whose statements were central to the applicant's conviction in so far as it concerned the proceedings they were conducting (see *Svanidze v. Georgia*, no. 37809/08, § 34, 25 July 2019). In fact, the Doğubayazıt Assize Court rejected the applicant's request to hear evidence from A.Y. on the grounds that this would not have an impact on the merits of the case. On that basis, the Court cannot entertain the Government's contention that the applicant had failed to comply with the statutory time-limits to submit his request for A.Y. to be heard. Accordingly, the Court cannot agree that the applicant was afforded a possibility to confront the witnesses in the presence of the judge who ultimately decided the case, which is the underlying rationale of the principle of immediacy. It must therefore seek to ascertain whether there were any procedural safeguards which would nonetheless have enabled the trial court to have an appropriate understanding of the evidence and arguments.

58. In that regard, the Court notes with concern that in its reasoned judgment, the Doğubayazıt Assize Court reproduced, almost verbatim, the line of reasoning adopted by the Erzurum Assize Court, including the observations of that court on the credibility of A.Y., with the phrase "[as] ascertained as a result of the principle of immediacy" being left out. On that basis, the Doğubayazıt Assize Court held that the statements that A.Y. had made to the police had to be taken into account in establishing the facts of the case and found, contrary to the Erzurum Assize Court, that, through his threatening words, the applicant had supported the acts of his co-defendants E.A. and F.A. and had directed A.Y. to carry out the bomb attack, thereby taking part in the bombing, by acting "in unity of thought and action" with the other defendants. Those were the exact words used by the Court of Cassation to quash the Erzurum Assize Court's judgment in respect of the applicant. In such circumstances, the Court cannot hold that the availability of transcripts of A.Y.'s statements or the possibility afforded to the applicant to exercise his elementary defence rights, such as having access to the file or being able to raise any point he deemed appropriate in his defence – statutory rights granted to everyone accused of an offence in Türkiye – were such as to remedy the prejudice stemming from the shortcoming identified above, given

the cursory nature of the Doğubayazıt Assize Court's examination of A.Y.'s statements (see, *mutatis mutandis*, *Beraru*, cited above, § 66, and *Lazu v. the Republic of Moldova*, no. 46182/08, § 39 *in fine*, 5 July 2016).

59. Similarly, neither the Court of Cassation, which was silent on this matter, nor the Constitutional Court, which did not examine this matter from the standpoint of the principle of immediacy, can be regarded as having remedied the prejudice identified above.

60. Last but not least, and without taking any stance on the matter, the Court observes that the importance of the principle of immediacy, which in this case would have required that the judges who ultimately decided the case hear evidence from A.Y., is further borne out by the difference in the observations made and conclusions reached by the judges who had directly observed A.Y. and those who had not. In fact, the former group of judges had concluded, mainly on the basis of A.Y.'s statements, that the applicant had not been criminally liable for the bombing under Articles 82, 174 and 302 of the Criminal Code (the Erzurum Assize Court) and that his involvement had only given rise to the offence of membership of an armed terrorist organisation when assessed along with certain other evidence (two judges of the Erzurum Assize Court), or that he should have been acquitted altogether (the minority judge of the Erzurum Assize Court). In contrast, the judges of the Court of Cassation and the Doğubayazıt Assize Court, who did not hear A.Y., took the view that the applicant had committed all of the offences attributed to him and should therefore be found guilty and sentenced accordingly.

61. The foregoing considerations are sufficient to enable the Court to conclude that the domestic courts failed to comply with the requirements of the principle of immediacy. On that basis, the Court also dismisses the Government's preliminary objection to the effect that the application is manifestly ill-founded (see paragraph 39).

62. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

63. Lastly, in his observations on the admissibility and merits of the case, dated 11 July 2021, the applicant submitted certain additional complaints, which were not relevant to the complaint of which the Government had been given notice, including in particular a violation of his rights under Article 5 of the Convention, a violation of his right of access to a court, a breach of his rights under Article 8 of the Convention related to a search of his house and the unfairness of the outcome of the criminal proceedings.

64. The Court notes that at the time when the Government were given notice of the application, it had already examined and dismissed the above-mentioned complaints under Article 5 and the complaint under

Article 6 concerning the outcome of the criminal proceedings. It thus follows that they are inadmissible in accordance with Article 35 § 2 (b) of the Convention as being substantially the same as a matter that has already been examined by the Court. As for the remainder of the complaints, they concern previously unmentioned issues and they cannot be regarded as an elaboration of the applicant's original complaint to the Court. Accordingly, those complaints were 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

65. 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

66. The applicant claimed 100,000 euros (EUR) in respect of pecuniary damage and EUR 100,000 in respect of non-pecuniary damage.

67. The Government contested those claims, submitting that they were unsubstantiated, excessive and at odds with the Court's case-law on the matter.

68. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As regards non-pecuniary damage, the Court notes that it does not follow from its finding of a violation of Article 6 § 1 of the Convention in the applicant's case that he was wrongly convicted and it is impossible to speculate as to what might have occurred had there been no breach of the Convention (see *Dvorski v. Croatia* [GC], no. 25703/11, § 117, ECHR 2015). In such circumstances, 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. Accordingly, the finding of a violation in itself constitutes, in the specific circumstances of the present case, 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 *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, § 203, 27 October 2020, and *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 425, 26 September 2023).

B. Costs and expenses

69. The applicant further claimed EUR 7,800 in respect of the costs and expenses incurred before the Court, which corresponded to sixty-eight hours

of legal work undertaken by his lawyer and to EUR 1,000 for the preparation of the application form lodged with the Court. In support of those claims, the applicant submitted a fee agreement with his lawyer and a breakdown of costs as drawn up by his lawyer.

70. The Government contested the claims, arguing that the applicant had failed to submit any valid supporting document or any other document indicating that he had signed an agreement with his lawyer or that he had paid the sums claimed, or details about the days on which the legal work in question had been carried out or in which set of proceedings the sums had been incurred.

71. 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 were actually and necessarily incurred and are reasonable as to quantum (see *Yüksel Yalçınkaya*, cited above, § 429, 26 September 2023). 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 1,000 covering costs for the proceedings before the Court, plus any tax that may be chargeable to the applicant (see *Elif Nazan Şeker v. Turkey*, no. 41954/10, § 65, 8 March 2022).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible with the exception of the applicant's complaints raised in his submissions dated 11 July 2021;

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

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

4. *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 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
      (ii) 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;

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

Done in English, and notified in writing on 12 March 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President