



The Court finds several violations of the Convention and orders the termination of the pre-trial detention of opposition politician Selahattin Demirtaş

In today's Chamber judgment¹ in the case of [Selahattin Demirtaş v. Turkey \(no. 2\)](#) (application no. 14305/17) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights,

a violation of Article 5 § 3 (right to be brought promptly before a judge) of the Convention,

no violation of Article 5 § 4 (right to a speedy review of the lawfulness of detention),

a violation of Article 3 of Protocol No. 1 (right to free elections);

and, by six votes to one, that there had been:

a violation of Article 18 (limitation on use of restrictions on rights) in conjunction with Article 5 § 3.

The case concerned the arrest and pre-trial detention of Mr Selahattin Demirtaş, who at the time of the events was one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party.

The Court accepted that Mr Demirtaş had been arrested and detained on "reasonable suspicion" of having committed a criminal offence. However, having regard to the reasons given by the national courts, the Court found that the judicial authorities had extended Mr Demirtaş's detention on grounds that could not be regarded as "sufficient" to justify its duration.

Although Mr Demirtaş had retained his status as a member of parliament throughout his term of office, the Court found that his inability to take part in the activities of the National Assembly as a result of his pre-trial detention constituted an unjustified interference with the free expression of the opinion of the people and with his right to be elected and to sit in Parliament.

The Court found that it had been established beyond reasonable doubt that the extensions of Mr Demirtaş's detention, especially during two crucial campaigns, namely the referendum and the presidential election, had pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which was at the very core of the concept of a democratic society.

The Court therefore held, unanimously, that the respondent State was to take all necessary measures to put an end to the applicant's pre-trial detention.

Principal facts

The applicant, Selahattin Demirtaş, is a Turkish national who was born in 1973 and is currently detained in Edirne (Turkey). At the material time, he was one of the co-chairs of the Peoples'

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Democratic Party (HDP), a left-wing pro-Kurdish political party. From 2007 onwards he was a member of the Turkish Grand National Assembly. Following parliamentary elections in November 2015, he was re-elected as an HDP member of parliament, and his term of office ended at the time of the June 2018 elections.

In September and October 2014, members of Daesh (Islamic State) launched an offensive on the Syrian town of Kobani, some 15 km from the Turkish border town of Suruç. Armed clashes took place between Daesh forces and the People's Protection Units (YPG), an organisation founded in Syria and regarded as a terrorist organisation by Turkey on account of its links with the PKK (the Workers' Party of Kurdistan). From 2 October 2014 onwards, a large number of demonstrations were held in Turkey and local and international NGOs called for solidarity with Kobani against the siege by Daesh. From 6 October 2014, the demonstrations became violent.

Previously, during late 2012 and January 2013, a peace process known as the "solution process" had been initiated with a view to finding a lasting, peaceful solution to the "Kurdish question". A series of reforms aimed at improving human rights protection were implemented. In February 2015 a ten-point reconciliation declaration, known as the "Dolmabahçe consensus", was presented to the public by a delegation of HDP members of parliament and the then Deputy Prime Minister.

The HDP achieved 13% of the vote in the June 2015 parliamentary elections, passing the threshold for representation in the National Assembly. The AKP, the ruling party, lost its majority in Parliament. On 20 July 2015 a terrorist attack apparently carried out by Daesh took place in Suruç, leaving 34 people dead and more than 100 injured. On 22 July 2015, in another terrorist attack in Ceylanpınar, two police officers were killed. The murders, allegedly committed by members of the PKK, resulted *de facto* in the end of the "solution process". The day after that attack, the PKK's leaders urged the people to arm themselves and to dig underground passages that could be used during armed clashes. They called for the proclamation of a political system of self-governance and announced that all civil servants in the region would now be considered accomplices of the AKP and would risk being targeted. In November 2015 the HDP polled 10% of the vote in elections won by the AKP, which regained its majority in the National Assembly.

On 20 May 2016 the National Assembly passed a constitutional amendment whereby parliamentary immunity was lifted in all cases where requests for the lifting of immunity had been transmitted to the National Assembly prior to the date of adoption of the amendment. The amendment affected a total of 154 members of the National Assembly, including 55 from the HDP. On various dates, 14 HDP members of parliament, including Mr Demirtaş, and one from the CHP were placed in pre-trial detention as the subject of criminal investigations.

A total of 70 members of parliament applied to the Constitutional Court for a review of the constitutional amendment, arguing that it should be treated as a "parliamentary decision" taken under the Constitution to lift the immunity attaching to their status as members of parliament. The Constitutional Court unanimously rejected the application, finding that the case before it concerned a constitutional amendment in the formal sense of the term and not a parliamentary decision. It stated that the amendment in question could be reviewed in accordance with the procedure laid down in Article 148 of the Constitution, by which only the President of Turkey or one-fifth of the 550 members of the National Assembly could apply to the Constitutional Court for a review. Finding that this condition was not satisfied in the case before it, the Constitutional Court rejected the application.

Some 31 investigation reports, the vast majority concerning terrorism-related offences, were drawn up by public prosecutors in respect of Mr Demirtaş while he was serving as a member of parliament. Following the entry into force of the constitutional amendment, the Diyarbakır public prosecutor decided to join all the criminal investigations in a single file. On six occasions the competent public prosecutors issued summonses for Mr Demirtaş to give evidence; however, he failed to appear before the investigating authorities. On 4 November 2016 he was arrested at his home and taken

into police custody. On the same day, assisted by three lawyers, he appeared before the public prosecutor and maintained that he had been arrested and taken into police custody on account of his political activities and on the orders of the President of Turkey. He stated on that occasion that he would not answer any questions relating to the accusations against him. The public prosecutor called for him to be placed in pre-trial detention for membership of an armed terrorist organisation and incitement to commit an offence.

On 8 November 2016 Mr Demirtaş lodged an objection against the order for his pre-trial detention, but it was dismissed.

On 11 January 2017 the public prosecutor filed a bill of indictment against Mr Demirtaş, charging him with forming or leading an armed terrorist organisation, disseminating propaganda in favour of a terrorist organisation, incitement to commit an offence, condoning crime and criminals, public incitement to hatred and hostility, incitement to disobey the law, organising and participating in unlawful meetings and demonstrations, and not complying with orders by the security forces for the dispersal of an unlawful demonstration. He sought a sentence of between 43 and 142 years' imprisonment. On 22 March 2017, at the request of the Ministry of Justice on public-safety grounds, the Court of Cassation transferred the case to the Ankara Assize Court.

During the trial Mr Demirtaş argued that he had been detained for expressing his political opinions and denied committing any criminal offence. In the course of the investigation and the trial, he lodged more than 15 objections against his continued pre-trial detention. The national courts repeatedly extended his detention. The criminal proceedings are currently pending before the Ankara Assize Court.

On 17 November 2016 and 29 May 2018 Mr Demirtaş lodged individual applications with the Constitutional Court. The first was dismissed, while the second is still pending.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 3 (right to liberty and security and right to trial within a reasonable time or release pending trial), the applicant complained that his initial pre-trial detention and its continuation had been arbitrary; that the duration of his pre-trial detention was excessive; and that the relevant judicial decisions had contained no reasons other than mere citation of the grounds for detention provided for by law and had been worded in abstract, repetitive and formulaic terms. Relying on Article 5 § 4 (right to speedy review of the lawfulness of detention), the applicant complained that his lack of access to the investigation file had prevented him from effectively challenging the order for his pre-trial detention. He submitted that the proceedings before the Constitutional Court had not complied with the Convention requirement of "speediness". In addition, he complained that his pre-trial detention amounted to a violation of Article 3 of Protocol No. 1 (right to free elections). Relying on Article 18 (limitation on use of restrictions on rights) in conjunction with Article 5 § 3, he contended that he had been detained for expressing critical opinions about the political authorities and argued in that regard that the purpose of his pre-trial detention had been to silence him. The applicant also alleged a violation of Article 10 (freedom of expression) and Article 34 (right of individual petition).

The application was lodged with the European Court of Human Rights on 20 February 2017.

Judgment was given by a Chamber of seven judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Paul **Lemmens** (Belgium),
Valeriu **Griţco** (Republic of Moldova),

Jon Fridrik Kjølbro (Denmark),
Ivana Jelić (Montenegro),

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

Article 5 § 1

As regards Mr Demirtaş's complaint that his pre-trial detention did not comply with domestic legislation, the Court found that neither the interpretation nor the application of domestic law by the Constitutional Court appeared arbitrary or unreasonable. Mr Demirtaş had been placed and kept in pre-trial detention following the lifting of his parliamentary immunity and in accordance with Articles 100 et seq. of the Code of Criminal Procedure. This part of the application had to be declared inadmissible as being manifestly ill-founded.

The Court noted that while Mr Demirtaş was serving as a member of parliament, public prosecutors had submitted 31 investigation reports about him to the National Assembly in connection with requests to have his parliamentary immunity lifted. The criminal investigations had all been joined into a single file. After he had refused to give evidence to the investigating authorities, Mr Demirtaş had been arrested and taken into police custody on 4 November 2016. The Court observed that Mr Demirtaş had been deprived of his liberty on suspicion of having committed several offences, some of which were terrorism-related. It also noted that the national authorities, in particular the first-instance courts and the Constitutional Court, had found that it was possible to conclude that Mr Demirtaş had been acting in accordance with the instructions of the leaders of a terrorist organisation. Having regard to the requirements of Article 5 § 1 of the Convention as to the level of factual justification needed at the stage of suspicion, the Court considered that there had been sufficient information in the criminal case file to satisfy an objective observer that Mr Demirtaş might have committed at least some of the offences for which he had been prosecuted. It concluded that he could be said to have been arrested and detained on "reasonable suspicion" of having committed a criminal offence and that there had therefore been no violation of Article 5 § 1 of the Convention.

Article 5 § 3

Having been placed in pre-trial detention on 4 November 2016, Mr Demirtaş was still being deprived of his liberty. As to whether there was concrete evidence giving rise to a suspicion that he had committed an offence, the Court accepted that the suspicions against Mr Demirtaş could have accounted for his initial detention. It further observed that the judges ruling on his detention had also based their decisions on the fact that he was accused of offences listed in Article 100 § 3 of the Code of Criminal Procedure. In accordance with that Article, for certain offences Turkish law provided for a statutory presumption of the existence of grounds for detention: a risk of absconding, tampering with evidence or putting pressure on witnesses, victims and other persons.

In that connection, the Court reaffirmed that any system of mandatory detention on remand was *per se* incompatible with Article 5 § 3 of the Convention. Where the law provided for a presumption concerning the grounds for pre-trial detention, it nevertheless had to be convincingly demonstrated that there were concrete facts warranting a departure from the rule of respect for individual liberty. In the present case, the Court noted that the domestic courts' finding that alternative measures to detention appeared insufficient had not been based on any analysis of Mr Demirtaş's personal situation. It found that the judicial authorities had made barely any mention of the specific circumstances substantiating any risks in that regard, and nor had they specified how such risks had been established and had persisted over such a lengthy period.

The Court observed that the domestic courts had also extended Mr Demirtaş's pre-trial detention on the basis of the number and nature of the alleged offences, and that they had taken into account the severity of the sentences prescribed by law for such offences. Even assuming that the severity of the potential sentences and the nature of the charges might have justified his initial pre-trial detention, as the Constitutional Court had maintained, the Court considered that they could not have formed the sole reason for extending his detention, particularly at a late stage of the proceedings.

The Court further observed that the national courts had also referred to Mr Demirtaş's failure to give evidence to the investigating authorities as a ground for extending his detention. The Constitutional Court had concluded from this that there was a risk of his absconding. The Court nevertheless considered that the judicial authorities had not explained how the failure of Mr Demirtaş – who at the time had been co-chair of the third largest political party represented in the National Assembly – to give evidence could have indicated a flight risk. In that context, the Court attached considerable weight to the findings of the Constitutional Court judge in the minority, who had pointed out in his dissenting opinion that Mr Demirtaş had travelled abroad several times and had always come back without demonstrating any intention to flee. The Court also noted that he had long been aware of the criminal investigations of which he was the subject and of the seriousness of the charges against him, yet despite that, he had never absconded.

Lastly, as regards the other reasons given by the national courts for keeping Mr Demirtaş in detention, the Court observed at the outset that they entailed a formulaic enumeration of the grounds of general scope. It was especially struck by the lack of a thorough analysis of the arguments in favour of releasing him. It pointed out that decisions worded in formulaic terms could on no account be regarded as sufficient to justify a person's initial and continued pre-trial detention.

Having regard to the reasons provided by the national courts, the Court held that the judicial authorities had extended Mr Demirtaş's detention on grounds that could not be regarded as "sufficient" to justify its duration. There had therefore been a violation of Article 5 § 3 of the Convention.

Article 5 § 4

As regards Mr Demirtaş's alleged lack of access to the investigation file, the Court acknowledged that the evidence in the file was of fundamental importance for challenging the lawfulness of his detention. It observed, however, as the Constitutional Court had done, that Mr Demirtaş and his representatives had had unrestricted access to the investigation reports submitted to the National Assembly. It further noted that although he had not had an unlimited right of access to the evidence in the file, Mr Demirtaş had had sufficient knowledge of the substance of the evidence forming the basis for his detention and had thus had the opportunity to properly contest the reasons given to justify the detention. This aspect of the complaint was therefore manifestly ill-founded and had to be rejected.

Concerning the allegation by Mr Demirtaş that the proceedings before the Constitutional Court had not complied with the Convention requirement of "speediness", the Court observed that his application to the Constitutional Court had been complex, being one of the first of a series of cases raising complicated issues concerning the pre-trial detention of a member of parliament whose parliamentary immunity had been lifted. In addition, the Court found it necessary to take into account the Constitutional Court's exceptional caseload following the declaration of the state of emergency in July 2016. It observed that Mr Demirtaş had lodged an individual application with the Constitutional Court on 17 November 2016, and that that court's final judgment had been given on 21 December 2017. Although this period of 13 months and four days before the Constitutional Court could not be described as "speedy" in an ordinary context, in the specific circumstances of the case the Court found that there had been no violation of Article 5 § 4 of the Convention.

Article 3 of Protocol No. 1

The Court observed that this was the first case where it had had to examine a complaint under Article 3 of Protocol No. 1 to the Convention concerning the effects of the continued pre-trial detention of an elected member of parliament on the performance of his parliamentary duties.

The Court reiterated that the right to free elections was not restricted simply to the opportunity to take part in parliamentary elections. A person thus elected was entitled to sit in Parliament.

The Court noted that having been placed in pre-trial detention on 4 November 2016, Mr Demirtaş had been unable to take part in the activities of the legislature up to the expiry of his term of office on 24 June 2018 – that is, for one year, seven months and 20 days. His deprivation of liberty had made it impossible for him to perform any parliamentary duties and could be viewed, in the circumstances, as an interference with the exercise of his rights. Having regard to its conclusion as to the compliance of the pre-trial detention with domestic legislation, the Court could accept that the interference had satisfied the requirements of lawfulness. In view of its findings under Article 5 § 1, it proceeded on the assumption that the interference had pursued a legitimate aim, namely public-policy imperatives, being the consequence of Mr Demirtaş's detention, the purpose of which had been to ensure the proper conduct of the criminal proceedings against him.

However, the Court observed that in performing their balancing exercise, neither the courts that had ruled on the extension of his detention, those that had refused his applications for release, nor the Constitutional Court appeared to have had sufficient regard to the fact that Mr Demirtaş was not only a member of parliament but also one of the leaders of the country's political opposition, whose performance of his parliamentary duties required a high level of protection. Moreover, they had not demonstrated that there were pressing reasons justifying keeping him in pre-trial detention for such a lengthy period.

The Court noted that it had always emphasised that pre-trial detention was a temporary measure and that it should be as short as possible. Deprivation of liberty was such a serious measure that it was only justified where other, less severe measures had been considered and found to be insufficient to safeguard the individual or public interest at stake. Such considerations applied *a fortiori* in the case of a member of parliament. As the minority Constitutional Court judge had pointed out in his dissenting opinion, the judicial authorities had not explained why the application of an alternative measure to detention would have been insufficient. It did not appear from the case file that they had genuinely considered the application of alternative measures to pre-trial detention, even though such measures were provided for by domestic law. They had systematically found that alternative measures of that kind were insufficient, without ever providing any specific reasons connected to the individual case. Yet throughout his detention, Mr Demirtaş had been deprived of all opportunity to devote himself to his parliamentary responsibilities.

The Court concluded that although Mr Demirtaş had retained his status as a member of parliament throughout his term of office and had been able to receive his salary in that capacity, his inability to take part in the activities of the National Assembly as a result of his pre-trial detention constituted an unjustified interference with the free expression of the opinion of the people and with his right to be elected and to sit in Parliament. The measure in question had been incompatible with the very essence of his right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament and had infringed the sovereign power of the electorate that had voted him into Parliament. There had therefore been a violation of Article 3 of Protocol No. 1 to the Convention.

Article 18 in conjunction with Article 5 § 3

The Court noted that several criminal investigations in respect of Mr Demirtaş had been ongoing for years, but no significant steps had been taken until the end of the "solution process" to initiate a procedure for the lifting of his parliamentary immunity.

Reports and opinions by international observers, in particular the observations by the Commissioner for Human Rights, indicated that the tense political climate in Turkey in recent years had created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency. Concordant inferences drawn from that context confirmed that the judicial authorities had reacted harshly to Mr Demirtaş's conduct, on account of his position as one of the leaders of the opposition, and also to the conduct of other HDP members of parliament and elected mayors, as well as to dissenting voices more generally.

The Court observed that Mr Demirtaş did not see himself solely as an individual victim of a violation, but that he claimed to have been kept in pre-trial detention chiefly on account of his position as one of the leaders of the political opposition. The Court thus considered that what was under threat was the democratic system itself, not just Mr Demirtaş's rights and freedoms as an individual.

The Court found that it had been established beyond reasonable doubt that the extensions of Mr Demirtaş's detention, especially during two crucial campaigns, namely the referendum and the presidential election, had pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which was at the very core of the concept of a democratic society. There had therefore been a violation of Article 18 in conjunction with Article 5 § 3.

Article 10

Having regard to all the findings it had reached, the Court considered it unnecessary to rule separately on either the admissibility or the merits of the complaint under Article 10.

Article 34

The Court observed that there was no evidence that the investigations carried out into Mr Demirtaş's lawyers had been designed to induce him to withdraw or modify his complaint or otherwise interfere with the effective exercise of his right of individual petition, or indeed that they had had such an effect. Accordingly, the Court found that the respondent State had not breached its obligations under Article 34 of the Convention.

Article 46

By virtue of Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgment of the Court in any case to which they were parties.

The Court reiterated that it was primarily for the State concerned to choose the means to be used in its domestic legal order to discharge its legal obligation under Article 46. This discretion as to the manner of execution of a judgment reflected the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed. Nevertheless, where the nature of the violation found was such as to leave no real choice as to the measures required to remedy it, the Court could decide to indicate only one individual measure.

The Court considered that any continuation of Mr Demirtaş's pre-trial detention would entail a prolongation of the violation of Article 5 § 3 and Article 18 of the Convention and a breach of the obligations on respondent States to abide by the Court's judgment. That being so, the Court held that the respondent State was to ensure that Mr Demirtaş's pre-trial detention was ended at the earliest possible date, unless new grounds or evidence justifying his continued detention were put forward.

Just satisfaction (Article 41)

The Court held that Turkey was to pay the applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 15,000 in respect of costs and expenses.

Separate opinions

Judge Karakaş expressed a separate opinion, which is annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.