



**REPUBLIC OF TURKEY**  
**CONSTITUTIONAL COURT**

**FIRST SECTION**

DECISION

**SEBAHAT TUNCEL APPLICATION**

(Application Number: 2012/1051)

Date of Decision: 20/2/2014

## FIRST SECTION

### DECISION

<b>President</b>	:	Serruh KALELİ
<b>Members</b>	:	Zehra Ayla PERKTAŞ Burhan ÜSTÜN Nuri NECİPOĞLU Hicabi DURSUN
<b>Rapporteur</b>	:	Yunus HEPER
<b>Applicant</b>	:	Sebahat TUNCEL
<b>Counsel</b>	:	Att. Ercan KANAR

#### I. SUBJECT OF APPLICATION

1. The applicant asserted that her right to a fair trial and to political participation and freedom of expression was violated due to the implementation of the measure of judicial control in the form of "*restriction to go abroad*" although she was a member of parliament.

#### II. APPLICATION PROCESS

2. The application was lodged on the date of 28/11/2012 via the 10th Assize Court of Istanbul. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the Second Commission of the First Section that the examination of admissibility be conducted by the Section, that the file be sent to the Section.

4. In the session held by the Section on 17/9/2013, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on the date of 25/9/2013. The Ministry of Justice presented its opinion to the Constitutional Court on the date of 25/11/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on the date of 30/12/2013. The applicant submitted to the Constitutional Court her statements against the opinion of the Ministry of Justice on 14/1/2014.

#### III. FACTS AND CASES

##### A. Facts

7. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

8. The applicant was taken into custody on the date of 5/11/2006 with the allegation of being a member of an armed terrorist organization and arrested on the date of 8/11/2006.

9. Through the indictment of the Office of the Chief Public Prosecutor of Istanbul dated 13/11/2006, a criminal case was filed before the 10th Assize Court of Istanbul in order for the applicant to be punished with the claim that she committed the offense of being a member of an armed terrorist organization.

10. While the trial was going on, the applicant was elected as an independent member of parliament from Istanbul in the general elections for members of parliament dated 22/7/2007.

11. Upon the applicant's request for release, the 10th Assize Court of Istanbul decided on the release of the applicant on the date of 24/7/2007. The court did not rule on any security measure on the applicant, either. The justification of the court's decision of release is as follows:

*"it is understood... that when her trial was ongoing... she was elected as an independent member of parliament from the 3rd region of Istanbul in the general elections for members of parliament held on the date of 22/7/2007; that through the examination of the member of parliament minutes of the Presidency of the Provincial Election Board dated 24/7/2007 for the XXIII. Period, the accused Sabahat Tuncel was elected as an independent member of parliament in the 3rd electoral district in Istanbul on the date of 22/7/2007 and that in line with the relevant letter, her deputyship became official. As per article 83 of the Constitution, the state of detention and trial of the accused Sabahat Tuncel, who is present in the case file of our court, will not be continued as a member of parliament from the offense of membership in a terrorist organization unless there is a decision by the assembly."*

12. On the date of 26/7/2007, the Office of the Chief Public Prosecutor of Istanbul objected against the justifications of the 10th Assize Court of Istanbul as included in the decision on the release of the applicant dated 24/7/2007. The 10th Assize Court of Istanbul decided on the acceptance of the objection through its decision dated 26/7/2007 and decided on the removal of the explanations included in the decision on the release of the applicant with regard to article 83 of the Constitution and on "...correction of the justification of release as the reasons since the accused Sebahat Tuncel was elected as an independent member of parliament in the elections for members of parliament, that there is no possibility of escaping and of obfuscating the evidence left due to this quality".

13. The applicant became an independent candidate for deputyship from Istanbul and was elected again in the General Election for Deputyship for the 24th Period held on the date of 12 June 2011.

14. The 10th Assize Court of Istanbul decided on the punishment of the applicant with an imprisonment of 8 years and 9 months due to the offense of being a member of an armed terrorist organization and the implementation of the measure of judicial control "restriction to go abroad" until the decision became final on the date of 18/9/2012. The justification of the court's decision of judicial control is as follows:

*"On the implementation of the measure of judicial control "restriction to go abroad" according to article 109/3-a of the CCP regarding the accused given the amount of*

*punishment imposed on the accused and the period during which she remained under detention..."*

15. The application of objection that the applicant filed against the decision of the measure of judicial control was dismissed through the decision of the 11th Assize Court dated 11/10/2012 and the decision became final on the same date and was notified to the applicant on the date of 30/10/2012. The justification of the decision of dismissal is as follows:

*"As it is understood that there is no inappropriateness in the decision of measure in the form of "restriction to go abroad" as issued on the accused Sebahat TUNCEL among the measures of judicial control in the file of the 10th Assize Court of Istanbul numbered Merits 2006/358 and at its hearing dated 18/9/2012 and in the interlocutory decision of the 10th Assize Court of Istanbul dated 25/9/2012, that the issued decision complies with the procedure and the law, ..."*

16. The applicant appealed the final decision of the 10th Assize Court of Istanbul; the decision of the court of first instance was approved through the writ of the 9th Criminal Chamber of the Supreme Court of Appeals dated 24/12/2013.

## **B. Relevant Law**

17. Article 83 of the Constitution with the heading "*Legislative immunity*" is as follows:

*"Members of the Grand National Assembly of Turkey cannot be held responsible for the votes they cast and the words they speak during the activities of the Assembly, the opinions they put forward at the Assembly and for repeating and disclosing these unless a contrary decision is made by the Assembly upon the proposal of the Bureau in that sitting.*

*A deputy against whom there are claims of offending before or after election cannot be arrested, interrogated, detained and tried without the decision of the Assembly. A case of in flagrante delicto which requires a heavy penalty and the conditions specified in article 14 of the Constitution on the condition that the investigation thereof started before the election are out of the scope of this provision. However, in such a case, the authorized body must immediately and directly inform the Grand National Assembly of Turkey on the situation.*

*The execution of a penal sentence given about a member of the Grand National Assembly of Turkey before or after election is delayed until the membership of the said member ceases; no statute of limitations will apply for the period of membership.*

*Investigation and prosecution against a re-elected deputy is subject to the lifting of his/her immunity once again by the Assembly.*

*Political party groups at the Grand National Assembly of Turkey cannot hold meetings and make decisions on legislative immunity.*

18. Article 14 of the Constitution with the heading "*Prohibition of abuse of fundamental rights and freedoms*" is as follows:

*"None of the rights and freedoms present in the Constitution can be exercised in the form of activities aiming to impair the indivisible integrity of the State with its territory and nation and to abolish the democratic and secular Republic which is based on human rights.*

*None of the provisions of the Constitution can be interpreted in a way that enables the State or individuals to engage in an activity to abolish the fundamental rights and freedoms recognized by the Constitution or to restrict them more comprehensively than that specified in the Constitution.*

*The sanctions to be imposed against those who engage in activities contrary to these provisions are regulated by law."*

19. Paragraphs numbered (1) and (2) of article 314 of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 with the heading of "*Armed organization*" are as follows:

*"Article 314- (1) A person who forms or conducts an armed organization with the purpose of committing the crimes in the fourth and fifth chapters of this section shall be penalized with a prison sentence of ten to fifteen years.*

*(2) A prison sentence of up to ten years shall be imposed on those who join the organized group defined in paragraph one."*

20. Subparagraph (b) of paragraph one of article 4 of the Code on the Fight Against Terrorism dated 12/4/1991 and numbered 3713 with the heading "*Offenses committed for the purpose of terrorism*" is as follows:

*"The following offenses shall be considered to be a terror offense in the event that they are committed within the framework of the activity of a terrorist organization established in order to commit offenses in line with the aims specified in article 1:*

*The offenses stipulated in articles 79, 80, 81, 82, 84, 86, 87, 96, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, 118, 142, 148, 149, 151, 152, 170, 172, 173, 174, 185, 188, 199, 200, 202, 204, 210, 213, 214, 215, 223, 224, 243, 244, 265, 294, 300, 316, 317, 318 and 319 and paragraph two of article 310 of the Turkish Criminal Code*

*..."*

21. Article 5 of the Code on the Fight Against Terrorism numbered 3713 with the heading of "*Increase of penalties*" is as follows:

*"The imprisonments or judicial fines to be determined on those who commit the offenses stipulated in articles 3 and 4 according to the relevant codes shall be adjudged by way of increasing them by half. In the penalties to be determined in this way, the upper limit of the penalty which is determined for both that act and all kinds of penalties can be exceeded. However, an aggravated lifelong imprisonment shall be adjudged instead of a lifelong imprisonment.*

*If it is prescribed that the penalty of the offense be increased in the relevant article due to the fact that the offense is committed within the framework of the activity of the organization; an increase shall be made over the penalty only according to the provision of this article. However, the increase to be made cannot be lower than two thirds of the penalty.*

*The provisions of this article shall not be applied regarding children."*

22. The relevant paragraphs of article 109 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 with the heading "*Judicial control*" are as follows:

*(1) It may be adjudicated for an accused to be placed under judicial control instead of being detained in the presence of grounds for detention set forth in article 100 in the investigation carried out due to a crime.*

*...*

*(3) Judicial control includes subjugation of the accused to one or more of the liabilities shown below:*

*a) Not going abroad.*

*...*

*(6) The period spent under judicial control cannot be deducted from the penalty by considering it a ground for restriction of personal freedom. This provision shall not apply in cases set forth in sub-paragraph (e) of paragraph three of the article.*

*(7) Provisions pertaining to judicial control may apply (...) for those released due to the expiration of the periods of detention prescribed in the codes."*

23. Article 110 of the Code numbered 5271 with the heading of "*Decision of judicial control and authorities to order*" is as follows:

*(1) The suspect may be placed under judicial control at every phase of the investigation stage upon request of the Public prosecutor and decision of the criminal judge of peace.*

*(2) Upon request of the Public prosecutor, the judge, in application of judicial control, may place the suspect under one or more new liabilities; may wholly or partially revoke, amend the liabilities comprising the content of the judicial control or temporarily hold the suspect from abiding by some of these.*

*(3) Article 109 and provisions of this article shall be implemented by other judicial authorities having jurisdiction and competency at every phase of the prosecution stage when deemed necessary."*

24. Article 111 of the Code numbered 5271 with the heading "*Revocation of the decision of judicial control*" is as follows:

*(1) Upon motion of the suspect or accused, the judge or court may decide as per paragraph two of article 110 within five days after receiving the Public prosecutor's opinion.*

*(2) Decisions pertaining to judicial control may be objected."*

#### **IV. EXAMINATION AND JUSTIFICATION**

25. The individual application of the applicant dated 28/11/2012 and numbered 2012/1051 was examined during the session held by the court on the date of 20/2/2014 and the following were ordered and adjudged:

##### **A. Claims of the Applicant**

26. The applicant alleged;

*i.* That in the decision dated 18/9/2012 of the 10th Assize Court of Istanbul before which she was tried due to the offense of being a member of an armed terrorist organization, a decision of judicial control in the form of the failure to go abroad was unlawfully issued on her, that the decision of judicial control and the decision of the court which made the examination of objection lacked justification and that for this reason, article 141 of the Constitution was violated,

*ii.* That the prohibition of the failure to go abroad had a restrictive quality, that the right to freedom and security was violated as a decision was issued on the objection filed against this decision without receiving the opinion of the applicant and her defense counsel,

*iii.* That the decision of judicial control "the failure to go abroad" was an ideological and political decision, that for this reason, it had a quality of violating the principle of equality stipulated in article 10 of the Constitution, that the fact that the prohibition of going abroad was imposed although there was no final decision had a quality of violating the presumption of innocence stipulated in article 38 of the Constitution and article 83 of the Constitution which regulates legislative immunity,

iv. That the implementation of the measure of the prohibition of going abroad in a way which was restricting freedom on a member of parliament although there was no final judgment and a Parliament decision was not issued had a quality of violating the freedom of abode and travel regulated in article 23 of the Constitution,

v. That the expression of thoughts was an inseparable part of her parliamentary activities, that the failure of parliamentarians to go abroad within the framework of legislative activity was contrary to article 26 of the Constitution which regulates the freedom of expression and dissemination of thought,

vi. That she was released through the decision of release of the 10th Assize Court of Istanbul dated 14/7/2007 as there was no possibility of escaping for her, that however, the imposition of the prohibition of going abroad without depending on any justification in its decision dated 18/9/2012 had a quality of violating her constitutional rights and filed a request for compensation.

## **B. Evaluation**

27. In the opinion of the Ministry against the claims of the applicant, it was stated that our country was not a party to the Additional Protocol Numbered 4 of the European Convention on Human Rights (ECHR) in which the right to liberty of movement is regulated. The Ministry also stated that the complaints of the applicant needed to be examined within the framework of the right to free election stipulated in article 3 of the Additional Protocol Numbered One of the ECHR and article 67 of the Constitution, that in the concrete incident, the applicant did not encounter any obstacle with regard to participation in legislative activities in the Parliament, that whether or not the measure imposed on the applicant and the aim sought to be achieved were proportionate needed to be evaluated by the Constitutional Court.

28. Against the opinion of the Ministry on the merits of the application, the applicant repeated her statements in her application petition, moreover; she stated that parliamentary activities could not only be limited to intra-parliamentary activities, that the activities to be performed within the country or at abroad needed to be handled within the framework of legislative immunity. The applicant asserted that the prohibition of going abroad had the quality of violating the right to elect, to be elected and to engage in political activity stipulated in article 67 of the Constitution.

29. In criminal law, in order for an investigation or prosecution initiated due to a committed offense to be performed in a sound way, resorting to some measures can turn into an obligation. These measures can have the aim of ensuring that proceedings are conducted without delay and endangering them and that the decisions to be issued are implemented by way of the prevention of the escape of the suspect or accused, making the suspect or accused present at the trial, the prevention of the obfuscation of evidence. While protection measures are means used for maintaining the old situation during proceedings or ensuring that the decision to be issued is enforced, they are also temporary. The fact that a protection measure is temporary means that a measure comes to an end in the event that no reason which justifies this measure remains.

30. Protection measures are regulated in articles 90 to 144 of the chapter four of the Code numbered 5271 with the side heading of "*Protection measures*". There amongst, measures such as arrest and taking under custody, detention, judicial control, search and seizure, the supervision of communication established through telecommunications,

surveillance through undercover investigator and technical means are measures that restrict personal liberty.

31. Subjecting a suspect or accused to one or a few liabilities stipulated in the code is defined as judicial control in the event that the conditions of detention are present and on the condition that they are within the framework of proportionality and comply with the aims to be achieved with detention. In article 109 of the Code numbered 5271 with the heading of "*Judicial Control*", the means of judicial control introduced as an alternative to detention are listed. In subparagraph (a) of paragraph numbered (3) of the same article, the measure "*failure to go abroad*" is accepted as a lighter protection measure which replaces detention.

32. As it is accepted as a judicial control measure, in order to be able to decide on the measure "*failure to go abroad*", there need to be cases indicating the existence of a strong suspicion of crime stipulated in article 10 of the Code numbered 5271 and a reason for detention.

### **1. In Terms of Admissibility**

#### **a. In Terms of the Principle of Equality**

33. The applicant asserted that the fact that the prohibition of going abroad was imposed on her because she had a conviction which did not become final due to political reasons while the prohibition of going abroad was not imposed even for parliamentarians on whom investigation files were present due to disgraceful crimes was discriminatory as it was an ideological and political decision and that, for this reason, "*the principle of equality before law*" regulated in article 10 of the Constitution was violated.

34. When article 148 of the Constitution and article 45 of the Code numbered 6216 are taken into consideration, it is not possible to evaluate in an abstract manner the claims of the applicant as to effect that article 10 of the Constitution and article has been violated and it is certainly necessary to handle them in connection with another fundamental right and freedom which is the subject matter of the individual application. (App. No: 2012/1049, 26/3/2013, § 33).

35. It is necessary to handle the applicant's claim with regard to the violation of the principle of equality within the framework of especially the right to personal liberty and security and the freedom of travel and in connection with these rights and freedoms. Therefore, the principle of equality does not have any independent protection function within the scope of an individual application and is a complementary right which guarantees the exercise and protection of other rights and their application remedies (App. No: 2012/1049, 26/3/2013, § 34).

36. Due to the reasons explained, the claims of the applicant as to the fact that article 10 of the Constitution was violated should be evaluated within the framework of the claims as to the fact that articles 19 and 23 of the Constitution were violated.

#### **b. In Terms of the Presumption of Innocence**

37. The applicant asserted that the fact that the restriction on going abroad was imposed on her without any court decision which became final had the quality of violating the presumption of innocence stipulated in article 38 of the Constitution.



38. While the judicial control measures stipulated in article 109 of the Code numbered 5271 with the heading of “*Judicial control*” can be resorted to in order for the investigation or prosecution conducted due to the committed offense to be executed in a sound way, they can also be resorted to in order to ensure that the judgment ruled as a result of the prosecution is enforced. As a matter of fact, according to article 110 of the Code numbered 5271 with the heading “*Decision of judicial control and authorities to order*”, it is regulated that a decision of judicial control can be issued with the decision of a judge in each stage of the investigation and prosecution phase. On the other hand, in accordance with article 111 of the Code numbered 5271 with the heading “*Revocation of the decision of judicial control*”, the legal remedy of objection is envisaged against the measure of “*restriction to go abroad*”.

39. In the present incident, the 10th Assize Court of Istanbul, through its decision dated 18/9/2012, ruled upon the measure of restriction on going abroad in order to ensure that the accused be prevented from escaping and that the issued decisions be implemented. The applicant resorted to the legal remedy of objection against this decision of the court of instance. The objection was dismissed through the decision of the 11th Assize Court of Istanbul which was the authority of objection dated 11/10/2012 and the decision of judicial control became final on the same date. In this respect, in order to be able to rule upon the measure of “*restriction to go abroad*” which replaces detention, it is not necessary that the merits of the trial which is conducted be finalized with a judgment, it is also not necessary that the court decision with regard to the merits of the trial to finalize, either.

40. For the reasons explained, as no evident and visible violation has been detected in relation to the action of trial through which the applicant asserted that the fact that the imposition of the measure of the prohibition of going abroad on her without any court decision which became final with regard to the merits of the trial had the quality of violating the presumption of discretionary, it should be decided that this part of the application is inadmissible due to the fact that “*it is clearly devoid of basis*” without examining it in terms of other conditions of admissibility.

### **c. In Terms of the Right to Personal Liberty and Security and the Freedom of Travel**

41. The applicant asserted that the prohibition of going abroad had a quality of restricting freedom, that therefore, her right to liberty and security and freedom of abode and travel were violated.

42. Article 19 of the Constitution with the heading of “*Personal liberty and security*” is as follows:

*“Everyone has personal liberty and security.*

*No one can be deprived of his/her liberty except for the following cases, the procedure and conditions of which are specified in the law:*

*Execution of penalties restricting liberty and of security measures ruled by courts; arrest or detention of an individual as required by a court verdict or an obligation set forth in law; execution of an order for the rehabilitation of a minor under supervision or for bringing him/her before the competent authority; execution of a measure taken in compliance with the principles specified in the law for the treatment, education or rehabilitation at an institution of a mentally ill person, a drug or alcohol addict, a vagabond who poses a threat to the society or a person who may possibly spread diseases; arrest or detention of a person who illegally*

*attempts to enter or enters into the country, or for whom a deportation or extradition order is issued.*

*Individuals against whom there is strong evidence of delinquency may only be detained through a decision by a judge in order to prevent their escape, prevent the destruction or manipulation of evidence or in other circumstances as such which are specified in law and require detention. Arresting without a decision by a judge may only be possible in the event of in flagrante delicto or in cases where a delay is prejudicial; the conditions for this are indicated in law.*

*The reasons for arrest or detention and the charges against them are notified to the arrested or detained individuals in writing in any case and, if it is not possible to do this immediately, orally at once and in cases of collective offense until appearance before the judge at the latest.*

*The arrested or detained individual is brought to the court within forty eight hours at the latest and, for collective offenses, within four days at the latest excluding the time required for being sent to the court that is closest to the place of detention. No one can be deprived of his/her liberty without a court verdict after the end of such periods. These periods can be extended in the case of a state of emergency, martial law and war.*

*That an individual is arrested or detained is immediately notified to his/her next of kin.*

*Detained individuals have the right to request being tried within a reasonable time and being released during investigation or prosecution. Release can be linked to a guarantee in order to ensure that the relevant individual is present at the court during trial or that the sentence is executed.*

*For any reason whatsoever, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is made about his/her case as soon as possible and in order to be released immediately if such restriction is in violation of the law.*

*The loss suffered by individuals who are subjected to a procedure apart from such principles will be paid by the State in accordance with the general principles of the law of damages.*

43. Article 19 of the Constitution protects the right to personal liberty and security. In paragraph two of article 19 of the Constitution, the cases which will constitute an intervention in personal liberty are listed. In this context, the European Court of Human Rights (ECtHR) stated that the concept of “freedom” did not cover the physical liberty of a person (*Engel and Others v. the Netherlands*, App. No: 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8/6/1976, § 58). Although there is no doubt that people who are taken in custody and kept in a detention house, detained, sentenced to an imprisonment and kept in a prison are deprived of their freedom, deprivation of freedom may take place in many various forms and these concepts do not cover all states of deprivation of freedom. Types of deprivation of freedom increase both through amendments in codes and with changes in the practices of public force. (*Guzzardi v. Italy*, App. No: 7367/76, 6/11/1980 § 95). For this reason, it should be stated that “personal liberty” is an autonomous concept which needs to be separately evaluated in each incident.

44. The ECtHR stated that the restrictions which were aimed at the freedom of movement and were covered by article 5 of the ECHR were different from the restriction of the freedom of travel which was a separate right and was guaranteed with article 2 of the Additional Protocol No 4 to the ECHR. According to the ECtHR, an intervention in the right to liberty and security in terms of article 5 of the ECHR is an extreme form of the restriction of the freedom of travel within the scope of article 2 of the Additional Protocol No 4 to the

ECHR. The ECtHR stated that the difference between the restrictions aimed at the right to liberty and security and the restrictions aimed at the freedom of travel was not related to “*the quality and essence of the restriction*”, that the difference therebetween was only a difference of “*degree and intensity*” (*Guzzardi v. Italy*, § 93). In the evaluation of degree or intensity in restrictions, various factors such as the type, period, effects and the form of application of the measure in question (*Guzzardi v. Italy*, § 92) and to what extent the daily life of an individual is kept under control by the state needs to be taken into consideration. In the evaluations in question, the present conditions of the case and the present situation of the applicant also needs to be taken into consideration.

45. Article 23 of the Constitution with the heading “*Freedom of abode and travel*” is as follows:

*“Everyone has the freedom of abode and travel.*

*Freedom of abode may be restricted by law in order to prevent offending, ensure social and economic development, realize sound and steady urbanization and protect public property;*

*Freedom of travel may be restricted by law for investigation and prosecution of crimes and in order to prevent offending.*

*The freedom of citizens to go abroad may only be restricted on the basis of a decision by a judge for the purpose of investigation and prosecution of crimes.*

*Citizens cannot be deported and cannot be deprived of their right to enter homeland.”*

46. Article 2 of the Protocol Number 4 to the ECHR Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol thereto with the heading “*Freedom of movement*” is as follows:

*“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

*2. Everyone shall be free to leave any country, including his own.*

*3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

*4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”*

47. Both in article 23 of the Constitution and in article 2 of the Additional Protocol Number 4 to the ECHR, the right to the freedom of travel is present within the country of a state while the right to the freedom of leaving the country of a state in which a person is residing is also present. In the present incident, the security measure of “*restriction to go abroad*” was ruled on, regarding the applicant by the Court of first instance in order to ensure that the punishment restricting freedom be enforced. This measure constitutes a restriction on the right of a person to leave the country.

48. The ECtHR decided that a restriction on the right of a person to leave the country constituted an intervention which needed to be evaluated within the scope of article 2 of the Additional Protocol Number 4 to the ECHR (See *Riener v. Bulgaria*, App. No: 46343/99, 23/5/2006 §§ 110). From paragraph four of article 23 of the Constitution which goes as “*The freedom of citizens to go abroad may only be restricted on the basis of a decision by a judge for the purpose of investigation and prosecution of crimes*”, it is understood that the prevention of a person from going abroad is within the scope of the freedom of travel stipulated in article 23 of the Constitution.

49. Paragraph three of article 148 of the Constitution is as follows:

*"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which is guaranteed by the Constitution has been violated by public force. In order to submit an application, ordinary legal remedies must be exhausted."*

50. Paragraph numbered (2) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 is as follows:

*"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which is guaranteed by the Constitution has been violated by public force."*

51. In paragraph three of article 148 of the Constitution and paragraph numbered (1) of article 45 of the Code numbered 6216, it is provided that anyone can apply to the Constitutional Court based on the claim that from their fundamental rights and freedoms that are guaranteed by the Constitution, any that falls within the scope of the ECHR and its additional protocols to which Turkey is a party has been violated by public force.

52. In order for an application or complaint to fall within the scope of the jurisdiction of the Court in terms of subject, the right which is asserted by the applicant to have been violated should be protected through the ECHR and the additional protocols to which Turkey is a party. It is not possible for the applications related to one of the provisions of the additional protocols to which Turkey is not a party to be examined by the Constitutional Court. The framework of the applications that the Court can examine in relation to which rights has been drawn up by the Constitution and the Code numbered 6216 and it is not possible to extend the framework of this venue.

53. Our country is not a party to the Additional Protocol Number 4 to the ECHR. For this reason, no individual application can be lodged with regard to a complaint concerning the freedom of travel which falls within the scope of the mentioned Protocol and is stipulated in article 23 of the Constitution (see *Nicolatos and Others v. Turkey*, App. No: 45663/99...(dec.), 1/6/2010; *Fathi v. Turkey*, App. No: 32598/06, 30/6/2009).

54. Due to the reasons explained, it should be decided that the part of the application which is relevant to the complaint concerning the freedom of travel stipulated in article 23 of the Constitution is inadmissible due to "*lack of venue in terms of subject*" without it being examined in terms of the other conditions of admissibility.

55. It has been necessary to decide on the inadmissibility of the part of the prohibition of going abroad imposed on the applicant which is relevant to the complaint aimed at the freedom of travel stipulated in article 23 of the Constitution due to "*lack of venue in terms of*

*subject*". For this reason, it should be decided that the claim of the applicant as to the effect that article 10 of the Constitution was violated as evaluated within the framework of her claims as to the effect that article 23 of the Constitution was violated is inadmissible due to "*lack of venue in terms of subject*" as the principle of equality is a complementary right which does not have any independent protective function and guarantees the exercise and protection of the right to personal liberty and security and the freedom of travel and their application remedies.

#### **d. Right to Elect, to Be Elected and to Engage in Political Activity**

56. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it appraises the legal definition of the facts and cases itself. It is concluded that the complaints of the applicant as to the effect that the expression of thoughts was an inseparable part of her parliamentary activities and that the failure of parliamentarians to go abroad within the framework of legislative activity was contrary to article 26 of the Constitution which regulates the freedom of expression and dissemination of thought need to be evaluated within the scope of article 67 of the Constitution in which "*The rights to elect, to be elected and to engage in political activity*" are included.

57. On the other hand, although the applicant asserted that she was released through the decision of release of the 10th Assize Court of Istanbul dated 14/7/2007 as there was no possibility of escaping for her, that however, the failure to include sufficient and relevant justification with regard to the imposition of the prohibition of going abroad without depending on any justification in the decision of the same court dated 18/9/2012 violated her right in article 141 of the Constitution, it is concluded that this part of the complaint also needs to be evaluated as a whole within the scope of article 67 of the Constitution in which "*The rights to elect, to be elected and to engage in political activity*" are included by considering the form of expression of the complaint.

58. The complaints of the applicant as to the fact that the decision of judicial measure of the restriction to go abroad issued on her did not contain any justifications and that her right to be elected was violated are not clearly devoid of basis. Moreover, as there is no other reason for inadmissibility, it needs to be decided that the part of the application as regards these complaints is admissible.

## **2. In Terms of Merits**

59. The applicant alleged that the decision of judicial measure in the form of the failure to go abroad had the quality of violating article 83 of the Constitution which regulates legislative immunity as it prevented her legislative activities.

60. The Ministry of Justice stated that the applicant's complaints under this heading needed to be examined within the scope of article 3 of the Additional Protocol No 1 to the ECHR and article 67 of the Constitution. In its opinion, the Ministry stated that in the present incident, there was not an issue of whether or not the applicant could be elected as a member of parliament, that the issue was relevant to whether or not the right to political participation was violated due to the decision of judicial control issued on the applicant who was elected as a member of parliament. In the opinion of the Ministry, it was stated that the applicant was sentenced to a punishment restricting freedom for a period of 8 years and 9 months, instead of the detention of the applicant the restriction of going abroad which was lighter was imposed by the court of instance and that this measure did not prevent the applicant from engaging in legislative activities in the parliament, that in this respect, it was necessary to

evaluate whether or not the restriction imposed on the right to political participation through the measure imposed on the applicant was proportionate.

61. The applicant did not agree with the opinion of the Ministry, repeated her complaints which were in the application petition and in addition, requested that a decision be delivered determining that her rights stipulated in article 67 of the Constitution were violated.

62. It is concluded that this complaint of the applicant which asserted that she was not able to completely fulfill the duty of deputyship as the restriction on going abroad was imposed on her although she was elected as a member of parliament is in essence related to the right to elect, to be elected and to engage in political activity and needs to be examined within the scope of article 67 of the Constitution.

63. Paragraph one of article 67 of the Constitution with the heading of "*Rights to elect, to be elected and to engage in political activity*" is as follows:

*"Citizens have the right to elect, to be elected and to engage in political activity independently or within a political party and participate a referendum in accordance with the conditions set forth by law."*

64. Article 3 of the Additional Protocol No 1 to the ECHR is as follows:

*"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."*

65. In article 67 of the Constitution, the right to elect, to be elected and to engage in political activity independently or within a political party is guaranteed. Elections and political rights are the indispensable elements of a democratic state which is stipulated in article 2 of the Constitution (CC, M.2002/38, D.2002/89, D.D. 8/10/2002). Similarly, the ECtHR also accepts "*the right to free election*" as one of the most important principles of democracy, which is the basic element of the European public order. The ECtHR stated that the rights protected by article 3 of the Additional Protocol Number 1 to the Convention were of vital importance for the establishment and sustainment of the foundations of an effective and meaningful democracy based on the rule of law. (see *Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 2/3/1987, § 47; *Danoka v. Latvia* [BD], App. No: 58278/00, 16/3/2006, § 103; *Yumak and Sadak v. Turkey* [BD], App. No: 10226/03, 8/7/2008, § 105).

66. The rights stipulated in paragraph one of article 67 of the Constitution are directly related to the objective of realizing democracy. Political rights cover the rights to vote, to be a candidate and to be elected in elections as well as the right to engage in political activity. (App. No: 2012/1272, 4/12/2013, § 110). In a parliamentary democracy, deputies who are elected as the representatives of public through the elections determined according to democratic procedures and principles realize the connection between public and the political legitimacy of the parliament (App. No: 2012/1272, 4/12/2013, § 127).

67. However, the right to be elected covers not only the right to be a candidate in elections, but also the right of the relevant person to exercise his/her authority to represent *ipso facto* in his/her capacity as a member of parliament after being elected. In this context, an intervention in the participation of the elected deputy in legislative activity can constitute an intervention not only in his/her right to be elected, but also in the right of voters to express their free will (for the decision of the ECtHR in the same vein, see *Sadak and Others v.*

*Turkey*, App. No. 25144/94, 26149/95, 26154/95, 27100/95, 27101/95, 11/6/2002, § 33, 40) and in the right to engage in political activity.

68. On the other hand, there are important connections between the right to elect, to be elected and to engage in political activity and the freedom of expression. As a matter of fact, based on the relation of deputy-voter, the ECtHR emphasized that the freedom of expression was important especially for the elected representatives of the public, that the deputy represented the voter, defended their interests by drawing attention to their demands, that therefore, an intervention in the freedom of expression of an opposing deputy required a stricter review. (see *Castells v. Spain*, App. No. 11798/85, 23/12/1992, § 42).

69. The parliament which is the holder of legislative authority and the deputies which comprise it are the representatives of different political views which are existing in the society within constitutional boundaries. The main field of duty of the deputies who are granted with the authority of decision-making on behalf of the public through free elections is the parliament and the field of duty that they own contains a superior public interest and importance (App. No: 2012/1272, 4/12/2013, § 128).

70. Although it can be said that restrictions can be brought in terms of political activities through codes within the specific conditions of each country, it is obvious that deputies have a constitutional protection in legislation activities. What matters is not to prevent the political will of public and not to neutralize the essence of a right. Disproportionate interventions which will prevent elected deputies from fulfilling their legislation activities will eliminate the authority of political representation created with public will, prevent the reflection of the will of voters in the parliament (App. No: 2012/1272, 4/12/2013, § 129).

71. On the other hand, the rights to elect, to be elected and to engage in political activity are not absolute and can be restricted for legitimate purposes. Although the reasons for restriction are not prescribed in article 67 of the Constitution, some constitutional prohibitions are included. On the other hand, it is stated in article 67 of the Constitution that political rights will be enjoyed "*in accordance with the conditions stipulated in law*". Thus, the Constitution accepts that a right can be restricted through a legal remedy. The facilities of restriction prescribed through the regulation exposed to restriction through a legal remedy also need to be evaluated together with article 13 of the Constitution within the scope of the principle of the integrity of the constitution. In other words, it is clear that the restrictions aimed at the freedoms prescribed in paragraph one of article 67 of the Constitution needs to have a limit. The criteria under article 13 of the Constitution must be taken into consideration as regards the restriction of fundamental rights and freedoms. For this reason, the review concerning the restrictions imposed on the right to be elected and to engage in political activity should be conducted within the framework of the criteria stipulated in article 13 of the Constitution and within the scope of article 67 of the Constitution. (see App. No: 2012/1272, 4/12/2013, § 131).

72. Similarly, the ECtHR also accepts that these rights can be restricted, however, states that these restrictions should not be at such an extent as to impair "*the free expression of the opinion of the people in the choice of the legislative body*" and in this sense, to prevent certain persons or groups from participating in the political life of the country, to impair the essence of the right in question and to eliminate its effect and should be proportionate to the prescribed aim. (see *Mathieu-Mohin and Clerfayt v. Belgium*, App. No: 9267/81, 2/3/1987, § 52; *Tanase v. Moldova* [BD], App.No: 7/08, 27/4/2010, §§ 157, 158, 161)

73. In the present incident, the applicant was taken into custody on the date of 5/11/2006 with the allegation of being a member of an armed terrorist organization and arrested on the date of 8/11/2006. Through the indictment of the Office of the Chief Public Prosecutor of Istanbul dated 13/11/2006, a criminal case was filed before the 10th Assize Court of Istanbul in order for the applicant to be punished with the claim that she committed the offense of being a member of an armed terrorist organization, the applicant was elected as an independent member of parliament from Istanbul in the General Election for Members of Parliament for the 23rd Period held on the date of 22/7/2007 while the trial was going on under detention. Upon the applicant's request for release, the 10th Assize Court of Istanbul decided on the release of the applicant on the date of 24/7/2007 on the ground that there was no possibility of escaping for her as she was elected as a member of parliament. The court did not rule on any security measure on the applicant, either. Therefore, neither the conducted prosecution nor the state of detention of the applicant constituted any obstacle to the fact that she was elected as a deputy. In this respect, there was no intervention in the applicant's right to be elected, nor was any claim in relation to this asserted. As the applicant was released after she was elected as a member of parliament, she took the oath at the Grand National Assembly of Turkey and started fulfilling her duty of deputyship *ipso facto*. The applicant became an independent candidate for deputyship from Istanbul and was elected again in the General Election for Deputyship for the 24th Period held on the date of 12 June 2011.

74. However, the 10th Assize Court of Istanbul, through its decision dated 18/9/2012, decided on the punishment of the applicant with an imprisonment of 8 years and 9 months due to the offense of being a member of an armed terrorist organization and the implementation of the measure of judicial control "restriction to go abroad" until the decision became final. In other words, the measure of "*restriction to go abroad*" which is the subject matter of the complaint of the applicant started to be imposed as of the date on which the applicant was sentenced to an imprisonment of 8 years and 9 months by the court of first instance.

75. The first issue which needs to be resolved in the present incident is to determine whether or not the measure of "*restriction to go abroad*" constituted an intervention aimed at the "*right to be elected*" and the right "*to engage in political activity*" which had an inseparable relation between the rights to elect, to be elected and to engage in political activity of the applicant who was a member of parliament. In the subsequent stages, it needs to be determined whether or not the intervention whose existence was accepted was based on legitimate purposes, whether or not the right in question was restricted in a way which would damage its essence, whether or not the restriction was necessary in a democratic society and whether or not the means used were disproportionate.

#### **i. Concerning the Existence of the Intervention**

76. The applicant stated that parliamentary activities were not only exclusive for the parliament itself, that at the same time, the prevention of parliamentary activities within the country or abroad was contrary to legislative immunity, that she went abroad many times as a member of the Commission of Foreign Relations of the GNAT of the 23rd period, that she was not able to participate in parliamentary activities abroad with the imposition of the prohibition of going abroad.

77. It is clear that there are difficulties in making a comprehensive definition in a democratic society of the concept of "*engaging in political activity*" which is stipulated in



paragraph one of article 67 of the Constitution and is an autonomous concept. In the present incident, the actions of the applicant who is a political actor as she is a member of parliament, the actions that she performed in order to influence the political decisions of the society and the state needs to be accepted as political activity. While these actions can be performed within the country, they can also be performed abroad. Then, there is an intervention aimed at the applicant's right to "*engage in political activity*" with regard to the prevention of the applicant from going abroad so as to engage in a political activity.

## **ii. Concerning the Intervention Resting on Valid Grounds**

78. The aforementioned interventions will constitute the violation of articles 13 and 67 of the Constitution unless they are not among the constitutional prohibitions stipulated in paragraph one of article 67 of the Constitution and they fulfill the conditions stipulated under article 13 of the Constitution. Due to this reason, whether or not the restriction is in line with the conditions of bearing no prejudice to the essence, being indicated under the relevant article of the Constitution, being prescribed by codes, not being contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality as prescribed under article 13 of the Constitution needs to be determined.

### **1. Being Prescribed by Codes**

79. The applicant did not make any claims as to the effect that there was contrariety to the provision of "*the exercise of these rights are regulated by law*" stipulated in paragraph four of article 67 and the requirement of "*being prescribed by codes*" stipulated in article 13 of the Constitution. As a result of the evaluations which are made, it is concluded that article 109 of the Code numbered 5271 with the heading of "*Judicial control*" fulfills the criterion of "*being prescribed by codes*".

### **2. Legitimate Purpose**

80. The applicant was sentenced to an imprisonment of 8 years and 9 months due to the offense of being a member of an armed terrorist organization and it was decided that the judicial control measure of the failure to go abroad be imposed in order to ensure that the imprisonment ruled is enforced after the finalization of the decision.. It is concluded that the mentioned measure of the failure to go abroad is a part of the precautions aimed at the punishment of criminals and has a legitimate purpose.

### **3. Necessity and Proportionality in a Democratic Society**

81. Finally, it should be evaluated whether or not a reasonable balance has been pursued between the right of an applicant "to engage in political activity" in a democratic society and the public interest in the failure of the applicant to go abroad within the period during which the file is under appeal examination in the decisions on the dismissal of the objection filed against this measure.

82. The Constitutional Court defined democratic society as follows in its case-law: "*Democracies are regimes in which fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The limitations which bear prejudice against the essence of fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic societal order. For this reason, fundamental rights and freedoms may be limited exceptionally and only without*

*prejudice to their essence to the extent that it is compulsory for the continuation of democratic societal order and only by code.*" (CC, M.2006/142, D.2008/148, D.D. 24/9/2008). In other words, if the restriction which is introduced halts or renders extremely difficult the exercise of the right and freedom by bearing prejudice to its essence, renders it ineffective or if the balance between the means and objective of the restriction is disrupted in violation of the principle of proportionality, it will be against the democratic societal order (See CC, M.2009/59, D.2011/69, D.D. 28/4/2011; CC, M.2006/142, D.2008/148, D.D. 17/4/2008).

83. Another guarantee which will intervene in all kinds of limitations to be introduced to rights and freedoms is the "*principle of proportionality*" expressed under article 13 of the Constitution. This principle is a guarantee which needs to be taken into consideration with priority in applications regarding the limitation of fundamental rights and freedoms. Although the requirements of a democratic societal order and the principles of proportionality are regulated as two separate criteria under article 13 of the Constitution, there is an relation between these two criteria. Indeed, the Constitutional Court drew attention to this relationship between being necessary for a democratic societal order and proportionality in its previous decisions and decided that the means which would ensure that fundamental rights would be accessed with the least intervention will be preferred by stating that "*[Each limitation aimed at fundamental rights and freedoms] needs to be examined to see whether it is of the necessary quality for the democratic societal order, in other words, whether it fulfills the objective of public interest which is sought while serving as a proportionate limitation allowing for the least amount of intervention to fundamental rights...*" (CC, M.2007/4, D.2007/81, D.D. 18/10/2007).

84. According to the decisions of the Constitutional Court, proportionality reflects the relationship between the objectives and means of limiting fundamental rights and freedoms. The inspection for proportionality is the inspection of the means selected based on the sought objective in order to reach this objective. For this reason, in interventions introduced in the field of the right to elect, to be elected and to engage in political activity, it needs to be evaluated whether or not the intervention selected in order to achieve the targeted objective is suitable, necessary and proportionate.

85. In this context, the main axis for the evaluations to be carried out with regard to the facts which are the subject of the application will be whether or not the courts of instance which caused the intervention could convincingly put forward that the justifications they relied on in their decisions are in line with "*necessity in a democratic society*" and "*the principle of proportionality*" with a view to restricting the right to elect, to be elected and to engage in political activity.

86. In this framework, while deciding on the measure of protection of the restriction to go abroad regarding the people who are elected as members of parliament, courts need to show the existence of an interest which is much more overriding than the interest arising out of the right to be elected and to engage in political activity and which needs to be protected based on concrete facts. (App. No: 2012/1272, 4/12/2013, § 114). As a result of this, while examining whether or not the intervention aimed at the right of the applicant to be elected and to engage in political activities has reached the level of violating article 67 of the Constitution, it should also be considered whether or not the claims that the applicant asserted with her election as a member of parliament were duly evaluated in the decision through which the measure of the restriction to go abroad was imposed.

87. Therefore, in the event that it is accepted that the balance between the political and representation activities that the applicant was not able to perform as an elected member of parliament due to the measure of the restriction to go abroad and the public interest in the banning of the applicant from going abroad after the conclusion of the case with conviction until the appeal decision of the Supreme Court of Appeals is proportionate, it can be concluded that the justifications with regard to the measure of the restriction to go abroad are convincing or, in other words, relevant and sufficient.

88. The applicant asserted that the reason as to the effect that there was no possibility of escaping for her was predicated in the decision of release of the court of first instance dated 14/7/2007, that however, there was a conflict in the imposition of the prohibition of going abroad without depending on any justification in the decision of the same court dated 18/9/2012 and that this conflicting decision had the quality of violating her constitutional rights.

89. The Court of First Instance which ruled on the measure of the restriction to go abroad predicated her decision of the measure on the fact that the punishment restricting freedom ruled as 8 years and 9 months regarding the applicant was a long period, that the applicant was convicted of being a member of the illegal armed terrorist organization, PKK, that the period of detention to be deducted from the penalty of the applicant was low when compared to the ruled penalty and decided on the measure of protection of "*the restriction to go abroad*" regarding the applicant so as to ensure that the judgment be enforced in the event that the decision became final. The punishment restricting freedom ruled regarding the applicant was later on approved with the writ of the Supreme Court of Appeals dated 24/12/2013 .

90. The applicant was released on the ground that there was no possibility of escaping for her as she was elected as a member of parliament when her trial was going on under detention with the allegation of being a member of the armed terrorist organization, PKK. When it was decided that the applicant be released, there was no decision of conviction regarding her. However, it was decided, through the decision of the Court of first instance dated 18/9/2012, that the applicant be sentenced to an imprisonment of 8 years and 9 months on the ground that it was proven that she had committed the offense of being a member of the illegal armed terrorist organization, PKK. The Court of First Instance decided on the measure of the restriction to go abroad regarding the applicant following the decision of conviction. The court showed the justification of the measure as the length of the punishment restricting freedom ruled regarding the applicant and the length of the period remaining for the applicant to stay in prison in the event that the decision became final, the fact that the applicant was punished due to being a member of an armed terrorist organization.

91. In terms of the examination of an individual application, there is an essential difference between the status of the accused following the incrimination of a person and the status following the delivery of a decision of conviction regarding the same person. The concept of "*conviction*" means the "*determination of guilt*" due to an offense which is proven to have been committed. Conviction means being convicted by the court which holds the trial. When a decision of conviction has been made, it is accepted that it is proven that the charged crime is committed and that the perpetrator is responsible for this and thus a punishment restricting freedom and/or a fine are adjudged with regard to the accused. With the conviction, the state of the person to be under strong suspicion of crime comes to an end. In this regard, the conviction decision shall not separately need to be finalized.

92. In the present incident, the applicant had the status of a person on whom a decision of conviction was issued as of the date of 18/9/2012 on which the court of first instance issued the decision of conviction. The security measure of the restriction to go abroad regarding the applicant was issued as a result of the judgment of conviction and predicated on the conviction. According to the justification of the Court of First Instance, there is a sufficient causality relation between the decision of conviction and the security measure of "*the restriction to go abroad*". While the intervention which consisted of the restriction of the applicant to go abroad in the process following the decision of conviction due to the decision of "the restriction to go abroad" which had the quality of a protection measure is not contrary to the requirements of a democratic society, it cannot be said that it is disproportionate in terms of the targeted objectives as the applicant was able to fulfill her duties of deputyship.

93. Due to these reasons, it should be decided that the applicant's right to elect, to be elected and to engage in political activity which is guaranteed in article 67 of the Constitution was not violated.

## V. JUDGMENT

In the light of the reasons explained, it is held **UNANIMOUSLY** on the date of 20/2/2014;

### A. That the applicant's

1. claims as to the effect that the presumption of innocence was violated are **INADMISSIBLE** due to the fact that they are "*clearly devoid of basis*",

2. claims as to the effect that the freedom of travel was violated are **INADMISSIBLE** due to "*lack of venue in terms of subject*",

3. claims as to the effect that the principle of equality was violated are **INADMISSIBLE** due to "*lack of venue in terms of subject*",

4. claims as to the effect that the right to elect, to be elected and to engage in political activity was violated are **ADMISSIBLE**,

**B.** Paragraph one of article 67 of the Constitution was **NOT VIOLATED** in relation to the applicant's claim as to the effect that the right to elect, to be elected and to engage in political activity was violated,

### C. That the trial expenses be charged on the applicant.

President  
Serruh KALELİ

Member  
Zehra Ayla PERKTAŞ

Member  
Burhan ÜSTÜN

Member  
Nuri NECİPOĞLU

Member  
Hicabi DURSUN