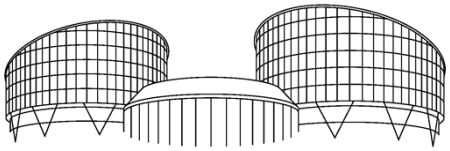

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF DICLE AND SADAK v. TURKEY

(Application no. 48621/07)

JUDGMENT
(Extracts)

STRASBOURG

16 June 2015

FINAL

16/09/2015

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

In the case of Dicle and Sadak v. Turkey,

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

András Sajó, *President,*
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 19 May 2015,

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

PROCEDURE

1. The case originated in an application (no. 48621/07) 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 two Turkish nationals, Mr Mehmet Hatip Dicle and Mr Selim Sadak ("the applicants"), on 24 October 2007.

2. The applicants were represented by Mr L. Kanat, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants complained about a violation of Article 6 § 2 of the Convention and of Article 3 of Protocol No. 1 to the Convention.

4. On 5 January 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. Mr Hatip Dicle and Mr Selim Sadak were born in 1955 and 1954 and live in Diyarbakir and Şırnak, respectively.

A. The facts giving rise to applications nos. 29900/96, 29901/96, 29902/96 and 29903/96

6. Mr Hatip Dicle and Mr Selim Sadak, who were MPs in the Grand National Assembly of Turkey and members of the DEP political party (Democracy Party), which has since been dissolved by the Constitutional Court, were arrested on 2 March 1994 and 1 July 1994 respectively.

7. On 8 December 1994 they were sentenced by the Ankara State Security Court to fifteen years' imprisonment for belonging to an illegal organisation, pursuant to Article 168 § 2 of the Penal Code.

8. By judgment of 26 October 1995 the Court of Cassation upheld that judicial decision.

B. Proceedings before the organs of the Convention

1. Judgment of 17 July 2001

9. On 17 July 2001, adjudicating on an application lodged by the applicants and two other persons, the European Court of Human Rights found, in its judgment in the case of *Sadak and Others v. Turkey (no. 1)* (nos. 29900/96, 29901/96, 29902/96 and 29903/96, ECHR 2001-VIII), a violation of Article 6 § 1 of the Convention on account of the lack of independence and impartiality of the State Security Court, as well as a violation of Article 6 § 3 (a), (b) and (d) of the Convention in conjunction with Article 6 § 1 on the grounds that the applicants had not received timely information on the reclassification of the charges against them and had been unable to question the prosecution witnesses or to have them questioned.

2. Supervision by the Committee of Ministers of the Council of Europe of the execution of the judgment of 17 July 2001

10. On 9 December 2004, at the 906th meeting of the Ministers' Deputies at the Council of Europe, the Committee of Ministers adopted a Final Resolution (ResDH(2004)86) on the judgment of the Court in the case of *Sadak and Others,* cited above. The relevant passages of that Resolution read as follows:

> "The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (hereinafter referred to as 'the Convention'),
>
> Having regard to the final judgment of the European Court of Human Rights in the Sadak and others case delivered on 17 July 2001 and transmitted the same day to the Committee of Ministers under Article 46 of the Convention;
>
> Recalling that the case originated in several applications (nos. 29900/96, 29901/96, 29902/96 and 29903/96) against Turkey, lodged with the European Commission of Human Rights on 17 January 1996 under former Article 25 of the Convention by Mr Selim Sadak, Ms Leyla Zana, Mr Hatip Dicle and Mr Orhan Doğan, four Turkish

nationals, and that the Commission declared admissible the complaints relating to the lack of fairness of the criminal proceedings conducted against them, to the lack of independence and impartiality of the State Security Court which convicted them, in 1994, to 15 years' imprisonment for belonging to an armed organisation, as well as to the discriminatory violation of their right of freedom of expression and freedom of association;

Whereas in its judgment of 17 July 2001 the Court unanimously:

- held that there had been a violation of Article 6 of the Convention on account of the lack of independence and impartiality of the Ankara State Security Court;

- held that there had been a violation of Article 6, paragraphs 3 (a), (b) and (d), of the Convention, taken together with paragraph 1, on account of the fact that the applicants were not notified in good time that the charges against them had been altered and that they were unable to examine or have examined the witnesses against them;

- held that it was not necessary to examine the other complaints under Article 6 of the Convention;

- held that it was not necessary to examine the complaints under Articles 10, 11 and 14 of the Convention;

- held that the government of the respondent state was to pay, within three months, USD 25 000 to each of the four applicants in respect of all heads of damage taken together; USD 10 000 to all the applicants together in respect of costs and expenses, and that simple interest at an annual rate of 6% would be payable on those sums from the expiry of the above-mentioned three months until settlement;

- dismissed the remainder of the applicants' claim for just satisfaction;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 46, paragraph 2, of the Convention;

Having invited the Government of the respondent state to inform it of the measures which had been taken in consequence of the judgment of 17 July 2001, having regard to Turkey's obligation under Article 46, paragraph 1, of the Convention to abide by it;

Whereas during the examination of the case by the Committee of Ministers, the government of the respondent state gave the Committee information about the measures taken in order to erase the consequences for the applicants of the violations found by the Court and to prevent new violations of the same kind as those found in the present judgment; this information appears in the appendix to this resolution;

Having satisfied itself that, on 16 October 2001, within the time-limit set, the government of the respondent state paid the applicants the sums provided for in the judgment of 17 July 2001;

Recalling, as far as individual measures are concerned, Interim Resolution ResDH(2002)59 of 30 April 2002 in which the Committee requested the reopening of the criminal proceedings against the applicants or the adoption of other ***ad hoc*** measures to erase the consequences of their unfair conviction, as well as Interim Resolution ResDH(2004)31 of 6 April 2004 by which the Committee, stressing the importance of the presumption of innocence, requested that the applicants be released pending the outcome of their new trial in the absence of any compelling reasons justifying their continued detention;

Having noted with satisfaction that, on 14 July 2004, the Court of Cassation quashed the judgment of 21 April 2004 of the Ankara State Security Court confirming the applicants' previous conviction, that, since June 2004, the applicants are no longer in detention following the suspension of the execution of their sentence, that restrictions on their travel abroad were removed on 16 September 2004, that the applicants are no longer deemed to be convicted and that a new trial is currently pending before the Ankara 11th Criminal Court;

Considering that, since the violation found by the European Court concerned the fairness of the incriminated proceedings and not their outcome, it is not necessary to await the outcome of the new trial;

Declares, after having examined the information supplied by the Government of Turkey, that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case."

C. Reopening of the proceedings against the applicants

11. Meanwhile, on 3 February 2003, Act No. 4793 reforming a number of previous Acts came into force. It added to Article 327 of the Code of Criminal Procedure (CPP) a new paragraph 6 providing for the reopening of criminal proceedings following a finding of a violation by the European Court of Human Rights.

12. On 4 February 2003 the applicants requested the reopening of proceedings on the basis of the judgment delivered by the Court in their case.

13. On 21 April 2004, having ordered the reopening of the proceedings against the applicants pursuant to Article 327 § 6 CPP, the Ankara State Security Court reiterated its judgment of 8 December 1994. In the grounds for the judgment it mainly used the words "accused (convicted)" with reference to the applicants. Occasionally it used the words "convicted (accused)" with reference to Mr Selim Sadak and the word "convicted" with reference to Mr Hatip Dicle.

14. On 8 June 2004 the applicants lodged an appeal on points of law against the 21 April 2004 judgment of the State Security Court. In that appeal they requested their release under Article 38 of the Constitution, relying on their right to the presumption of innocence. They argued that under Article 338 CPP the acceptance of the reopening of proceedings had invalidated the finality of their first conviction. They pointed out that in the event of an application for reopening of proceedings the law was silent on the issue of the execution of the initial sentence and on the conduct of the future proceedings. The applicants submitted that the absence of provisions in that regard did not mean that there was a legal vacuum provided that any proceedings reopened returned to the trial phase. They added that persons being retried no longer had the status of convicted persons, which meant that the restriction on their liberty could no longer be considered as being in "execution" of the sentence initially imposed on them. Consequently, they

concluded that the reopening of the proceedings had given them prisoner status, and that they had therefore lost their "convict" status.

15. Subsequently the applicants submitted another brief memorial to the Court of Cassation, arguing, in particular, that by referring to them as "convicted persons" the State Security Court had flouted their right to the presumption of innocence. Indeed, they took the view that since proceedings had been reopened their conviction was no longer *res judicata* and therefore that they should no longer have been considered as convicted persons and their right to the presumption of innocence should have been respected, pursuant to Article 38 of the Constitution and Article 6 § 2 of the Convention.

16. On 9 June 2004 the Court of Cassation ordered the applicants' release.

17. By judgment du 13 July 2004 the Court of Cassation quashed the judgment of 21 April 2004, stating that the violations found by the European Court of Human Rights in its judgment of 17 July 2001 had not been remedied. The relevant part of the judgment read as follows:

> "III. The procedural phase following the reopening of the proceedings
>
> It is accepted, in both legal practice and legal theory, that where an application for a reopening of proceedings pursuant to the ... Code of Criminal Procedure is accepted, the investigation which must be conducted [after the reopening of proceedings] is independent and distinct from the previous investigation, and the decision to reopen the proceedings provides the basis for that fresh investigation. As stated in the judgment of the Plenary Assembly of the Court of Cassation of 5. 11. 1990 (E. 8/220 and K. 258), the hearings to be organised [in the framework of the new trial] are not the continuation of those held previously, and all the procedural rules must be applied to those hearings as if the case were being tried for the first time. The assessment of new evidence, of the nature of the offence and of the sentencing in the framework of the hearings to be held when the proceedings are reopened must be conducted quite independently and separately from the assessment during the initial proceedings, and new pieces of evidence ... may be gathered and examined.
>
> IV. Conclusion
>
> ...
>
> 2 – The proceedings as reopened under the relevant decision is completely independent from the previous proceedings; in accordance with that principle, all the legal rules of procedure must be applied to the new hearings, the indictment must be read out, the reclassification of charges must be notified and fresh interrogations must be conducted ..."

18. The State Security Courts having in the meantime been abolished under Act No. 5190, the Court of Cassation referred the case to the Ankara Assize Court ("the Assize Court").

19. On 1 June 2005 the new Turkish Penal Code came into force. The offence of belonging to an armed band formerly set out in Article 168 is now governed by Article 314 of the new Penal Code.

20. On 9 March 2007, having taken note, in particular, of the Court of Cassation's argument that the procedure for reopening the trial was completely independent from the initial one, the Assize Court upheld the conviction of 8 December 1994. It nevertheless reduced the applicants' sentence to a prison term of seven years and six months pursuant to Article 314 § 2 of the Penal Code. In the reasoning of its decision the court used the words "accused (convicted person)" with reference to the applicants.

21. On 27 February 2008 the Court of Cassation upheld that judgment.

D. The applicants' candidacy for the parliamentary elections of 22 July 2007

22. Meanwhile, on 19 May 2007, the Higher Electoral Council had issued a decision setting out the conditions to be met by candidates – including independent candidates with no party political affiliation – standing for the parliamentary elections of 22 July 2007. The relevant part of that decision read as follows:

> "1. ... After serving final sentences ... [the candidate] must, pursuant to section 13/A of the Law on the register of police records, provide, for each conviction, a document certifying that he has recovered his civil rights and that the conviction has become *res judicata*.
>
> ...
>
> 3. Pursuant to the Penal Code ... save in cases of negligence, persons who have been sentenced to a prison term of twelve months or more or who have been convicted of an offence, pursuant to section 11 (f) of Act No. 2839 on the election of members of parliament and whose prison sentence has become *res judicata*, must provide a document certifying that they have, or are deemed to have, served their sentence."

23. On 10 May 2007, Mr Hatip Dicle applied to the Ankara Assize Court for a document establishing that he had indeed served his full prison term.

24. In its 15 May 2007 decision the Assize Court held as follows:

> "In applying to the convicted person the provisions of Act No. 5237 on the entry into force of [the Penal Code] of 1 June 2005, it was decided to sentence Mehmet Hatip Dicle to a prison term of seven years and six months, to apply section 53 of Act No. 5237 and to deduct from that sentence the period which he had served in detention.
>
> The State Prosecutor has filed an appeal on points of law against that judgment, but the latter has not yet become final.
>
> The convicted person Mehmet Hatip Dicle, whose sentence was commuted to seven years and six months pursuant to the provisions [of the Penal Code], was remanded in custody from 2 March 1994 to 17 March 1994, and imprisoned from 17 March 1994 to 9 June 2004 as a detainee and then as a convicted person.

> In the light of the foregoing considerations, the final sentence to be imposed on Mehmet Hatip Dicle for belonging to an illegal armed organisation is a prison term of fifteen years ... In order to serve that sentence, he was held in prison for the aforementioned periods.
>
> Pursuant to the provisions of the Penal Code [in respect of the applicant], this court delivered judgment on 9 March 2007 (E. 2004/343 and K. 2007/67) reducing the fifteen-year prison sentence to a term of seven years and six months. Since that judgment is not yet final it has not become *res judicata*. Consequently, it is impossible to indicate the date on which the sentence was completed. However, [it may be said that] the sentence served by the convicted person up to the date of his release corresponds to a sentence of seven years and six months...
>
> On those grounds:
>
> This court cannot lawfully adjudicate on the application lodged by the convicted person Mehmet Hatip Dicle for a document certifying that he has served the full sentence imposed on him, firstly because the decision to reduce his sentence to seven years and six months has not yet become final, and secondly because the [initial] judgment sentencing him to a fifteen-year term did become *res judicata* and he was released on account of the stay of execution of that sentence."

25. On 1 and 4 June 2007 Mr Hatip Dicle and Mr Selim Sadak submitted their names as independent candidates for the parliamentary elections of 22 July 2007 in the constituencies of Diyarbakır and Şırnak respectively. They provided, *inter alia*, copies of their police records mentioning their 8 December 1994 conviction by the State Security Court and the decision given by the Assize Court on 15 May 2007.

26. By decision of 9 June 2007 the Higher Electoral Council rejected the applicants' candidacies on the grounds that their criminal convictions had rendered them ineligible.

II. RELEVANT DOMESTIC LAW

...

B. Provisions on reopening criminal proceedings

32. Former Article 327 CPP listed the cases in which "a case leading to a judgment which has become *res judicata* can be the subject of a retrial in the convicted person's favour". That provision was amended by section 3 of Act No. 4793 (enacted on 23 January 2003 and published in the Official Gazette on 4 February 2003), which added a sixth case where a reopening is possible, reading as follows:

> "Where it has been established by a final [ECHR] judgment that a criminal-law decision was given in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Additional Protocols thereto, a reopening of proceedings may be applied for within one year from the date on which the [ECHR] judgment has become final."

33. According to section 1 of the transitional provisions of that Act, the provision cited above was applicable only in the following two situations: where the Court had delivered a judgment which had become final before the entry into force of the Act, and where it had delivered a judgment, which had become final, on an application which had been lodged after the entry into force of the Act.

34. On 1 July 2005 the new CPP came into force. The relevant part of Article 311 CPP, which came into force on 1 June 2005, reads as follows:

> "(1) Proceedings having led to a final decision may be reopened under the following conditions:
>
> ...
>
> (f) Where it has been established by final judgment of the European Court of Human Rights that the conviction infringed the Convention for the Protection of Human Rights and Fundamental Freedoms and the Additional Protocols thereto or that the conviction constituted the basis for such infringement. In such cases, a reopening of proceedings may be requested within one year from the date on which the judgment of the European Court of Human Rights became final."

35. Act No. 6459 was adopted on 11 April 2013 and published in the Official Gazette on 30 April 2013. Section 21 of that Act provides for a derogation to Article 311 § 2 CPP. Pursuant to that provision, the restriction *ratione temporis* provided for in Article 311 § 2 CPP does not apply to cases pending at 15 June 2012 before the Committee of Ministers of the Council of Europe in the context of supervision of execution. Persons affected by that restriction can request a reopening of their proceedings within three months of the entry into force of that Act (see *Hulki Güneş v. Turkey* (dec.), no. 17210/09, §§ 29-32, 2 July 2013).

36. According to Articles 318 to 323 CPP, requests for a reopening of proceedings must be submitted to the court which imposed the initial sentence. That court has juridiction to adjudicate on the admissibility of the request without holding a hearing. Where the requisite conditions are not fulfilled, the court declares the request inadmissible. Otherwise, the court appoints a rapporteur judge to gather evidence and organise public hearings. After that procedure, the rapporteur judge decides whether to uphold or set aside the previous decision. Where an acquittal is ordered following the reopening of proceedings, compensation must be awarded to the person having sustained damage on account of the partial or total execution of the previous sentence (see *Leyla Zana and Others v. Turkey* (dec.), no. 2932/04, 29 September 2008).

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

39. Relying on Article 6 § 2 of the Convention, the applicants complained that their right to the presumption of innocence had been infringed. That provision reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

40. The Government contested the applicants' argument.

...

B. Merits

1. The parties' submissions

a) The applicants

45. The applicants submitted that in the reasoning given for its judgment base on Article 341 CPP, the Court of Cassation had observed that the reopening procedure was independent and distinct from the initial proceedings. They therefore considered that they should have been tried as "accused" rather than "convicted" persons. Furthermore, they should have benefited from the presumption of innocence until the judgment delivered with regard to them had become final.

46. The applicants then observed that following the reopening procedure they had both been sentenced to prison terms of seven years and six months', that is to say a shorter sentence than they ones they had actually served, which had totalled ten years, three months and seven days in the case of Mr Hatip Dicle, and nine years, eleven months and eight days in the case of Mr Selim Sadak. In that connection, they complained that the domestic authorities had flouted Article 53 §§ 1 and 2 of the Penal Code.

b) The Government

47. The Government submitted that the applicants' complaints under Article 6 § 2 of the Convention concerned the execution of the judgment delivered by the Court in the case of *Sadak and Others v. Turkey (no. 1)* (nos. 29900/96, 29901/96, 29902/96 and 29903/96, ECHR 2001-VIII). They submitted, with reference to the case-law of the Court, that the Court's finding of a violation was essentially declaratory. With particular reference to the decision in *Leyla Zana and Others v. Turkey* ([dec.]), n° 2932/04, 29 September 2008), they added that even if Article 6 of the Convention were applicable to the instant case, the reopening of the proceedings should be considered as part of an ongoing judicial process under domestic law

originating in a lack of fairness in the proceedings which had led to the applicants' initial conviction.

48. The Government, with reference to Act No. 5352 on police records, stated that the reopening of proceedings under domestic law did not automatically lead to the deletion of the initial conviction from the police record, nor did it defer the execution of that conviction. Furthermore, if such an entry was to be deleted, the judgment delivered after the second set of proceedings had to have become *res judicata*. That being the case, the independence of the second set of proceedings did not mean "independence" as regards the merits of the case, but rather independence as regards the proceedings themselves. In other words, the procedural rules should apply as if a new case were being heard. The Government took the view that the present application should be rejected on grounds of incompatibility *ratione materiae*, inasmuch as it comprised no new material liable to produce a conclusion different from that which the Court had adopted in its decision in *Leyla Zana and Others,* cited above.

49. The Government further submitted that Article 6 § 2 of the Convention was inapplicable in the instant case. They stated that the reopening of the proceedings had given rise not to a judgment on a new "criminal charge" against the applicants but to one which had upheld the judgment of 8 December 1994. They therefore considered that, on account of a conviction which, in their view, had become *res judicata*, the applicants had no longer held, during the second set of proceedings, "accused person" status for the purposes of Article 6 § 2 of the Convention, but rather were "convicted persons". Furthermore, after the reopening of the proceedings, the initial conviction of 8 December 1994 had remained *res judicata* until the conclusion of the second set of proceedings under the Court of Cassation judgment, which had become final on 27 February 2008. In the Government's view, it was as of the latter date that the entry concerning the applicants' first conviction could have been deleted from their police records and replaced with the second conviction.

2. The Court's assessment

a) Relevant general principles in the present case

50. Article 6 § 2 protects everyone's right to be "presumed innocent until proved guilty according to law". As the Court has reiterated (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 93, ECHR 2013), viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 77, Series A no. 146, and *Telfner v. Austria*, no. 33501/96, § 15, 20 March 2001); presumptions of fact or of law (see *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141-A, and *Radio France and Others v. France*,

no. 53984/00, § 24, ECHR 2004-II); and premature statements by the trial court or any other public authority concerning an accused person's guilt (see *Allenet de Ribemont*, cited above, §§ 35-36, and *Nešťák v. Slovakia*, no. 65559/01, § 88, 27 February 2007).

51. The Court considers that the presumption of innocence has been flouted if an official statement concerning an accused person reflects an opinion that he is guilty even though his guilt has not yet been legally established. It is sufficient, in this context, even if no formal finding has been made, for a given reasoning to suggest that the judge in question considers the person in question guilty. The Court also observes that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities (see *Allenet de Ribemont v. France*, 10 February 1995, § 36, Series A no. 308; *Daktaras v. Lithuania*, no. 42095/98, § 42, ECHR 2000-X; *Butkevičius v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II; and *Gutsanovi v. Bulgaria*, no. 34529/10, §§ 191 and 193, ECHR 2013).

52. The Court further reaffirms that a distinction must be made between decisions that reflect an opinion that the person in question is guilty and those which simply describe a situation of suspicion. The former violate the principle of the presumption of innocence, while the latter are considered compatible with the spirit of Article 6 of the Convention (see *Marziano v. Italy*, no. 45313/99, § 31, 28 November 2002 and the references therein).

53. Lastly, the Court reiterates that Article 6 § 2 of the Convention governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution". However, once an accused has been found guilty, in principle, it ceases to apply in respect of any allegations made during the subsequent sentencing procedure (see *Matijašević v. Serbia*, no. 23037/04, § 46, ECHR 2006-X).

54. Finally, however, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory (see *Allen* [GC], cited above, § 94).

b) Application of those principles to the present case

55. As a preliminary remark, the Court emphasises that whereas in the case of *Leyla Zana and Others*, cited above, the reopening of the proceedings had been refused, in the present case the request submitted by the applicants for such reopening was granted. It reiterates that, in principle, Article 6 of the Convention does not apply to proceedings concerning a failed request to reopen a case under domestic law. However, if the applicant's request for reopening has been granted, the new proceedings can then be regarded as concerning the determination of a criminal charge against him (see *Nikitin v. Russia*, no. 50178/99, § 60, ECHR 2004-VIII, and *Vanyan v. Russia*, no. 53203/99, § 56, 15 December 2005). Consequently, the guarantees set out in Article 6 of the Convention, including the safeguard on the presumption of innocence, apply to the proceedings conducted in the present case.

56. The Court must therefore assess whether the facts of the case point to an infringement of the applicants' right to the presumption of innocence for the purposes of Article 6 § 2 of the Convention. First of all, the Court must determine whether the Ankara Assize Court, by using the words "accused/convicted person" instead of the single word "accused" with reference to the applicants during the trial proceedings which followed the reopening of the proceedings, can be considered as having presented the applicants as being guilty before their guilt had been legally established. Secondly, it must decide whether the fact that, even after the case had been reopened, the applicants' criminal conviction was still registered on their police records amounts to an infringement of their right to the presumption of innocence.

57. As regards the first part of the applicants' complaint, the Court notes that it transpires from the reasoning of the 13 July 2004 judgment of the Court of Cassation that the trial court had apparently found it difficult to implement the legal consequences of the reopening of the proceedings. The problem facing the court was whether the reopening of the case followed on from the initial proceedings after which the applicants had been found guilty and sentenced to imprisonment, or whether such reopening should be considered as a completely new set of proceedings.

58. On that understanding, the Court notes that the Court of Cassation, in its judgment of 13 July 2004, put an end to that legal discussion and to the approach adopted by the trial court concerning the procedural rules applicable to the applicants' trial in the framework of the reopening of the proceedings. The Court of Cassation provided a clear legal response by referring to a judgment delivered by its Plenary Assembly (see paragraph 17 above) and pointing out that the reopening of the case constituted a set of proceedings which was completely independent from the initial proceedings against the applicants. It added that in the framework of the reopening of the case, all the procedural rules should be applied to those hearings as if the

case were being tried for the first time, covering the hearings to be organised, the serving of the indictment on the applicants and the new questioning to be conducted.

59. It follows that the Ankara Assize Court which re-examined the applicants' case following the 13 July 2004 judgment of the Court of Cassation were aware that the reopening of the case constituted a new set of proceedings completely independent from the initial one. That being the case, the Court notes that the Assize Court nevertheless continued to refer to the applicants as the "accused/convicted persons", even though it had not yet determined their guilt in the light of the evidence and the applicants' submissions. In the framework of the reopening of the case, the applicants' guilt was not legally established until 27 February 2008, when the Court of Cassation upheld the 9 March 2007 judgment of the Assize Court.

60. The Court emphasises that the fact that the applicants were ultimately found guilty and sentenced to a prison term of seven years and six months cannot negate their initial right to be presumed innocent until proved guilty according to law. It once again reiterates that Article 6 § 2 governs criminal proceedings in their entirety "irrespective of the outcome of the prosecution" (see *Matijašević*, cited above, § 49).

61. That is why, having had regard to the relevant circumstances of the case, the Court considers that the use by the competent domestic authorities in the framework of the reopening of the case, of the words "accused/convicted persons" with reference to the applicants even before any judgment on the merits of their case infringed their right to the presumption of innocence.

62. As regards the second part of the applicants' complaint, in view of the facts and the legal issues arising in this case, which originated in an individual application, the Court reiterates that it is not its task to rule *in abstracto* on the domestic legal rules governing police records or the practicalities of their implementation. In the present case, it must assess *in concreto* the impact on the applicants, for the purposes of Article 6 § 2 of the Convention, of the persistence of an entry on their initial criminal conviction on their police records, even though the Court had found a violation of certain provisions of the Convention in the judgment which had provided the basis for the acceptance by the competent domestic courts, in pursuance of the relevant legislation, of the applicants' request to reopen the proceedings.

63. The Court observes that the debate between the parties concerns the question whether the request to reopen the case should have led to the deletion of the initial conviction from the applicants' police records. It notes that, contrary to the Government's assertions on that matter, according to the Court of Cassation, where a case has been reopened it should be tried as if it were being tried for the first time. In the light of its arguments set out

above, the Court considers that the new set of proceedings was independent from the initial one.

64. Accordingly, having regard to the reasoning of the Court of Cassation in its judgment of 13 July 2004, the Court notes that the applicants' police records continued to comprise the entry concerning their initial conviction. It holds that such an entry, which presented the applicants as being guilty, even though in the framework of the reopening of the proceedings they should, in principle, have been considered as suspects in respect of offences on which judgment had not yet been delivered, raises an issue concerning the applicants' right to the presumption of innocence, as secured under Article 6 § 2 of the Convention.

65. Consequently, the Government's assertion that the entry concerning the applicants' initial conviction can only be deleted from their police records after the sentencing procedure in the framework of the reopened proceedings seems questionable. It should be emphasised that that argument contradicts the reasoning of the Court of Cassation (see paragraph 17 above) and the Court's well-established case-law on that matter. The Court reiterates that there is a fundamental difference between saying that someone is merely suspected of having committed a criminal offence and unequivocally declaring, without any final conviction, that that person has committed the offence with which he has been charged (see *Marziano*, cited above, § 31, and *Gutsanovi*, cited above, § 203). It considers that in the present case the impugned entry in the police records has declarative force.

66. Accordingly, the Court finds that there has been a violation of Article 6 § 2 under this head.

II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1

67. The applicants complained of a violation of their right to stand for election as independent candidates. They relied on Article 3 of Protocol No. 1 to the Convention, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

68. The Government contested the applicants' argument.

69. The Cour notes that this complaint is connected with that examinéd above and that it must threfore also déclaré it admissible.

A. The parties' submissions

1. The applicants

70. The applicants submitted that, contrary to the provisions of Article 53 of the Penal Code, their application to stand in the parliamentary elections had been rejected on the grounds that they had been sentenced to fifteen years' imprisonment. They added that at the time of rejection of their candidacy, the prison term of seven years and six months imposed on them had been served and that they had fulfilled the conditions for release. They submitted that, in any event, they could not have been given any heavier sentence under domestic law. For that reason they considered that, having served their sentence on the date of submission of their candidacies to those elections, there could have been no objection not to accept it. They took the view that the relevant domestic law had been applied arbitrarily in order to prevent them from standing in those elections.

71. As regards the Government's argument that Mr Hatip Dicle had stood in the parliamentary elections on 12 June 2011 (see paragraph 73 above), they explained that he had been elected but that his election had subsequently been annulled. He had lodged an application with the Court against that decision on 11 August 2011 (application no. 53915/11). Mr Selim Sadak stated that he had been elected mayor of Siirt and that, consequently, he had not stood in the parliamentary elections on 12 June 2011.

72. Referring to the case-law of the Court, the applicants alleged that they had suffered disproportionate interference with their right to stand for election and that that interference had infringed the substance of that right, in breach of Article 3 of Protocol No. 1 to the Convention.

2. The Government

73. With reference to the general principles emerging from the Court's case-law on Article 3 of Protocol No. 1 to the Convention, the Government explained that the Higher Electoral Council was responsible for supervising the conditions to be fulfilled by a candidate wishing to stand for election. They submitted that, pursuant to Article 76 of the Constitution, section 11 of Act No. 2839 and Article 53 of the Penal Code, the applicants' ineligibility, which had been of limited duration, had been prescribed by law and had pursued a legitimate aim compatible with the principle of the rule of law and the general objectives of the Convention, that is to say the protection of democratic order.

74. The Government added that on the date on which the applicants had submitted their applications to stand in the parliamentary elections on 22 July 2007 they had been subject to a final sentence of fifteen years' imprisonment, because their seven years and six months' prison sentence

had been given during the second set of proceedings and therefore had not yet become *res judicata*. It had proved impossible to replace the fifteen-year sentence with the latter until after 27 February 2008, and the applicants had been released from prison on 9 June 2004, after the reopening of the case. The Government explained that on that date the applicants had not yet served their whole fifteen-year prison sentence, as stated by the Assize Court in its judgment of 15 May 2007. The Government took the view that the rejection of the applicants' candidacies for the parliamentary elections on 22 July 2007 could not be regarded as a disproportionate measure or one which had impeded the free expression of the opinion of the people in choosing their elected representatives.

75. Finally, the Government informed the Court that Mr. Selim Sadak had not stood for the 12 June 2011 parliamentary elections and that the Higher Electoral Council had accepted Mr Hatip Dicle's candidacy for the parliamentary elections of 12 June 2011. They stated that the applicants' ineligibility, resulting from their conviction of 8 December 1994, had been temporary. Accordingly, the applicants could not claim to have been victims of a violation of Article 3 of Protocol No. 1 to the Convention.

B. The Court's assessment

1. Relevant general principles

76. The Court has consistently emphasised the importance of Article 3 of Protocol No. 1 to the Convention in a truly democratic political system, which is why it takes pride of place in the Convention system. In *Yumak and Sadak v. Turkey* ([GC], no. 10226/03, § 105, ECHR 2008) the Court reiterated that the rights guaranteed under that Article are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Tănase v. Moldova* [GC], no. 7/08, § 154, ECHR 2010).

77. The case-law of the Court draws a distinction between the active aspect of the rights guaranteed under Article 3 of Protocol No. 1 to the Convention, which concerns the right to vote, and the passive aspect of those rights, that is to say the right to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113, and *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 105 and 106, ECHR 2006-IV).

78. The Court further reiterates that the rights guaranteed under Article 3 of Protocol No. 1 are not absolute, that there is room for "implied limitations", and that the Contracting States have a wide margin of appreciation in this sphere (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II; and *Ekoglasnost v. Bulgaria*, no. 30386/05, § 58, 6 November 2012).

79. More particularly, States enjoy considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification. Though originating from a common concern – to ensure the independence of members of parliament, but also the electorate's freedom of choice – the criteria vary according to the historical and political factors peculiar to each State. The number of situations provided for in the constitutions and electoral legislations of many member States of the Council of Europe shows the diversity of possible choice on the subject. None of these criteria should, however, be considered more valid than any other provided that it guarantees the expression of the will of the people through free, fair and regular elections (see *Gitonas and Others v. Greece*, 1 July 1997, § 39, *Reports of Judgments and Decisions* 1997-IV; *Podkolzina*, cited above, § 33; and *Krasnov and Skuratov v. Russia*, nos. 17864/04 and 21396/04, § 41, 19 July 2007).

80. Consequently, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires the finding that this or that candidate has failed to satisfy them to comply with a number of criteria framed to prevent arbitrary decisions (see *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, § 50, ECHR 2007; *Podkolzina,* cited above, § 35; *Melnychenko v. Ukraine*, no. 17707/02, § 59, ECHR 2004-X; and *Oran v. Turkey*, nos. 28881/07 and 37920/07, § 54, 15 April 2014).

2. Application of these principles to the present case

81. In the first place, the Court takes note of the information transmitted by the Government to the effect that Mr Hatip Dicle's candidacy for the parliamentary elections of June 2011 had been accepted, while Mr Selim Sadak, for his part, had not stood in those elections because he had been elected mayor of Siirt. The Court points out, however, that its task is confined to assessing the circumstances obtaining in the instant case and therefore it cannot be expected to find that a case is no longer of any valid legal interest to the applicants because there have been developments since the material time (see, *mutatis mutandis*, *Sadak and Others*, cited above, § 38).

82. Secondly, the Court notes that the present case primarily concerns the passive aspect of the right to vote, that is to say the right to stand in elections (see *Mathieu-Mohin and Clerfayt*, cited above, §§ 46-51, and *Ždanoka*, cited above, §§ 105 and 106). In that context, it notes that both the applicants submitted their candidacies to the Higher Electoral Council for the parliamentary elections of 22 July 2007 as independent candidates without any party political affiliation, one in the Diyarbakır constituency and the other in Şırnak. The Higher Electoral Council rejected their candidacies on the grounds that the applicants' police records mentioned

their criminal sentence passed on 8 December 1994 by the Ankara State Security Court, which meant that they did not fulfil the conditions prescribed by law (see paragraph 26 above).

83. Consequently, the Court considers that there was an interference in the applicants' access to their right to stand for election under Article 3 of Protocol No. 1 to the Convention. In order to be able to decide whether that interference amounted to a violation of the said provision, the Court must ascertain whether it met the requirements of legality, in other words whether it was "prescribed by law", whether it pursued a legitimate aim and whether it was proportionate to the aim pursued (see *Tănase* [GC], no. 7/08, cited above, § 163, and *Karimov v. Azerbaijan*, no. 12535/06, §§ 42 and 43, 25 September 2014).

84. That being the case, the Court first of all reiterates that it has already held that the strong showing by independent candidates was one of the main features of the 22 July 2007 parliamentary elections in Turkey, as part of a strategy to circumvent the 10 % threshold of votes at the national level imposed on all political parties taking part in the elections (see *Yumak and Sadak*, cited above, § 147, and *Oran*, cited above, § 58). It is against that background that the applicants' desire to stand as independent candidates in the parliamentary elections of 22 July 2007 should be seen.

85. It transpires from the case file that the legal issue to be determined in the present case is whether the considerations set out by the Ankara Assize Court in its decision of 15 May 2007, to the effect that the applicants had not yet served their full prison sentence as imposed by the Ankara State Security Court on 8 December 1994, met the requirements of section 11 of Act No. 2839, section 9 of Act No. 5352 and Article 53 of the Penal Code. According to the information provided by the Assize Court, the impugned entry still appeared on the applicants' police records despite the fact that following the finding of a violation in the Strasbourg Court's 17 July 2001 judgment, the competent domestic courts had accepted the request to reopen the case.

86. The Court considers that the applicants' claim in this regard should be examined in the light of the line of reasoning which it used above when assessing the applicants' complaint under Article 6 § 2 of the Convention (see paragraphs 54-64 above). It should be remembered that when a case is reopened following a finding of a violation by the Strasbourg Court, the question which arises concerns the applicability and foreseeability of the effects of section 11 of Act No. 2839, section 9 of Act No. 5352 and Article 53 of the Penal Code. In this context, it transpires from the reasoning of the 13 July 2004 judgment of the Court of Cassation that where a case is reopened it must be tried as if it were completely independent from the first set of proceedings. The case in question should therefore have been tried as if it was being adjudicated for the first time. The Court reiterates that it has already concluded that the failure to delete the applicants' initial conviction

from their police records after the reopening of the proceedings presented them as being guilty of facts in respect of which their guilt had not yet been legally established, and that there had therefore been an infringement of the applicants' right to the presumption of innocence, pursuant to Article 6 § 2 of the la Convention (see paragraph 64 above).

87. That being the case, the Court takes the view that, on the one hand, the application of the legal provisions in question by the Ankara Assize Court in its decision of 15 May 2007 and the interpretation of those provisions by the Court of Cassation in its judgment of 13 July 2004 as regards the consequences of the reopening of the proceedings following the finding of a violation by the Strasbourg Court, and, on the other hand, the retention of the impugned entry on the applicants' police records, failed to satisfy the criteria of foreseeability of the law within the meaning of the Court's case-law. On the basis of that consideration, the Court notes that there was apparently some degree of incompatibility between the laws in force at the material time concerning the conditions to be fulfilled in order to stand in the 22 July 2007 parliamentary elections and the interpretation and implementation of those laws in the national legal system by the various domestic courts and judicial authorities. Nevertheless, the Court considers that in the framework of this application it is not called upon to resolve that apparent clash between the manners in which a lower court and a higher court, that is to say the Court of Cassation, applied a domestic provision.

88. In the light of the above considerations, the Court finds that in the instant case the impugned interference was not "prescribed by law". It therefore considers it unnecessary to ascertain whether that interference pursued a legitimate and was proportionate to the aim pursued.

89. It follows that the manner in which the impugned national legislation in force at the material time was applied in the present case curtailed the applicants' right to stand for election for the purposes of Article 3 of Protocol No. 1 to such an extent as to impair its very essence.

90. There has therefore been a violation of Article 3 of Protocol No. 1 to the Convention.

...

FOR THESE REASONS, THE COURT,

...

2. *Holds*, by five votes to two, that there has been a violation of Article 6 § 2 of the Convention;

3. *Holds*, by five votes to two, that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

...

Done in French, and notified in writing on 16 June 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	András Sajó
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Spano and Judge Kjølbro is annexed to this judgment.

A.S.
A.C.

JOINT PARTLY DISSENTING OPINION OF JUDGES SPANO AND KJØLBRO

I. Preliminary remarks

1. Article 6 § 2 of the Convention provides that everyone charged with a criminal offence is to be presumed innocent until proved guilty according to law. We are unable to agree with the majority that there has been a violation of this provision on the facts of the present case, taking particular account of the specific features of the Turkish system for the reopening of criminal proceedings. The same applies to the majority's finding of a violation of Article 3 of Protocol No. 1, as it is closely connected to the reasoning underlying the breach of Article 6 § 2. We agree, however, with the Court that there has been no violation of Article 13 in the present case.

II. Turkish system of reopening of criminal proceedings

2. As a correct understanding of the Turkish system of reopening of criminal proceedings, after final conviction, is crucial for the resolution of this case, we will start by giving an overview of the main elements of this system.

3. The pertinent provisions of Turkish law dealing with the reopening of criminal proceedings are described in paragraphs 32-36 of today's judgment. The essential features of this system are as follows. *Firstly*, a judgment that has acquired *res judicata* may be reopened if certain conditions are fulfilled. *Secondly*, if the request for reopening is deemed admissible, the court assigns a judge rapporteur who is responsible for obtaining evidence and holding a public hearing. After the closure of argument, the court decides whether to confirm the original judgment or to annul it.

4. Furthermore, it follows from the Court of Cassation's judgment of 13 July 2004, in the first reopening proceedings in the applicants' case, as described in paragraph 17 of the judgment, that upon the reopening of criminal proceedings the new proceedings are fully independent and the accused person has to be afforded all the procedural rights and safeguards that flow from the right to a fair trial.

5. It is important for the present case that, in its judgment of 2004, the Court of Cassation did not discuss the legal consequences for the status of the previously convicted person, upon the reopening of his case, as regards the *res judicata* force of the original conviction. As is clear from the provisions of the Code of Criminal Procedure referred to in the judgment (cited in paragraph 3 above), where new proceedings have been instituted, the conditions for reopening being fulfilled, the original conviction

nevertheless remains in force, having binding legal effect, until the court seised in the reopening proceedings decides to confirm or annul it. In our view, this reasonable interpretation of domestic law is confirmed by the Assize Court's judgment in the first applicant's case dealing with the dispute on his eligibility to stand as a candidate for the Parliamentary elections in 2007. In the judgment of the Assize Court of 15 May 2007, as described in paragraph 24 of the present judgment, it is clearly stated that the original domestic judgment, convicting the first applicant, had acquired *res judicata*, the binding nature of which was still in force, and the Assize Court did not make any allowances in this regard for the fact that the request for reopening had been granted.

6. In sum, under the applicable Turkish law, as interpreted and applied by the domestic courts, the decision to reopen the criminal proceedings in the applicants' case did not, *in and of itself*, alter the legally binding force of the original conviction of 1995. In our view, the examination of the applicants' complaints under Articles 6 § 2 and Article 3 of Protocol No. 1 to the Convention must take place within this domestic legal context, as we will now explain in more detail.

III. Complaint under Article 6 § 2 of the Convention

7. The relevant general principles of the Court's case-law under Article 6 § 2 of the Convention are set out in paragraphs 50-54 of the Court's judgment. We note that it is a general and necessary element in the Court's development of its jurisprudence in this field that the presumption of innocence is meant to protect individuals from being proclaimed publicly, characterised or treated by the domestic authorities as guilty of criminal acts if they have not been found guilty in accordance with the law. We note that there is nothing in the case-law, as it stands, to preclude member States from setting up a system, like Turkey has, whereby the original conviction retains binding legal force pending the outcome of new proceedings after reopening. Of course, as correctly stated by the majority in paragraph 55 of the judgment, in the new proceedings the accused must be afforded all the relevant procedural safeguards of a fair trial and to be presumed innocent. However, and importantly, the fact that a person has initially been convicted of a criminal act may have a bearing on the assessment of his legal situation in other contexts, even though the proceedings have been reopened, for example as regards his eligibility to stand for elections, at least until the new proceedings have been concluded and the initial conviction set aside, if that is the case.

8. As described in paragraph 56 of the Court's judgment, the applicants' complaint under Article 6 § 2 of the Convention has two limbs. *Firstly*, the question arises whether, by using the words "accused/convicted person", instead of only "accused", in its judgment, the Assize Court regarded the

applicants as being guilty of the offence for which they were charged before their guilt had been legally established. *Secondly*, it must be examined whether it was incompatible with the presumption of innocence to maintain information on their initial conviction in the criminal record after the decision to reopen their case.

9. As to the *first limb*, the majority rely heavily on the reasoning given by the Court of Cassation in its judgment of 13 July 2004 (see paragraphs 57-59) where that court established (see paragraph 4 above) that the new proceedings, upon reopening, were to be considered fully independent from the initial proceedings and, therefore, that the applicants should be afforded all procedural safeguards as if the criminal charge were being examined for the first time. The majority continue by stating that the Ankara Assize Court, which decided the issue anew after the Court of Cassation's judgment of 2007, confirmed that the fresh proceedings were to be considered completely independent from the original proceedings. However, the Court proceeds to fault the Assize Court for using the words "accused/convicted person" in its judgment, when their guilt had not been finally established in the new proceedings. The majority find this use of words by the Assize Court to constitute a violation of the right to be presumed innocent.

10. We disagree. The majority apply Article 6 § 2 of the Convention to the facts of the case without taking adequately into account the context of the new proceedings and the continued binding legal force of the original conviction in accordance with domestic law and practice. *Firstly*, the Assize Court found itself in a delicate situation whereby it attempted to balance the conflicting position of the applicants, who were still, as a matter of domestic law, regarded as having been convicted of a criminal act according to the conviction from 1995, but were, at the same time, accused persons in the new proceedings entitled to all the guarantees of a fair trial, including the presumption of innocence. The use of the words "accused/convicted person" must be assessed in this specific context. *Secondly*, and more importantly, the applicants do not, in any shape or form, make the claim that the use of this combination of words had any effect on the way the Assize Court applied the burden of proof, assessed the evidence or the way they were treated in the course of the proceedings. Nor is there any allegation made by the applicants that the terminology used in the judgment had any practical implications for them during the proceedings. On the contrary, as the majority themselves acknowledge (see paragraph 59 of the judgment and paragraph 9 above), the Assize Court clearly confirmed that the applicants had to be afforded procedural safeguards, as the new proceedings were completely independent of the initial proceedings, in conformity with the Court of Cassation's judgment of 2004. In other words, no claim has been made by the applicants that the use of words "accused/convicted person", which must, as previously mentioned, be understood in the light of the

special features of the Turkish system of reopening of criminal proceedings, should in substance be understood to mean that the Assize Court did not presume them to be innocent.

11. To be clear, we certainly acknowledge that in the more traditional context of a criminal trial – one that does not involve new proceedings through the reopening of a case after final conviction, where the conviction retains legal force – the use of words of this nature by a court would be highly problematic under Article 6 § 2 of the Convention. But in the particular circumstances of this case, and for the reasons set out above, we fail to see how this wording constituted a violation of the principle of the presumption of innocence. That finding constitutes in our view an overly abstract and formalistic application of Article 6 § 2 which does not take account of the special context of the present case.

12. As to the *second limb* of the applicants' Article 6 § 2 complaint, the majority consider that the question to be examined is whether the reopening of the criminal proceedings should have led the domestic authorities to erase immediately from the criminal record the information about the applicants' original conviction from 1995 (see paragraph 63 of the Court's judgment). Again, the majority rely almost exclusively on the Court of Cassation's judgment of 13 July 2004 to answer that question in the affirmative. The majority consider that as the new proceedings were completely independent from the first, and as the applicants should have been presumed innocent in the course of the new proceedings, the retention of the information about the original conviction on the criminal record constituted, in and of itself, a violation of the right to be presumed innocent.

13. Again, with all due respect, the majority fail to appreciate adequately the way in which the Turkish system of reopening of criminal proceedings works. We reiterate that irrespective of the decision to reopen the case, the original conviction remains in force under Turkish law until the new proceedings are concluded by a final decision either to confirm or to annul it. Although it is clear under the Court's case-law that full procedural safeguards must be afforded in the new proceedings, including the presumption of innocence, this does not mean that changes to a criminal record need to be made, thus erasing the existence of an original conviction that still retains binding legal force, immediately upon the reopening of a case. Nothing in the Court of Cassation's judgment of 2004 suggests otherwise. Again, that court only dealt with the issue of what procedural safeguards should be afforded to the applicants in the new proceedings, as they were to be considered independent of the original proceedings. Thus, the Court of Cassation did not call into question the continued binding legal force of the original conviction or give an opinion on whether it could have legal significance in other contexts, for example as regards information being maintained on the applicants' criminal record. Lastly, on the facts of this case, no claim has been made by the applicants that the continued

registration of the original conviction in the criminal register had any bearing on the conduct of the new criminal proceedings by the Assize Court. To conclude, we disagree with the majority that Article 6 § 2 of the Convention required, in the circumstances of this case and taking into account the applicable Turkish law, the erasure from the criminal register of the applicants' original conviction before the new proceedings were concluded by a final decision.

IV. Complaint under Article 3 of Protocol No. 1

14. The applicants also complained of a violation of Article 3 of Protocol No. 1 as they were not considered eligible to stand as candidates for the Parliamentary elections in Turkey in 2007. We agree with the majority that the applicants' passive rights under the said provision have been interfered with but disagree that there has been a violation of Article 3 of Protocol No. 1 on account of the lack of a foreseeable legal basis for the interference (see paragraphs 86-89 of the Court's judgment).

15. At paragraph 87 of the judgment, the majority consider that the reasoning adopted by the Ankara Assize Court of 15 May 2007 (see paragraph 24), when deciding on the request of the first applicant to declare that he had served his original sentence in full, together with the Court of Cassation's judgment of 2004, on the one hand, and the retention of the original conviction in the criminal record, on the other, did not comply with the conditions of foreseeability of domestic law under the Court's case-law. The majority observe in this regard that there is seemingly an inconsistency between the laws in force at the material time, dealing with the conditions of eligibility to stand for elections, and the application of these laws by the different domestic courts. We understand the majority here to be stating that the way the Ankara Assize Court interpreted the relevant provisions of the electoral laws (see paragraph 24) did not comply with the interpretation given by the Court of Cassation in 2004 as to the independent nature of the new proceedings after reopening. In sum, the majority's reasoning for its finding of a violation of Article 3 of Protocol No. 1 is intimately connected to its view of the application of Article 6 § 2 of the Convention to the facts of the case, in particular the retention of information about the original conviction in the criminal record after the reopening of the proceedings (see paragraph 86 of the judgment).

16. For the same reasons as those we have already set out above (see paragraphs 12-13), we cannot agree with the majority in this regard. Yet again, the majority overestimate the impact and scope of the Court of Cassation's judgment of 2004. We reiterate that this court did not call into question the continued binding legal force of the original conviction or state an opinion on whether it could have legal significance in other contexts, for example as regards information being maintained on the applicants'

criminal record for the purposes of standing in Parliamentary elections. It follows that the Ankara Assize Court's interpretation of the applicable electoral laws, in particular section 11 of Law no. 2839, section 9 of Law no. 5352 and Article 53 of the Criminal Code, as described in paragraph 24 of the judgment, cannot in our view be considered manifestly unreasonable or arbitrary, taking into account the continued binding legal force of the original conviction of 1995. Accordingly, the majority do not present any persuasive arguments to the effect that the interference with the applicants' rights under Article 3 of Protocol No. 1 lacked a foreseeable legal basis.

17. In conclusion, we respectfully dissent from the view of the majority of our colleagues that there has been a violation of Articles 6 § 2 and Article 3 of Protocol No. 1 in the present case.