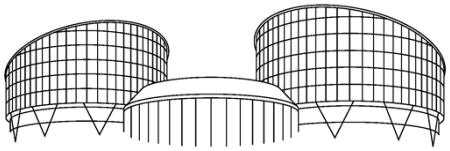

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ALPARSLAN ALTAN v. TURKEY

(Application no. 12778/17)

JUDGMENT

STRASBOURG

16 April 2019

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

In the case of Alparslan Altan v. Turkey,

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

Robert Spano, *President*,
Paul Lemmens,
Julia Laffranque,
Ivana Jelić,
Arnfinn Bårdsen,
Darian Pavli, *judges*,
Harun Mert, *ad hoc judge,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 19 March 2019,

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

PROCEDURE

1. The case originated in an application (no. 12778/17) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Alparslan Altan ("the applicant"), on 16 January 2017.

2. The applicant was represented by Mr E.Y. Aras, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that he had been deprived of his liberty in breach of Article 5 of the Convention.

4. On 29 September 2017 notice of the complaints concerning Article 5 §§ 1 and 3 was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court. The applicant and the Government each filed observations on the admissibility and merits of the case.

5. Ayşe Işıl Karakaş, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). Harun Mert was accordingly appointed by the President to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, a former member of the Turkish Constitutional Court, is a Turkish national who was born in 1968 and lives in Ankara. He is currently detained.

A. The applicant's professional career

7. In 1993 the applicant began his career as a public prosecutor. In 2001 he was appointed as a rapporteur at the Constitutional Court. On 27 March 2010 he was appointed by the President of Turkey as a judge of the Constitutional Court for a term of office due to expire when he reached the age of 65. On 26 October 2011 he was elected Vice-President of the Constitutional Court (*Anayasa Mahkemesi Başkanvekili*) by the court's judges for a four-year term, which ended on 26 October 2015. At the time of the events to which the application relates, he was a judge at the court.

B. Attempted coup of 15 July 2016 and declaration of a state of emergency

8. During the night of 15 to 16 July 2016 a group of members of the Turkish armed forces calling themselves the "Peace at Home Council" attempted to carry out a military coup aimed at overthrowing the democratically installed parliament, government and President of Turkey.

9. During the attempted coup, soldiers under the instigators' control bombarded several strategic State buildings, including the parliament building and the presidential compound, attacked the hotel where the President was staying, held the Chief of General Staff hostage, also attacked television channels and fired shots at demonstrators. During the night of violence, more than 250 people were killed and more than 2,500 were injured.

10. The day after the attempted military coup, the national authorities blamed the network linked to Fetullah Gülen, a Turkish citizen living in Pennsylvania (United States of America) and considered to be the leader of an organisation known as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure"). Several criminal investigations were subsequently initiated by the appropriate prosecuting authorities in respect of suspected members of that organisation.

11. On 20 July 2016 the government declared a state of emergency for a period of three months as from 21 July 2016; the state of emergency was

subsequently extended for further periods of three months by the Council of Ministers, chaired by the President.

12. On 21 July 2016 the Turkish authorities gave notice to the Secretary General of the Council of Europe of a derogation from the Convention under Article 15.

13. During the state of emergency, the Council of Ministers, chaired by the President, passed thirty-seven legislative decrees (nos. 667-703) under Article 121 of the Constitution. One of them, Legislative Decree no. 667, published in the Official Gazette on 23 July 2016, provided in Article 3 that the Constitutional Court was authorised to dismiss any of its members who were considered to belong or be affiliated or linked to terrorist organisations or organisations, structures or groups found by the National Security Council to have engaged in activities harmful to national security. The legislative decrees also placed significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention (for example, extension of the police custody period, and restrictions on access to case files and on the examination of objections against detention orders).

14. The Government stated that during and after the coup attempt, prosecutors' offices had initiated criminal investigations in respect of individuals involved in the attempt and those who were not involved but had links to the FETÖ/PDY organisation, including members of the judiciary. They specified in that connection that on 16 July 2016, in the context of a criminal investigation opened by the Ankara public prosecutor's office, some 3,000 judges and prosecutors, including two judges of the Constitutional Court (including the applicant) and more than 160 judges of the Court of Cassation and the Supreme Administrative Court, had been taken into police custody and subsequently placed in pre-trial detention. In addition, warrants had been issued for the arrest of thirty judges of the highest courts who were deemed to be fugitives.

15. On 18 July 2018 the state of emergency was lifted.

C. The applicant's arrest and pre-trial detention

16. On 16 July 2016, in the course of the criminal investigation opened by the Ankara public prosecutor's office (see paragraph 14 above), the applicant was arrested and taken into police custody on the instructions of the same office, which described him as a member of the FETÖ/PDY terrorist organisation and urged that he be placed in pre-trial detention. The relevant parts of the instructions were worded as follows:

> "The offence of overthrowing the Government and the constitutional order through force and violence is currently being committed across the country; there is a risk that members of the [FETÖ/PDY] terrorist organisation committing the offence in question might flee the country ..."

On the same day, the police conducted a search of the applicant's home and seized computers and other IT equipment belonging to him.

17. On 19 July 2016 the applicant was questioned by the Ankara public prosecutor. He was suspected of having sought to overthrow the constitutional order (Article 309 of the Criminal Code) and being a member of the FETÖ/PDY terrorist organisation (Article 314 of the Criminal Code). During the questioning, the applicant, who was assisted by a lawyer, denied all the allegations against him and argued that they could only have been based on his dissenting opinions as set out in judgments of the Constitutional Court. His lawyer challenged the applicant's detention in police custody, arguing that the requirements of a case of discovery *in flagrante delicto* were not satisfied and that his client could not be the subject of a criminal investigation without permission from the Constitutional Court. He requested that his client be released on bail.

18. Later that day, the Ankara public prosecutor's office ordered the applicant, together with thirteen other suspects – six judges of the Supreme Administrative Court, six judges of the Court of Cassation and another judge – to appear before the 2nd Magistrate's Court (*sulh ceza hakimliği*). He called for the applicant to be placed in pre-trial detention, bearing in mind that certain members of the FETÖ/PDY organisation had fled after the events and that evidence had yet to be gathered.

19. On 20 July 2016 the applicant, assisted by his lawyer, Mr M. Orak, appeared before the 2nd Magistrate's Court with the thirteen other suspects. According to the record of the questioning, they were suspected of attempting to overthrow the constitutional order and being members of the FETÖ/PDY organisation, offences punishable under Articles 309 and 314 of the Criminal Code. The suspects' statements, including those made by the applicant, were recorded using the SEGBİS sound and image information system (*Ses ve Görüntü Bilişim Sistemi*). The transcripts of the recordings indicate that the applicant, after describing his career as a judge at the Constitutional Court, denied all the accusations against him. They also show that his lawyer challenged all the measures taken against his client, relying on the latter's special status linked to his position as a Constitutional Court judge. The relevant parts of the transcripts read as follows:

> "The suspect's lawyer, Mr M. Orak: '... it appears that Articles 109 and 114 [this in fact refers to Articles 309 and 314 of the Criminal Code] were mentioned in the record of the hearing; is the request for detention under Article 114 [314] also being made on the basis of Article 109 [309]?'
>
> The magistrate, M.C.: 'Not [on the basis of Article] 109 [309].'
>
> The suspect's lawyer, Mr M. Orak: 'OK ... Since my client has been brought before you on the basis of Article 114 [314], this is not a case of discovery *in flagrante delicto*. So all the steps taken in connection with that offence have been *ultra vires* and unlawful ... In this case, the criminal investigation and trial should be conducted

from the start by the plenary Constitutional Court ... There is no concrete evidence that could justify pre-trial detention, and the accusations were based on abstract allegations ... [Furthermore], in this particular case, the cumulative conditions for pre-trial detention were not met, and in any event, we are asking for alternative measures to be ordered ..."

20. On the same day, the magistrate ordered the pre-trial detention of the applicant and the thirteen other suspects, holding as follows:

"... In view of the fact that some suspects and their representatives contended that the Ankara public prosecutor's office and our court did not have jurisdiction [to deal with the case], it should be noted that in accordance with section 16(1) of Law no. 6216 ..., the criminal investigation was governed by the ordinary rules, given that the offence of which the suspects were accused, namely membership of an armed terrorist organisation, was a 'continuing offence' (*temadi olan suç*) and that there was a case of discovery *in flagrante delicto*.

Following an examination of the investigation file, the suspects' pre-trial detention is ordered, regard being had to the nature of the alleged offence, the state of the evidence, [all the] records included in the file, the decisions of 17 July 2016 by the presidents' offices at the Court of Cassation and the Supreme Administrative Court, the reports on searches and seizures and the entire contents of the case file, and also the fact that there is concrete evidence giving rise to a strong suspicion that the offence in question has been committed. [It is also noted that] the alleged offence was among the so-called 'catalogue' offences listed in Article 100 of the Code of Criminal Procedure, that pre-trial detention is a proportionate measure in view of the length of the sentence provided for by law, and that alternative measures to detention are insufficient on account of the risks of absconding and of damage to evidence."

21. Also on 20 July 2016 the Government declared a state of emergency for a period of three months as from 21 July 2016; the state of emergency was subsequently extended for further periods of three months by the Council of Ministers, chaired by the President.

In addition, on 21 July 2016 the Turkish authorities gave notice to the Secretary General of the Council of Europe of a derogation from the Convention under Article 15 (see paragraphs 11-13 above).

22. On the same day, the applicant lodged an objection against the order for his pre-trial detention. In support of the objection, he argued that there was no concrete evidence that could justify detention, and that such a measure did not comply with the relevant domestic law. He also asked for alternative measures to be applied on the grounds that his son was severely disabled and dependent on his personal assistance.

23. In a decision of 4 August 2016 the Constitutional Court, meeting in plenary session, dismissed the applicant from his post. In reaching that decision it noted, on the basis of Article 3 of Legislative Decree no. 667, that "information from the social environment" (*sosyal çevre bilgisi*) and the "common opinion emerging over time" (*zaman içinde oluşan ortak kanaatleri*) among members of the Constitutional Court suggested that the applicant had links to the organisation in question, making him no longer fit to practise his profession.

24. On 9 August 2016 the 3rd Magistrate's Court dismissed the applicant's objection against the order for his detention.

25. On 26 September 2016 the applicant applied for release on bail. In support of his application, he repeated his argument that his detention did not comply with the relevant domestic law. He argued firstly that as he had not been accused of having taken part in the attempted coup, this was not a case of discovery *in flagrante delicto*. He further noted that the cases of *in flagrante delicto* were listed in Article 2 of the Code of Criminal Procedure (CCP) and that his own situation did not fall into any of those categories. In addition, he argued that the order for his detention did not contain any specific grounds relating to him and was not based on any fact justifying such a measure. Lastly, he again asked for alternative measures to be applied, referring to the health of his son, who was seriously disabled and dependent on his personal assistance.

26. On various other occasions, the applicant applied for release on bail. In decisions adopted on 7 November and 5 December 2016, in line with an earlier decision of 21 September 2016, the competent magistrates refused his applications.

27. In a letter dated 8 November 2017 the public prosecutor's office at the Court of Cassation forwarded the case file to the 10th Criminal Division of the same court. On several occasions the Criminal Division reviewed whether it was necessary to keep the applicant in pre-trial detention and ordered the extension of his detention.

D. Summary report by the Ankara public prosecutor's office

28. On 25 October 2017 the Ankara public prosecutor's office submitted a summary report (*fezleke*) to the public prosecutor's office at the Court of Cassation with a view to instituting criminal proceedings against the applicant. In the report it stated that the FETÖ/PDY organisation was the instigator of the attempted coup of 15 July 2016 and that a judicial investigation was being conducted in respect of judges deemed to be members of that structure and to have acted under its orders and instructions. The public prosecutor's office pointed out that the risk of a coup had not been entirely eliminated and that a case of discovery *in flagrante delicto* was at issue, falling within the jurisdiction of the Assize Court; accordingly, a criminal investigation had been initiated in respect of the applicant on 16 July 2016 on the basis of the provisions of ordinary law. It noted that statements by anonymous witnesses and suspects, the content of communications between other individuals via the ByLock messaging service and information about signals from mobile telephones (see paragraphs 32-40 below) all showed that the applicant had committed the offence of membership of an armed terrorist organisation.

E. Individual application to the Constitutional Court

29. On 7 September 2016 the applicant lodged an individual application with the Constitutional Court. He complained that he had been arbitrarily arrested and placed in pre-trial detention, in breach of the relevant law, namely the Constitutional Court Act (Law no. 6216) and that court's rules of procedure. He also alleged that there was no specific evidence giving rise to a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. Furthermore, he maintained that the domestic courts had not given sufficient reasons for the decisions ordering his detention. He argued in addition that he had been arrested and detained for reasons other than those provided for in the Constitution. He also complained that the magistrates who had ordered his pre-trial detention were not independent and impartial, and that the conditions of his detention were incompatible with the prohibition of inhuman and degrading treatment. In addition, he contended that his dismissal and the various measures taken against him had infringed his rights to a fair trial, to respect for his private life and home and to freedom of expression, and had constituted discrimination.

30. On 11 January 2018 the Constitutional Court gave a judgment (no. 2016/15586) in which it decided, unanimously, to reject the following complaints as manifestly ill-founded: the complaint concerning the lawfulness of the detention order and the lack of reasonable suspicion justifying it; the complaint concerning the alleged lack of independence and impartiality of the magistrates who had ordered the applicant's pre-trial detention; and the complaints concerning the right to a fair trial, the right to respect for private life and the home and the prohibition of discrimination.

With regard to the complaint concerning the lawfulness of the applicant's detention in police custody, the Constitutional Court held that he should have brought an action under Article 141 § 1 (a) of the CCP but had refrained from doing so. It found that the same applied to his complaints concerning his dismissal. Furthermore, it noted that there was no information in his application or the appended material as to whether the applicant had lodged an objection under Article 91 § 5 of the CCP against his detention in police custody. Accordingly, it declared these complaints inadmissible for failure to exhaust the appropriate remedies.

31. In its judgment the Constitutional Court, after describing the characteristics of the FETÖ/PDY organisation and its covert structure within the judiciary, first summarised the evidence gathered by the Ankara public prosecutor's office (1) and then addressed the complaints concerning the lawfulness of the detention order and the alleged lack of reasonable suspicion justifying it (2).

1. The evidence

32. According to the Constitutional Court's judgment, the allegation that the applicant had knowingly joined the judicial branch of the FETÖ/PDY organisation was based on the following facts and evidence:

(a) statements by anonymous witnesses;
(b) statements by a suspect;
(c) messages exchanged via ByLock; and
(d) other facts.

The evidence can be summarised as follows.

(a) Statements by anonymous witnesses

33. An anonymous witness referred to as "Defne" made several statements to the Kahramanmaras and Ankara public prosecutors' offices.

In her statements of 4 August 2016 the witness said the following:

> "... I was appointed as a rapporteur at the Constitutional Court. While I was working at the Constitutional Court, we kept seeing friends who belonged to this structure [the FETÖ/PDY organisation] ... There, I noticed that certain files were monitored ... Some practices came to my notice; for instance, applications relating to the election threshold and the funding of political parties ... were monitored by the rapporteurs and members [of the Constitutional Court] belonging to the FETÖ/PDY organisation. After such applications were lodged, [these rapporteurs and members of the Constitutional Court] started to keep track of the cases by enquiring about their outcome. The ones monitoring these cases were Alparslan Altan, who was the mentor, and the chief rapporteurs belonging to this structure. I recall that Alparslan Altan would write a dissenting opinion whenever a decision was not adopted [along the lines] that he wanted."

In her statement of 6 October 2016 the same witness said the following:

> "On the basis of my own observations, the contacts I had while working at the Constitutional Court as a rapporteur, and the comments and behaviour of rapporteurs whom I know to be members of this structure, I can say that the former member and rapporteur of the Constitutional Court Alparslan Altan was a member of this *cemaat* [the term '*cemaat'* literally means 'community'; however, at the time of the events, the term was commonly used to denote followers of Fetullah Gülen, the presumed head of the FETÖ/PDY organisation – hereinafter 'the *cemaat*']. As in other judicial institutions there was a 'secret cell'-type organisation within the Constitutional Court ..."

34. In a statement taken on 27 December 2016 another anonymous witness, referred to as "Kitapçı", said the following:

> "... When I started working at the Constitutional Court as a rapporteur, I was convinced that, given his social contacts, Alparslan Altan was a member of the *cemaat*. His social contacts were what led me to reach this conclusion ..."

(b) Statements by a suspect

35. In addition, R.Ü., a former public prosecutor and a former rapporteur of the Constitutional Court who was accused of being a member of the

FETÖ/PDY organisation, made several statements to the Ankara public prosecutor's office. The relevant parts of his statement recorded on 9 September 2016 read as follows:

> "... Previously, I did not know that the former member of the Constitutional Court Alparslan Altan was a member of the *cemaat* ... However, when I noticed that this member was always in the minority in [decisions on] individual applications in which members of the *cemaat* were involved, I became firmly convinced that he could be a member of the *cemaat* ... I had already imagined, from conversations between members of the *cemaat*, that some members of the Constitutional Court might belong to [this structure]. But I did not know who. Over time, on account of his [positions] in these decisions, I became certain that this member [of the Constitutional Court] belonged to the *cemaat* ..."

36. In statements taken on 21 October 2016 and 19 July and 5 September 2017 R.Ü. confirmed his previous statements and asserted that although he had not met the applicant at meetings held between members of the FETÖ/PDY organisation, he was convinced that the applicant belonged to that structure. In particular, in his statements of 19 July and 5 September 2017 he mentioned that the applicant's codename was "Selahattin".

(c) Messages exchanged via ByLock

37. According to information in the case file, it was not established or alleged during the investigation that the applicant was a user of the ByLock encrypted messaging service.

However, transcripts of ByLock conversations between other individuals suspected of being members of the FETÖ/PDY organisation, namely Ö.İ., S.E. and B.Y., indicate a number of references to the applicant. According to the investigating authorities, Ö.İ., a teacher, was the "lay imam" responsible for members of the judiciary belonging to the FETÖ/PDY organisation (according to the public prosecutor's office, each of the structure's cells that had infiltrated the administrative and judicial authorities was led by a "lay imam"); S.E., a former rapporteur of the Constitutional Court, was in charge of the cell at that court; and B.Y., another former rapporteur of the Constitutional Court, was a member of the structure. Various measures had been taken against these three individuals in the course of the criminal investigations carried out in the aftermath of the attempted coup: in the case of Ö.İ., who had left the country, a warrant had been issued for his arrest; the same applied to S.E., who had been dismissed from his post and had fled; as for B.Y., he had been dismissed from his position as a judge by the Council of Judges and Prosecutors and had been placed in pre-trial detention on suspicion of being a member of the FETÖ/PDY organisation.

According to the investigating authorities, in the messages in question each member of the FETÖ/PDY organisation was designated by a codename. According to the suspect R.Ü., the applicant's codename was "Selahattin" (see paragraph 36 above).

It appears from the transcripts of messages exchanged between Ö.İ., S.E. and B.Y. via ByLock that the name "Selahattin" was mentioned on several occasions in connection with cases then pending before the Constitutional Court. The transcripts of the conversations also indicate that certain internal matters of the Constitutional Court, such as the election of the vice-president, and various cases pending before the court had been discussed by Ö.İ. and the former Constitutional Court rapporteurs. More specifically, the conversations show that, in relation to certain cases that had been brought by suspected members of the FETÖ/PDY organisation and rejected, the dissenting opinion by "Selahattin" had been praised. The transcripts also indicate that "Selahattin" had been provided with a telephone line by the FETÖ/PDY organisation.

38. The Government did not provide any information about the date on which these various items of evidence had been added to the case file. The applicant, however, stated that the Ankara public prosecutor's office had received the physical digital evidence of the ByLock conversations in December 2016, that the Ankara 3rd and 5th Magistrates' Courts had asked to have a copy of that evidence forwarded to them on 9 December 2016 and 24 March 2017, and that an expert report had been drawn up four months after the latter date.

(d) Other facts

39. After information had been obtained to suggest that a telephone line had been supplied by the FETÖ/PDY organisation to the individual known as "Selahattin" (see paragraph 37 above), investigations were carried out to ascertain whether the telephone line registered in the applicant's name ("telephone line no. 1") had sent signals from the same base station as the one used by the telephone line supplied by the FETÖ/PDY organisation ("telephone line no. 2"). It emerged that between 22 November 2015 and 16 July 2016 the two telephone lines had sent signals from the same base station. It also transpired that telephone line no. 2 was used solely for internet access and that both telephone lines had sent signals from the same location for twenty-nine days over different periods.

40. It was also established that two other telephone lines had been used to call individuals who had subsequently been arrested on suspicion of being members of the FETÖ/PDY organisation.

2. The Constitutional Court's assessment of the complaints concerning the lawfulness of the order for the applicant's pre-trial detention and the alleged lack of reasonable suspicion justifying it

41. Addressing the complaint about the lawfulness of the applicant's initial detention, the Constitutional Court held at the outset that this issue should be examined under Article 15 of the Constitution, by which, in an emergency, the exercise of fundamental rights and freedoms could be

partially or fully suspended, or measures derogating from the guarantees enshrined in the Constitution for those rights and freedoms could be taken.

42. As to the merits of the complaint, it held firstly that it was not disputed that the alleged offence – membership of an armed terrorist organisation – was an ordinary offence punishable by a heavy sentence and thus falling within the jurisdiction of the assize courts. Secondly, it noted:

> "123. The offence of which [the applicant] is accused, punishable under Article 314 of the Criminal Code, namely membership of an armed terrorist organisation, undoubtedly falls within the jurisdiction of the Assize Court, and this is not disputed by [him]. Moreover, although [the applicant] claims to have been prosecuted on account of his dissenting opinions as expressed in certain judgments of the Constitutional Court, he does not contend that the alleged offence is not an ordinary offence, that is to say, an offence [that was not] committed in connection with or during the performance of official duties. The classification of an offence (as an ordinary offence or as an offence linked to the performance of official duties) is a matter falling within the competence of the judicial authorities. The compliance of such classification with the law may also be reviewed in the context of an ordinary appeal or an appeal on points of law. Provided that there is no arbitrary interpretation – manifestly breaching the Constitution – and [entailing], as a result, [a violation of] rights and freedoms, it is primarily the task of the courts dealing with the case (*derece mahkemeleri*) to interpret and apply the law, including [the question of] the classification of an offence. It cannot be concluded that the classification of the offence of which [the applicant] is accused as an ordinary offence was unjustified and arbitrary, bearing in mind the findings reached and the reasons given [by the investigating bodies and judicial authorities], and in particular, the documents concerning [his] pre-trial detention.
>
> 124. In the present case, when the investigating bodies found that this was a case of discovery *in flagrante delicto*, they based that finding on the attempted coup of 15 July 2016 and the fact that the offence of which [the applicant] was accused, namely membership of an armed terrorist organisation, is a continuing offence.
>
> 125. According to the Court of Cassation's consistent practice, the offence of membership of an armed terrorist organisation is a continuing offence (*temadi eden suç*).
>
> ...
>
> 127. ... The plenary criminal divisions of the Court of Cassation have also held in a case concerning the conviction of two judges ... that 'as the current and consistent position of the Court of Cassation makes clear, regarding the offence of membership of an armed terrorist organisation, which is a continuing offence, except in cases where [its continuing nature ends with] the dissolution of the organisation or termination of membership, the continuing nature [of the offence] may be interrupted by the offender's arrest. The time and place of the offence must therefore be established to that end. For this reason, there is a situation of discovery *in flagrante delicto* at the time of the arrest of judges suspected of the offence of membership of an armed organisation.'
>
> 128. Having regard to the Court of Cassation judgments cited above, and to the fact that [the applicant] was arrested on suspicion of membership of the FETÖ/PDY organisation – deemed by the judicial authorities to constitute an armed terrorist organisation that premeditated the attempted coup – on 16 July 2016, at a time when [the authorities were taking steps to] defeat the coup attempt, it cannot be concluded

that there was no factual and legal basis for the finding by the investigating bodies that the offence of membership of an armed terrorist organisation, of which [the applicant] was accused, involved a situation of discovery *in flagrante delicto*.

129. In the light of the foregoing, the allegation that [the applicant], a Constitutional Court judge, was placed in pre-trial detention in an manner not complying with law and the safeguards enshrined in the Constitution and Law no. 6216 is unfounded. Accordingly, the order for [the applicant's] detention had a legal basis.

130. Before examining whether the detention order – which had a basis in law – pursued a legitimate aim and was proportionate, it should be ascertained whether there are 'facts giving rise to a strong suspicion that the offence has been committed', this being a prerequisite for pre-trial detention.

131. The [impugned] detention order states, with reference to '[all] the reports on searches and seizures and the entire contents of the case file', that there was concrete evidence giving rise to a strong suspicion in respect of the suspects, including [the applicant].

132. It also appears from the summary report (*fezleke*) concerning [the applicant] that the accusation that [he] was a member of a terrorist organisation was based on the following evidence: statements by anonymous witnesses and a suspect, the contents of communications between other individuals and information concerning the signals from [the applicant's] mobile telephones.

133. It should be noted that in the messages exchanged between other individuals (Ö.I., S.E. and B.Y.) via ByLock, certain references were made to [the applicant]. The investigating bodies found, on the basis of evidence such as the statements by suspects/witnesses and the messages exchanged via ByLock, that Ö.I., who is in fact a teacher, was the 'lay imam' responsible for the judges belonging to the FETÖ/PDY organisation, that S.E. (a rapporteur) was in charge of the organisation [within] the Constitutional Court and that B.Y. was a member of this structure. Among those individuals, an arrest warrant has been issued in respect of Ö.I., who has left the country. [Similarly], S.E., who has been dismissed from his post, has fled and a warrant has been issued for his arrest. As for B.Y., he has been dismissed from the position of judge by the Council of Judges and Prosecutors and has been placed in pre-trial detention on suspicion of being a member of the FETÖ/PDY organisation.

...

[In paragraphs 134-37 of its judgment, the Constitutional Court assessed the evidence. It then went on to conclude:]

138. It can therefore be observed that there is evidence in the file forming a basis for the suspicions against [the applicant]."

The Constitutional Court also observed that, in view of the very specific circumstances surrounding the attempted coup, the extent to which the FETÖ/PDY organisation had infiltrated the administrative and judicial authorities and the fact that the alleged offence was among the so-called "catalogue" offences, the order for the applicant's pre-trial detention could be said to have been based on justifiable grounds and proportionate. In the Constitutional Court's view, there was a risk that individuals involved in the coup attempt and those who had not been directly involved but had links to the FETÖ/PDY organisation – which was identified as the instigator of the

attempted coup – might abscond, tamper with evidence or take advantage of the disorder that had emerged during or after the coup attempt. The Constitutional Court held that these particular circumstances entailed a higher risk than might arise in what could be described as "normal" circumstances. It added that it was obvious that the applicant, as a member of that court himself, might be in an easier position than others to interfere with the evidence.

F. The indictment

43. On 15 January 2018 the public prosecutor's office at the Court of Cassation filed a bill of indictment in respect of the applicant, charging him in particular, under Article 314 of the Criminal Code, with being a member of an armed terrorist organisation, namely the FETÖ/PDY organisation. After describing the characteristics of that organisation and its covert structure within the judiciary, it set out the following items of evidence against the applicant: the statements by two anonymous witnesses (see paragraphs 33-34 above); the statements by a former rapporteur of the Constitutional Court accused of belonging to the FETÖ/PDY organisation (see paragraphs 35-36 above); the messages exchanged via ByLock and other facts (relating to information about telephone lines and records of journeys abroad).

44. In a summary judgment of 6 March 2019 the 9th Criminal Division of the Court of Cassation sentenced the applicant to eleven years and three months' imprisonment, in accordance with Article 314 § 2 of the Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713), for membership of an armed terrorist organisation. The judgment indicated that the applicant had fifteen days in which to lodge an appeal with the plenary criminal divisions of the Court of Cassation.

G. Other individual applications

45. The applicant also lodged two further individual applications with the Constitutional Court. In his application of 3 July 2017 he alleged a violation of Articles 6, 8 and 14 of the Convention. In his application of 26 July 2018 he complained in particular that the length of his pre-trial detention had been excessive. According to the material available to the Court, both cases are still pending before the Constitutional Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Constitution

46. Article 11 of the Constitution provides:

"The provisions of the Constitution are fundamental legal rules binding on the legislative, executive and judicial organs, the administrative authorities and all other institutions and individuals. Laws shall not be contrary to the Constitution."

47. Article 15 of the Constitution reads as follows:

"In the event of war, general mobilisation, a state of siege or a state of emergency, the exercise of fundamental rights and freedoms may be partially or fully suspended, or measures derogating from the guarantees enshrined in the Constitution [in relation to those rights and freedoms] may be taken to the extent required by the situation, provided that obligations under international law are not violated.

Even in the circumstances listed in the first paragraph, there shall be no violation of: the individual's right to life, except where death occurs as a result of acts compatible with the law of war; the right to physical and spiritual integrity; freedom of religion, conscience and thought or the rule that no one may be compelled to reveal his or her beliefs or blamed or accused on account of them; the prohibition of retrospective punishment; or the presumption of the accused's innocence until a final conviction."

48. The relevant parts of Article 19 of the Constitution read as follows:

"Everyone has the right to personal liberty and security.

...

Individuals against whom there are strong presumptions of guilt may be detained only by order of a judge and for the purposes of preventing their absconding or the destruction or alteration of evidence, or in any other circumstances provided for by law that also necessitate their detention. No one shall be arrested without an order by a judge except when caught *in flagrante delicto* or where a delay would have a harmful effect; the conditions for such action shall be determined by law.

...

A person who has been arrested or detained shall be brought before a judge within forty-eight hours at the latest or, in the case of offences committed jointly with others, within four days, not including the time required to convey the person to the nearest court to the place of detention. No one shall be deprived of his or her liberty after the expiry of the aforementioned periods except by order of a judge. These periods may be extended during a state of emergency or a state of siege or in time of war.

..."

B. Law no. 6216 on the establishment and rules of procedure of the Constitutional Court

49. The relevant parts of Law no. 6216, published in the Official Gazette on 3 April 2011, provide as follows:

Preliminary examination (*inceleme*) and investigation (*soruşturma*) in respect of the President and members [of the Constitutional Court]

Section 16

"(1) The opening of an investigation in respect of the President and members [of the Constitutional Court] for offences allegedly committed in connection with or during the performance of their official duties, ordinary offences and disciplinary offences shall be subject to a decision by the plenary court. However, in cases of discovery *in flagrante delicto* falling within the jurisdiction of the assize courts (*ağır ceza mahkemesinin görevine giren suçüstü hâllerinde*), the investigation shall be conducted in accordance with the rules of ordinary law.

...

(3) Where appropriate, the President may appoint a member to carry out a preliminary examination of the case before it is referred to the plenary court. After completing the preliminary examination, the member thus appointed ... shall submit a report to the President.

(4) Once the case has been placed on the agenda by the President, the plenary court shall deliberate on it. The member concerned may not take part in the deliberations. Where the plenary court decides not to open an investigation, the member concerned and the complainants shall be notified of the decision.

(5) Where a decision is taken to open an investigation, the plenary court shall elect three of its members to form the investigation committee. The investigation committee shall be chaired by the senior member. It shall be vested with all the powers conferred upon the public prosecutor by the Code of Criminal Procedure (Law no. 5271 of 4 December 2004). Any procedural steps requested by the investigation committee shall be carried out immediately by the competent local judicial bodies. ..."

Judicial investigation and prosecution

Section 17

"(1) Except in cases of discovery *in flagrante delicto* of ordinary offences within the jurisdiction of the assize courts, preventive measures against the President and members [of the Constitutional Court] on account of alleged offences committed in connection with or during the performance of official duties may be ordered only in accordance with the provisions of this section.

(2) In cases of discovery *in flagrante delicto* of ordinary offences within the jurisdiction of the assize courts, the investigation shall be conducted in accordance with the rules of ordinary law. Where an indictment is drawn up, the prosecution shall be conducted by the plenary criminal divisions of the Court of Cassation [since 2 January 2017: 'by the appropriate criminal division of the Court of Cassation'].

(3) In the case of alleged offences committed in connection with or during the performance of official duties and also of ordinary offences, except in cases of discovery *in flagrante delicto* of ordinary offences within the jurisdiction of the assize courts, where the investigation committee requests a preventive measure as provided for in Law no. 5271 [the CCP] and other laws the plenary court shall give a decision on the request.

(4) Where the investigation committee, after completing its investigation, considers that no charges are necessary, it shall give a decision not to prosecute. If the

committee considers it appropriate to bring charges, it shall refer the matter to the Constitutional Court, in the case of offences linked to the performance of official duties, in order for it to adjudicate as the supreme court, or to the President [of the Constitutional Court], in the case of ordinary offences, in order for him or her to refer the case to the plenary criminal divisions of the Court of Cassation [since 2 January 2017: 'to the appropriate criminal division of the Court of Cassation']. The suspect and, where appropriate, the complainants shall be notified of the decisions of the investigation committee."

C. Law no. 5237 of 26 September 2004 instituting the Criminal Code

50. Article 309 § 1 of the Criminal Code is worded as follows:

"Anyone who attempts to overthrow by force or violence the constitutional order provided for by the Constitution of the Republic of Turkey or to establish a different order in its place, or *de facto* to prevent its implementation, whether fully or in part, shall be sentenced to aggravated life imprisonment."

51. Article 314 §§ 1 and 2 of the Criminal Code, which provides for the offence of membership of an illegal organisation, reads as follows:

"1. Anyone who forms or leads an organisation with the purpose of committing the offences listed in the fourth and fifth parts of this chapter shall be sentenced to ten to fifteen years' imprisonment.

2. Any member of an organisation referred to in the first paragraph above shall be sentenced to five to ten years' imprisonment."

D. Law no. 5271 of 4 December 2004 instituting the Code of Criminal Procedure (CCP)

52. The relevant parts of Article 2 of the CCP provide:

"...

(j) the following shall be classified as cases of discovery *in flagrante delicto* (*suçüstü*):

1. an offence in the process of being committed;

2. an offence that has just been committed, and an offence committed by an individual who has been pursued immediately after carrying out the act and has been apprehended by the police, the victim or other individuals;

3. an offence committed by an individual who has been apprehended in possession of items or evidence indicating that the act was carried out very recently.

..."

53. Article 91 § 2 of the CCP provides:

"Placement in pre-trial detention shall be dependent on the necessity of this measure for the investigation and on evidence giving rise to a suspicion that the individual has committed an offence."

54. Article 91 § 5 of the CCP provides that the arrested person or his or her representative, partner or relatives may lodge an objection against the arrest, the police custody order or the extension of the police custody period with a view to securing the person's release. The objection must be examined within twenty-four hours at the latest.

55. The relevant parts of Article 100 §§ 1 and 2 of the CCP provide:

> "1. If there are facts giving rise to a strong suspicion that the [alleged] offence has been committed and to a ground for pre-trial detention, a detention order may be made in respect of a suspect or an accused. Pre-trial detention may only be ordered in proportion to the sentence or preventive measure that could potentially be imposed, bearing in mind the significance of the case.
>
> 2. In the cases listed below, a ground for detention shall be presumed to exist:
>
> (a) if there are specific facts grounding a suspicion of a flight risk ...;
>
> (b) if the conduct of the suspect or accused gives rise to a suspicion
>
> (1) of a risk that evidence might be destroyed, concealed or tampered with;
>
> (2) of an attempt to put pressure on witnesses or other individuals ..."

For certain offences listed in Article 100 § 3 of the CCP (the so-called "catalogue offences"), there is a statutory presumption of the existence of grounds for detention. The relevant passages of Article 100 § 3 of the CCP read:

> "3. If there are facts giving rise to a strong suspicion that the offences listed below have been committed, it can be presumed that there are grounds for detention:
>
> (a) for the following crimes provided for in the Criminal Code (no. 5237 of 26 September 2004):
>
> ...
>
> 11. crimes against the constitutional order and against the functioning of the constitutional system (Articles 309, 310, 311, 313, 314 and 315);
>
> ..."

Article 101 of the CCP provides that reasons must be given for extending detention and for finding that alternative measures would be insufficient.

Under Article 109 of the CCP, as in force at the material time, even if all the grounds for detention were present, the court had the option of placing a suspect under judicial supervision instead of ordering detention where the suspect faced a maximum sentence of three years' imprisonment.

56. Article 141 § 1 (a) of the CCP provides:

> "Compensation for damage ... may be claimed from the State by anyone ...:
>
> (a) who has been arrested or taken into or kept in detention under conditions or in circumstances not complying with the law;
>
> ..."

57. Article 142 § 1 of the CCP reads as follows:

> "The claim for compensation may be lodged within three months after the person concerned has been informed that the decision or judgment has become final, and in any event within one year after the decision or judgment has become final."

58. According to the practice of the Court of Cassation, it is not necessary to wait for a final decision on the merits of the case before ruling on a claim brought under Article 141 of the CCP for compensation for the excessive length of pre-trial detention (decisions E.2014/21585, K.2015/10868 and E. 2014/6167, K. 2015/10867).

E. Jurisdiction of the assize courts

59. Under section 12 of Law no. 5235 of 7 October 2004, the offence of membership of an armed organisation falls within the jurisdiction of the assize courts.

F. Relevant case-law

60. In a judgment of 20 April 2015 (E.2015/1069, K.2015/840) the 16th Criminal Division of the Court of Cassation held as follows:

> "... The offence of membership of an armed organisation is committed by means of voluntary submission to the organisation's hierarchy and acceptance of the organisation's founding aims and its activities ... Although the offence is completed by the act of joining the organisation, it continues to be committed throughout membership ..."

61. In a judgment of 6 April 2016 (E.2015/7367, K.2016/2130) the same Criminal Division of the Court of Cassation held as follows:

> "The continuing nature of an offence ends at the time of the arrest. Where acts of a certain seriousness that are capable of [achieving] the organisation's aims are carried out between the time of joining the organisation and the time of the arrest, consideration must be given both to the legal rules governing each of the offences and to the provisions governing the combination of offences ..."

62. In a judgment of 18 July 2017 (E.2016/7162, K.2017/4786) the same division held:

> "... Membership of an organisation is punishable under Article 220 § 2 of the Criminal Code.
>
> ...
>
> A member of an organisation is a person who adheres to the hierarchy [of the structure] and as a result submits to the will of the organisation by being ready to discharge the duties entrusted to him or her. [Membership of] an organisation means joining it, having a bond with it and submitting to its hierarchical authority. A member of the organisation must have an organic link with it and participate in its activities.
>
> Although it is not an essential prerequisite for punishment of a member of an organisation that the member has committed an offence in connection with the organisation's activities and for the achievement of its aims, the individual must

nevertheless have made a specific material or moral contribution to the organisation's actual existence and moral reinforcement. As membership is a continuing offence, such acts must be of a certain intensity ...

The fact of belonging to the organisation, which constitutes a continuing offence, is treated as a single offence up to the termination of a legal and factual situation. Membership of the organisation ends with the individual's arrest, the dissolution of the organisation, or the individual's exclusion or departure from the organisation.

...

Offence of creating and being a member of a terrorist organisation:

For a structure to be classified as a terrorist organisation under Article 314 of the Criminal Code, in addition to satisfying the essential requirements for the existence of an organisation as set forth in Article 220 of the Criminal Code, the organisation must also be established with the aim of committing the offences [listed in certain chapters of the Criminal Code] ... and must also have access to sufficient weapons or the possibility of using them in order to achieve that aim ..."

63. In a leading judgment of 10 October 2017 (E.2017/YYB-997, K.2017/404) the plenary criminal divisions of the Court of Cassation ruled on the jurisdiction of the assize courts in relation to alleged offences by members of the judiciary. They held as follows:

"... as the current and consistent position of the Court of Cassation makes clear, regarding the offence of membership of an armed terrorist organisation, which is a continuing offence, except in cases where [its continuing nature ends with] the dissolution of the organisation or termination of membership, the continuing nature [of the offence] may be interrupted by the offender's arrest. The time and place of the offence must therefore be established to that end. For this reason, there is a situation of discovery *in flagrante delicto* at the time of the arrest of judges suspected of the offence of membership of an armed organisation, and [consequently] the investigation must be carried out in accordance with the provisions of ordinary law ..."

64. In a judgment of 11 January 2018 (no. 2016/23672) concerning the detention of a journalist, Mehmet Hasan Altan, the Constitutional Court examined a complaint concerning the lawfulness of that measure (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, §§ 35-44, 20 March 2018). After examining the evidence forming the basis for the applicant's pre-trial detention, it concluded that "strong evidence that an offence had been committed" had not been sufficiently established in the case before it. Next, the Constitutional Court examined whether there had been a violation of the right to liberty and security in the light of Article 15 of the Constitution. On this point, it noted firstly that in a state of emergency, the Constitution provided for the possibility of taking measures derogating from the guarantees set forth in Article 19, to the extent required by the situation. It observed, however, that if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence, the guarantees of the right to liberty and security would be meaningless. Accordingly, it held that Mr Altan's pre-trial detention was disproportionate to the strict exigencies of the situation and that his right to

liberty and security, as safeguarded by Article 19 § 3 of the Constitution, had been breached.

III. COUNCIL OF EUROPE DOCUMENTS

65. The Government referred to Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States, entitled "Judges: independence, efficiency and responsibilities" and adopted on 17 November 2010. The relevant parts of the Recommendation read as follows:

> "Liability and disciplinary proceedings
>
> 66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.
>
> ...
>
> 68. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.
>
> ...
>
> 71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen."

IV. NOTICE OF DEROGATION BY TURKEY

66. On 21 July 2016 the Permanent Representative of Turkey to the Council of Europe sent the Secretary General of the Council of Europe the following notice of derogation:

> "I communicate the following notice of the Government of the Republic of Turkey.
>
> On 15 July 2016, a large-scale coup attempt was staged in the Republic of Turkey to overthrow the democratically-elected government and the constitutional order. This despicable attempt was foiled by the Turkish state and people acting in unity and solidarity. The coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
>
> The Republic of Turkey is taking the required measures as prescribed by law, in line with the national legislation and its international obligations. In this context, on 20 July 2016, the Government of the Republic of Turkey declared a State of Emergency for a duration of three months, in accordance with the Constitution (Article 120) and the Law No. 2935 on State of Emergency (Article 3/1b). ...
>
> The decision was published in the Official Gazette and approved by the Turkish Grand National Assembly on 21 July 2016. Thus, the State of Emergency takes effect as from this date. In this process, measures taken may involve derogation from the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, permissible in Article 15 of the Convention.

I would therefore underline that this letter constitutes information for the purposes of Article 15 of the Convention. The Government of the Republic of Turkey shall keep you, Secretary General, fully informed of the measures taken to this effect. The Government shall inform you when the measures have ceased to operate.

..."

THE LAW

I. PRELIMINARY QUESTION CONCERNING THE DEROGATION BY TURKEY

67. The Government emphasised at the outset that all of the applicant's complaints should be examined with due regard to the derogation of which the Secretary General of the Council of Europe had been notified on 21 July 2016 under Article 15 of the Convention. Article 15 provides:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

A. The parties' submissions

68. The Government submitted that in availing itself of its right to make a derogation from the Convention, Turkey had not breached the provisions of the Convention. In that context, they noted that there had been a public emergency threatening the life of the nation on account of the risks caused by the attempted military coup and that the measures taken by the national authorities in response to the emergency had been strictly required by the exigencies of the situation.

69. The Government submitted in particular that recourse to pre-trial detention had been inevitable in the prevailing circumstances, since alternative measures to detention were manifestly inadequate. They pointed out that many individuals suspected of belonging to or providing aid and assistance to the FETÖ/PDY organisation had fled the country despite being

banned from doing so. That being so, the Government maintained that following the coup attempt, the detention of such individuals had been the only appropriate and proportionate choice.

70. The applicant submitted in reply that Article 15 of the Convention permitted derogations from the obligations under the Convention only "to the extent strictly required by the exigencies of the situation" and that the Court should therefore find a violation of Article 5 of the Convention.

B. The Court's assessment

71. The Court considers that the question thus arising is whether the conditions laid down in Article 15 of the Convention for the exercise of the exceptional right of derogation were satisfied in the present case.

72. In this connection, the Court notes firstly that the notice of derogation by Turkey, indicating that a state of emergency has been declared in order to tackle the threat posed to the life of the nation by the severe dangers resulting from the attempted military coup and other terrorist acts, does not explicitly mention which Articles of the Convention are to form the subject of a derogation. Instead, it simply announces that "measures taken may involve derogation from the obligations under the Convention".

73. However, the Court observes that the applicant did not dispute that the notice of derogation by Turkey satisfied the requirement laid down in Article 15 § 3 of the Convention. It further notes that in *Mehmet Hasan Altan v. Turkey* (no. 13237/17, § 93, 20 March 2018) it held, in the light of the Constitutional Court's findings on this point and all the other material in its possession, that the attempted military coup had disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention. In addition, it takes note of the position expressed by the Turkish Constitutional Court, which in its judgment of 11 January 2018 found that the case brought by the applicant should be examined under Article 15 of the Constitution, by which, in an emergency, the exercise of fundamental rights and freedoms may be partially or fully suspended, or measures derogating from the guarantees enshrined in the Constitution in relation to those rights and freedoms may be taken (see paragraph 41 above).

74. In the light of the foregoing, the Court is prepared to accept that the formal requirement of the derogation has been satisfied and that there was a public emergency threatening the life of the nation (see *Mehmet Hasan Altan*, cited above, § 89). With regard to the scope *ratione temporis* and *ratione materiae* of the derogation – a question which the Court could raise of its own motion, seeing that the date of the applicant's initial detention under the relevant legislation was 20 July 2016, one day before the state of emergency took effect – it considers that, in view of its conclusion below

(see paragraphs 119 and 148-49 below), it does not have to determine this issue here.

75. In any event, the Court observes that the applicant's detention on 20 July 2016, following his arrest on 16 July 2016, occurred a very short time after the attempted coup – the event that prompted the declaration of a state of emergency. It considers that this is undoubtedly a contextual factor that should be fully taken into account in interpreting and applying Article 5 of the Convention in the present case (see, *mutatis mutandis*, *Hassan v. the United Kingdom* [GC], no. 29750/09, § 103, ECHR 2014).

II. ADMISSIBILITY

A. Complaints concerning the applicant's arrest and detention in police custody

76. The Government raised two objections of failure to exhaust domestic remedies in respect of the applicant's arrest and detention in police custody. Firstly, they argued that he should have lodged an objection against his arrest on the basis of Article 91 § 5 of the CCP – a remedy that was capable of ending the deprivation of liberty complained of by the applicant. Secondly, they submitted that a compensation claim had been available to him under Article 141 § 1 (a) of the CCP. In support of their contentions, they produced two judgments delivered by the 12th Criminal Division of the Court of Cassation, from which it could be seen that the complainants had received compensation for being unlawfully deprived of their liberty.

77. The applicant contested the Government's argument. He asserted that a compensation claim did not offer reasonable prospects of success in terms of securing his release.

78. As regards complaints concerning the lawfulness of arrest and detention in police custody, the Court observes that the Turkish legal system provides two remedies in that respect, namely an objection aimed at securing release from custody (Article 91 § 5 of the CCP) and a compensation claim against the State (Article 141 § 1 (a) of the CCP) (see *Mustafa Avci v. Turkey*, no. 39322/12, § 63, 23 May 2017).

79. The Court notes in this connection that the Turkish Constitutional Court dismissed the applicant's complaints concerning his arrest and detention in police custody, finding that he had not availed himself of the remedies afforded by the domestic system (see paragraph 30 above).

80. In the light of the Constitutional Court's conclusion on this issue, the Court considers that, as regards the above-mentioned complaints, the applicant was required to use at least one of the remedies afforded by the national legal system, namely an objection aimed at securing release from custody (Article 91 § 5 of the CCP) and a compensation claim against the State (Article 141 § 1 (a) of the CCP).

However, it notes that the applicant did not avail himself of those remedies. It therefore allows the Government's objection and rejects the complaints concerning the applicant's arrest and detention in police custody for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention (see *Mehmet Hasan Altan*, cited above, § 101).

B. Complaints concerning the applicant's initial detention

81. With regard to the complaints under Article 5 of the Convention concerning the lawfulness of the order for the applicant's pre-trial detention, the Government again stated that a compensation claim had been available to him under Article 141 § 1 (a) and (d) of the CCP. They further submitted that in his individual application lodged on 7 September 2016 with the Constitutional Court (see paragraph 29 above), the applicant had not raised any complaints under Article 5 § 3 of the Convention. In that connection they drew the Court's attention to the individual application lodged with the Constitutional Court on 26 July 2018 in which the applicant had complained in particular of the length of his pre-trial detention. They pointed out that that application was still pending before the Constitutional Court (see paragraph 45 above). Accordingly, they urged the Court to declare these complaints inadmissible for failure to exhaust domestic remedies.

82. In addition, after summarising the Constitutional Court's judgment rejecting the applicant's complaints concerning the lawfulness of his pre-trial detention and the alleged lack of reasonable suspicion that he had committed a criminal offence, the Government submitted that a decision had been adopted at national level on the issues of which they had been given notice by the Court and that a legal assessment had been conducted on the basis of those complaints. Referring to *Pentikäinen v. Finland* ([GC], no. 11882/10, § 111, ECHR 2015) and *Bédat v. Switzerland* ([GC], no. 56925/08, § 54, 29 March 2016), they contended that the applicant did not have victim status.

83. The applicant contested the Government's argument. He asserted that a compensation claim did not offer reasonable prospects of success in terms of securing his release.

84. With regard to the applicant's complaints concerning his pre-trial detention, the Court reiterates that for a remedy in respect of the lawfulness of an ongoing deprivation of liberty to be effective, it must offer a prospect of release (see *Mehmet Hasan Altan*, cited above, § 103). It notes, however, that the remedy provided for in Article 141 of the CCP is not capable of terminating the applicant's deprivation of liberty.

The Court therefore concludes that the objection raised by the Government on this account must be dismissed.

85. As to the applicant's victim status, the Court refers to its consistent and well-established case-law to the effect that a favourable decision or

measure is not, in principle, sufficient to deprive applicants of their status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, among other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010). In the present case, it fails to see how a decision declaring all of the applicant's complaints inadmissible can deprive him of victim status.

86. Lastly, the Court does not accept the Government's argument that the complaint under Article 5 § 3 of the Convention should be rejected for failure to exhaust domestic remedies on the grounds that the applicant had not raised such a complaint in the context of his individual application to the Constitutional Court giving rise to the judgment of 11 January 2018.

The Court observes firstly that the application before it does not concern the length of the applicant's pre-trial detention. Consequently, the individual application which the applicant lodged on 26 July 2018 – complaining of the length of his pre-trial detention – and which is still pending before the Constitutional Court (see paragraph 45 above) is of no relevance to the present case, seeing that, as the Government indicated, he did not raise a complaint of that kind before the Court.

However, the Court observes that in his application form the applicant raised a complaint alleging that insufficient reasons had been given for the order for his pre-trial detention. In this connection it would emphasise that it held in *Buzadji v. the Republic of Moldova* ([GC], no. 23755/07, § 102, 5 July 2016) that the requirement for the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion that the arrested person had committed an offence – already applied at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest. When it gave notice of the application in the present case, the Court, referring to the case-law cited above and to Article 5 §§ 1 (c) and 3 of the Convention, put a question to the parties concerning the alleged lack of reasons for the pre-trial detention order, given that the applicant had expressly raised this complaint before the Constitutional Court (see paragraph 29 above). Furthermore, the Court observes, in the light of the Constitutional Court's reasoning in its judgment, that this complaint – concerning solely the order for the applicant's pre-trial detention – was central to the assessment performed by that court, although it did not provide specific reasoning on that issue. The Court therefore dismisses this preliminary objection.

87. Observing that the complaints concerning the lawfulness of the applicant's pre-trial detention, the alleged lack of reasonable suspicion that he had committed an offence and the alleged failure to provide reasons for his initial pre-trial detention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible on any other grounds, the Court declares them admissible.

III. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 3 OF THE CONVENTION

88. The applicant complained that he had been arbitrarily placed in pre-trial detention, in breach of domestic law, namely Law no. 6216.

He also argued that there had been no specific evidence giving rise to a reasonable suspicion that he had committed a criminal offence necessitating pre-trial detention. In particular, he maintained that the domestic courts had given insufficient reasons for the decisions ordering his detention. He complained on that account of a violation of Article 5 of the Convention, without specifying the exact provisions on which he was relying.

The Court considers it appropriate to examine these complaints under Article 5 §§ 1 and 3 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> ..."

89. The Government contested the applicant's argument.

A. Lawfulness of the applicant's pre-trial detention

1. The parties' submissions

(a) The applicant

90. The applicant submitted that on account of his position as a judge at the Constitutional Court, he enjoyed a special status in criminal investigations of which he was the subject. Under section 16 of Law no. 6216, the opening of a criminal investigation in respect of members of the Constitutional Court was in principle subject to a decision by the plenary court. He accepted that in cases of discovery *in flagrante delicto* falling within the jurisdiction of the assize courts, the investigation could be conducted under the rules of ordinary law. Nevertheless, he had not been

specifically accused of having taken part in the attempted coup and this could therefore not be treated as a case of *in flagrante delicto*. Moreover, such cases were listed in Article 2 of the CCP and his situation clearly did not fall into any of the categories concerned.

91. The applicant added that his alleged offence could only have been committed in connection with the performance of his official duties, given that it was said to relate to actions he had carried out under the instructions of the terrorist organisation.

(b) The Government

92. The Government stated firstly that the relevant Council of Europe instruments did not preclude the prosecution of a judge suspected of committing an offence. The applicant's pre-trial detention in the present case had been in accordance with domestic law, which itself was compatible with the Convention.

93. The Government stated that the applicant had been placed in pre-trial detention on the basis of Article 100 of the CCP. They pointed out that he was suspected of being a member of the FETÖ/PDY terrorist organisation. Although sections 16 and 17 of Law no. 6216 provided for a special procedure for conducting criminal proceedings against members of the Constitutional Court, in cases of discovery *in flagrante delicto* falling within the assize courts' jurisdiction the investigation was conducted in accordance with the rules of ordinary law and preventive measures could be ordered.

94. The Government submitted that the Ankara public prosecutor's office had called for the applicant to be detained on the basis of suspicion that he had committed the offences of "attempting to overthrow or change the constitutional order" and "membership of an armed terrorist organisation", in connection with the attempted coup of 15 July 2016. Referring to the position taken by the Constitutional Court (see paragraph 123 of the judgment cited in paragraph 42 above), they contended that it was obvious that these were ordinary offences falling within the jurisdiction of the Assize Court, as opposed to offences committed in connection with or during the performance of official duties.

95. The Government further noted that the applicant's argument that he was entitled to the status granted to members of the Constitutional Court by sections 16 and 17 of Law no. 6216 had not been accepted by the judicial body that had ordered his detention, namely the 2nd Magistrate's Court. Moreover, the magistrate in question had found that the criminal investigation had been governed by the rules of ordinary law, on the grounds that the suspect's alleged offence – membership of an armed terrorist organisation – was a "continuing offence" and that there had been a case of discovery *in flagrante delicto*. The Government cited the findings of the Ankara public prosecutor's office in its summary report of 25 October 2017 in noting that the risk of a coup had not been entirely eliminated at the

material time, that there had been a case of discovery *in flagrante delicto* falling within the jurisdiction of the Assize Court, and that an investigation had therefore been initiated in respect of the applicant on 16 July 2016 on the basis of the provisions of ordinary law.

96. The Government further maintained that it was clearly established in the settled case-law of the Court of Cassation that the offence of membership of an armed terrorist organisation was a continuing offence falling within the jurisdiction of the Assize Court. In addition, they referred to the conclusion reached by the plenary criminal divisions of the Court of Cassation in their judgment of 10 October 2017, to the effect that "there is a situation of discovery *in flagrante delicto* at the time of the arrest of judges suspected of the offence of membership of an armed organisation, and [consequently] the investigation must be carried out in accordance with the provisions of ordinary law" (see paragraph 63 above).

97. The Government submitted in conclusion that, in view of the case-law referred to above and the circumstances of the present case, there had been a situation entailing discovery *in flagrante delicto* of the offence of membership of an armed terrorist organisation. In support of that argument, they noted that the applicant's arrest and detention in police custody had taken place following the coup attempt that had been foiled by the authorities during the night of 15 to 16 July 2016. In addition, the applicant had been placed in pre-trial detention on suspicion of the offence of membership of the FETÖ/PDY organisation, a structure regarded as the instigator of the coup attempt and deemed by the courts to constitute an armed terrorist organisation.

98. Accordingly, the Government argued that the applicant's complaint that he had been placed in pre-trial detention without being afforded the guarantees enshrined in the Constitution and Law no. 6216 was unfounded, and that his detention in the present case had complied with the relevant legislation.

2. The Court's assessment

(a) Relevant principles

99. The Court would refer to the following principles applicable in this sphere as established in its case-law.

Article 5 § 1 of the Convention guarantees the fundamental right to liberty and security, which is of primary importance in a "democratic society" (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 181, 28 November 2017). The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty (see *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-X). More generally, Article 5 is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that

protect the physical security of the individual, and as such its importance is paramount (see *Buzadji*, cited above, § 84).

100. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty, save in accordance with the conditions specified in paragraph 1 of Article 5 of the Convention. The list of exceptions set out in Article 5 § 1 is an exhaustive one (see *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV), and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see *Mehmet Hasan Altan*, cited above, § 123, with further references).

101. It is well established in the Court's case-law on Article 5 § 1 of the Convention that any deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful" (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013). Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. This primarily requires any arrest or detention to have a legal basis in domestic law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. The Court must further ascertain in this connection whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein, notably the principle of legal certainty (see *Mooren v. Germany* [GC], no. 11364/03, § 72, 9 July 2009, with further references).

102. The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (see *Baka v. Hungary* [GC], no. 20261/12, § 165, 23 June 2016, with further references). This consideration, set out in particular in cases concerning the right of judges to freedom of expression, is equally relevant in relation to the adoption of a measure affecting the right to liberty of a member of the judiciary. In particular, where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with. Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018), the Court must be particularly attentive to the protection of members of the judiciary when

reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention.

103. Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty should be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law should be clearly defined and that the law itself should be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires all law to be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Del Río Prada*, cited above, § 125; *Medvedyev and Others v. France*, no. 3394/03, § 80, 10 July 2008; *Creangă v. Romania* [GC], no. 29226/03, § 120, 23 February 2012; and *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 92, 15 December 2016).

(b) Application of the above principles in the present case

(i) Article 5 § 1 of the Convention

104. The Court observes that the applicant was arrested on 16 July 2016 and taken into police custody on the same day. He was later placed in pre-trial detention on 20 July 2016 on suspicion of being a member of an armed terrorist organisation. Subsequently, on 6 March 2019, he was convicted of that offence.

105. Since the subject of the application is the applicant's initial detention, the first question to be determined is accordingly whether, as a judge serving on the Constitutional Court at the material time, he was placed in pre-trial detention on 20 July 2016 "in accordance with a procedure prescribed by law" as required by Article 5 § 1 of the Convention, following his arrest on 16 July 2016. In order to ascertain whether the applicant was "lawfully" detained for the purposes of Article 5 § 1 and was deprived of his liberty "in accordance with a procedure prescribed by law", the Court will first examine whether his detention complied with Turkish law.

106. The Court notes that it was not disputed among the parties that the applicant was arrested and placed in pre-trial detention on the basis of Articles 100 et seq. of the CCP, notwithstanding the guarantees afforded to members of the Constitutional Court under the relevant legislation. The question to which the parties' arguments and differing positions relate is whether the applicant's detention – as a judge serving on the Constitutional Court at the time of the events and as such enjoying a special status – under the rules of ordinary law may be said to satisfy the "quality of the law" requirement.

107. The Court observes that the applicant's argument on this issue was raised before the Constitutional Court, which held, with reference to the case-law of the Court of Cassation, that the measure in question, ordered in accordance with the rules of ordinary law, complied with the relevant legislation. In the Constitutional Court's view, notwithstanding the procedural safeguards afforded to its members by the Constitution and Law no. 6216, it could not be concluded "that there was no factual and legal basis for the finding by the investigating bodies that the offence of membership of an armed terrorist organisation, of which [the applicant] was accused, involved a situation of discovery *in flagrante delicto*" (see paragraph 42 above).

108. The Court observes that it has not been alleged that the applicant was arrested and placed in pre-trial detention while in the process of committing an offence linked to the attempted coup of 15 July 2016, although the Ankara public prosecutor's office, in its instructions of 16 July 2016, also mentioned the offence of attempting to overthrow the constitutional order. In fact, the latter offence was not taken into consideration by the magistrate who subsequently questioned the applicant and ordered his pre-trial detention (see paragraphs 19-20 above). The applicant was therefore deprived of his liberty primarily on suspicion of membership of FETÖ/PDY, a structure considered by the investigating authorities and the Turkish courts to be an armed terrorist organisation that had premeditated the coup attempt. The Constitutional Court found that those aspects constituted the factual and legal basis for the finding by the investigating authorities that there had been a case of discovery *in flagrante delicto*. In reaching that conclusion, it referred to recent case-law of the Court of Cassation (see paragraph 42 above).

109. On this point, the Court notes that in a leading judgment adopted on 10 October 2017, the plenary criminal divisions of the Court of Cassation held that at the time of the arrest of judges suspected of the offence of membership of an armed organisation, there was a situation of discovery *in flagrante delicto* (see paragraph 63 above). The leading judgment indicates that in cases involving an alleged offence of membership of a criminal organisation, it is sufficient that the conditions laid down in Article 100 of the CCP are satisfied in order for a suspect who is a member of the judiciary to be placed in pre-trial detention on the grounds that there is a case of discovery *in flagrante delicto*. This new judicial interpretation of the concept of *in flagrante delicto*, adopted long after the applicant was taken into detention, was based on the settled case-law of the Court of Cassation concerning continuing offences.

110. In this connection, the Court observes that, as it has frequently held, it has only limited power to deal with alleged errors of fact or law committed by the national courts, which have primary responsibility for interpreting and applying domestic law. Unless their interpretation is

arbitrary or manifestly unreasonable (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 86, ECHR 2007-I), the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I, and *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015). The Court is therefore required to verify whether the way in which domestic law is interpreted and applied in the cases before it is consistent with the Convention (see, *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II).

111. On this issue, the Court would emphasise that in general, the principle of legal certainty may be compromised if domestic courts introduce exceptions in their case-law which run counter to the wording of the applicable statutory provisions. In this connection, the Court observes that Article 2 of the CCP provides a conventional definition of the concept of *in flagrante delicto*, which is linked to the discovery of an offence while or immediately after it is committed. However, according to the case-law of the Court of Cassation as cited above, a suspicion – within the meaning of Article 100 of the CCP – of membership of a criminal organisation may be sufficient to characterise a case of discovery *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act.

112. In the Court's view, this amounts to an extensive interpretation of the concept of discovery *in flagrante delicto*, expanding the scope of that concept so that judges suspected of belonging to a criminal association are deprived of the judicial protection afforded by Turkish law to members of the judiciary, including the applicant, a judge serving on the Constitutional Court and hence entitled to such protection under Law no. 6216. As a result, in circumstances such as those of the present case, this interpretation negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive.

113. The Court observes that judicial protection of this kind is granted to judges not for their own personal benefit but in order to safeguard the independent exercise of their functions (see paragraph 102 above). As the Government rightly pointed out, such protection does not mean impunity. Its purpose is to ensure that the judicial system in general and its members in particular are not subjected, while discharging their judicial functions, to unlawful restrictions by bodies outside the judiciary, or even by judges performing a supervisory or review function. In this connection, it is important to note that Turkish legislation does not prohibit the detention of a member of the Constitutional Court, provided that the safeguards enshrined in the Constitution and Law no. 6216 are observed. Indeed, judicial immunity may be lifted by the Constitutional Court itself and prosecutions may be brought and preventive measures ordered, such as pre-

trial detention, in accordance with the procedure set out in sections 16 and 17 of that Law.

114. Furthermore, from a reading of the Court of Cassation's judgment of 10 October 2017 (see paragraph 63 above) the Court cannot see how that court's settled case-law concerning the concept of a continuing offence could have justified extending the scope of the concept of discovery *in flagrante delicto*, which relates to the existence of a current criminal act, as provided in Article 2 of the CCP (see paragraph 52 above). It appears from previous judgments of the Court of Cassation that it developed that approach for the purpose of determining the characteristics of continuing offences, the jurisdiction of the criminal courts and the applicability of the rule on limitation periods for prosecution in such cases (see paragraphs 60-62 above).

115. In the light of the foregoing, the Court concludes that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law in the present case are not only problematic in terms of legal certainty (see paragraph 103 above), but also appear manifestly unreasonable.

Accordingly, the applicant's detention, ordered on the basis of Article 100 of the CCP in conditions depriving him of the procedural safeguards afforded to members of the Constitutional Court, did not take place in accordance with a procedure prescribed by law, as required by Article 5 § 1 of the Convention.

(ii) Article 15 of the Convention

116. When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were "strictly required". In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 184, ECHR 2009).

117. The Court observes at the outset that the application in the present case does not strictly involve the measures taken to derogate from the Convention during the state of emergency and mainly concerns the applicant's detention on 20 July 2016 following his arrest on 16 July 2016. It should be noted that during the state of emergency, the Council of Ministers, chaired by the President and acting in accordance with Article 121 of the Constitution, passed thirty-seven legislative decrees (nos. 667-703). The decrees did indeed place significant restrictions on the

procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention (for example, extension of the police custody period, and restrictions on access to case files and on the examination of objections against detention orders; see paragraph 13 above). However, in the present case the applicant was taken into police custody and subsequently into pre-trial detention mainly on suspicion of membership of an armed terrorist organisation, an offence punishable under Article 314 of the Criminal Code. It should be noted in particular that the legislation applicable in his case, namely Article 100 of the CCP and the provisions governing the status of judges at the Constitutional Court, was not amended during the state of emergency. Instead, the measures complained of in the present case were taken on the basis of legislation which was in force prior to and indeed after the declaration of the state of emergency, and which, moreover, is still applicable.

118. The Court considers in this connection that an extensive interpretation of the concept of *in flagrante delicto* can clearly not be regarded as an appropriate response to the state of emergency. Such an interpretation, which, moreover, was not adopted in response to the exigencies of the state of emergency, is not only problematic in terms of the principle of legal certainty, but also, as already noted (see paragraph 112 above), negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive. In addition, it has legal consequences reaching far beyond the legal framework of the state of emergency. Accordingly, it is in no way justified by the special circumstances of the state of emergency.

119. Having regard to the foregoing, the Court finds that the decision to place the applicant in pre-trial detention, which was not taken "in accordance with a procedure prescribed by law", cannot be said to have been strictly required by the exigencies of the situation (see, *mutatis mutandis*, *Mehmet Hasan Altan*, cited above, § 140).

There has therefore been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicant's pre-trial detention.

B. Alleged lack of reasonable suspicion that the applicant committed an offence

1. The parties' submissions

(a) The applicant

120. The applicant submitted that there were no facts or information that could satisfy an objective observer that he had committed the offence of which he was accused. In particular, he argued that at the time when his detention had been ordered by the magistrate, the investigating bodies and the judicial authorities had had no evidence to justify that measure. There

had been scarcely any difference between his situation on 16 July 2016 and on 14 July 2016, the day before the coup attempt. Furthermore, the evidence referred to in the summary report and in the Constitutional Court's judgment had been obtained after he had been placed in pre-trial detention and in any event provided no indication that he had been caught perpetrating criminal acts and/or arrested and detained on reasonable suspicion of having committed an offence.

121. In addition, the applicant disputed the relevance of all the evidence obtained after he had been taken into detention. He argued that the statements by the suspect and the two anonymous witnesses that had been admitted in evidence against him were not such as to justify the suspicion against him, since they mainly involved subjective observations or assessments. As for the digital evidence, he categorically rejected it.

(b) The Government

122. The Government submitted that the FETÖ/PDY organisation was an atypical terrorist organisation which had extensively infiltrated influential State institutions and the judicial system under the guise of lawfulness. It had developed its structure by building its own network across all domains, including the media, trade unions, finance and education. It had also sought to control media outlets in order to ensure that they carried out activities corresponding to its aims, and to that end it had surreptitiously placed its members in media outlets, institutions and organisations not affiliated to it. In that way, the organisation in question had manipulated public opinion in line with its aims, by sending out "subliminal" messages from time to time.

123. With regard to the present case, the Government stated firstly that the order for the applicant's pre-trial detention indicated that there was concrete evidence giving rise to strong suspicion against him. Furthermore, in the summary report issued on 25 October 2017 by the Ankara public prosecutor's office, reference had been made to the statements by anonymous witnesses and suspects, the content of messages exchanged between other individuals via ByLock and information about signals from mobile telephones as evidence showing that the applicant had committed the offence of membership of an armed terrorist organisation.

124. After summarising the contents of the evidence in the file and the Constitutional Court's judgment declaring the applicant's individual application inadmissible, the Government submitted that in view of the very specific circumstances surrounding the coup attempt, the extent to which the FETÖ/PDY organisation had infiltrated the administrative and judicial authorities and the fact that the alleged offence was one of the "catalogue" offences, the applicant's pre-trial detention could be said to have been based on justifiable grounds and proportionate. There had been a risk that individuals involved in the coup attempt and those who had not been

directly involved but had links to the FETÖ/PDY organisation – which had been identified as the instigator of the attempted coup – might abscond, tamper with evidence or take advantage of the disorder that had emerged during or after the coup attempt. Supporting their argument by referring to the position taken by the Constitutional Court (see paragraph 42 above), the Government contended that those circumstances had entailed a higher risk than might arise in what could be described as "normal" circumstances, and it was obvious that the applicant, as a member of the Constitutional Court, might be in an easier position than others to interfere with the evidence.

125. The Government accordingly submitted, taking into account the general context at the time of the order for the applicant's pre-trial detention, the particular circumstances of the case as set out above and the contents of that order, that the grounds for the measure in question could not be said to be devoid of any factual basis, given that the risk of his absconding and tampering with evidence had formed such a basis.

2. The Court's assessment

(a) Relevant principles

126. The Court reiterates that a person may be detained under Article 5 § 1 (c) of the Convention only in the context of criminal proceedings, for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX, and *Mehmet Hasan Altan*, cited above, § 124). The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c).

Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will, however, depend upon all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; and *Mehmet Hasan Altan*, cited above, § 125).

127. The Court further reiterates that Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities have obtained sufficient evidence to bring charges at the time of arrest. The purpose of questioning during detention under Article 5 § 1 (c) is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A,

and *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, § 52, 31 May 2016).

128. The Court's task is to determine whether the conditions laid down in Article 5 § 1 (c) of the Convention, including the pursuit of the prescribed legitimate purpose, have been fulfilled in the case brought before it. In this context it is not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which are better placed to assess the evidence adduced before them (see *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016, and *Mehmet Hasan Altan*, cited above, § 126).

129. As it has consistently held, when assessing the "reasonableness" of a suspicion, the Court must be able to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured. Consequently, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence (see *Fox, Campbell and Hartley*, cited above, § 34 *in fine* ; *O'Hara*, cited above, § 35; and *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 89, 22 May 2014).

130. The Court would also reiterate that the suspicions against a person at the time of his or her arrest must be "reasonable" (see *Fox, Campbell and Hartley*, cited above, § 33). This applies *a fortiori* when a suspect is detained. The reasonable suspicion must exist at the time of the arrest and initial detention (see *Ilgar Mammadov*, cited above, § 90). Furthermore, the requirement for the judge or other judicial officer to give relevant and sufficient reasons in support of detention – in addition to the persistence of reasonable suspicion – already applies at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest (see *Buzadji*, cited above, § 102).

(b) Application of the above principles in the present case

(i) Article 5 § 1 of the Convention

131. In the present case the Court observes that the applicant was taken into police custody on 16 July 2016, the day after the coup attempt, on suspicion of being a member of a terrorist organisation and that he was placed in pre-trial detention on 20 July 2016. It further notes that in a bill of indictment filed on 15 January 2018, the public prosecutor's office at the Court of Cassation sought the applicant's conviction under Article 314 of the Criminal Code for membership of the FETÖ/PDY organisation. On 6 March 2019 he was convicted by the 9th Criminal Division of the Court of Cassation, hearing the case as a first-instance court.

132. The Court takes note of the applicant's position that there were no facts or information that could satisfy an objective observer that he had committed the offence of which he was accused. In particular, the applicant

contended that the evidence referred to by the Government had been obtained a long time after his arrest and initial detention and that as a result, at the time his detention had been ordered, the investigating bodies and the judicial authorities had had no evidence that could justify such a measure.

133. The Court must have regard to all the relevant circumstances in order to determine whether there was any objective information showing that the suspicion against the applicant was "reasonable" at the time of his initial detention. It notes that the Government argued that in view of the very specific circumstances surrounding the coup attempt, the extent to which the FETÖ/PDY organisation had infiltrated the administrative and judicial authorities and the fact that the alleged offence was one of the "catalogue" offences, the applicant's pre-trial detention could be said to have been based on justifiable grounds and proportionate. It observes that the Government also maintained that the order for the applicant's pre-trial detention indicated that there was concrete evidence giving rise to strong suspicion against him. Lastly, it observes that the Government substantiated their arguments by referring to the summary report issued on 25 October 2017 by the Ankara public prosecutor's office.

134. The Court considers that the very specific context of the present case calls for a high level of scrutiny of the facts. In this connection, it is prepared to take into account the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016 (see *Mehmet Hasan Altan*, cited above, § 210).

135. The Government emphasised the atypical nature of the organisation in question – considered by the Turkish courts to have premeditated the coup attempt of 15 July 2016 – and argued that it had extensively infiltrated influential State institutions and the judicial system under the guise of lawfulness (see paragraph 122 above). Such alleged circumstances might mean that the "reasonableness" of the suspicion justifying detention cannot be judged according to the same standards as are applied in dealing with conventional offences (see, for similar reasoning, *Fox, Campbell and Hartley*, cited above, § 32).

136. Nevertheless, in the Court's view the exigencies of dealing with organised crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) of the Convention is impaired (compare *Fox, Campbell and Hartley*, cited above, § 32). The Court's task in the present case is therefore to ascertain whether there were sufficient objective elements at the time of the applicant's initial detention to satisfy an objective observer that he could have committed the offence of which he was accused by the prosecuting authorities. In so doing, it must assess whether the measure in question was justified on the basis of information and facts available at the relevant time which had been submitted to the scrutiny of the judicial authorities that ordered the measure. It should be borne in mind that these considerations

are especially important for members of the judiciary, and in this instance the applicant, a member of the Constitutional Court at the time he was placed in pre-trial detention (see paragraph 102 above).

137. The Court notes that in examining the measure in issue, the Constitutional Court, after describing the characteristics of the FETÖ/PDY organisation and its covert structure within the judiciary, referred to the following items of evidence against the applicant: the statements by two anonymous witnesses; the statements by a former rapporteur of the Constitutional Court accused of belonging to the FETÖ/PDY organisation; the messages exchanged via ByLock and other facts (relating to information about telephone lines and records of journeys abroad) (see paragraphs 32-40 above).

138. It should be noted, however, that these items of evidence were gathered long after the applicant's initial detention. The first item to be obtained, namely the statement by an anonymous witness accusing the applicant of being a member of the FETÖ/PDY organisation, was recorded on 4 August 2016, more than two weeks after the applicant had been placed in pre-trial detention. The other statements and evidence were obtained a considerable time afterwards. The applicant repeatedly drew the national courts' attention to this fact, arguing in particular that there was no concrete evidence that could justify his pre-trial detention (see paragraphs 19, 22 and 29 above), and he also reiterated that argument before the Court. However, in the reasoning that led it to dismiss the applicant's application, the Constitutional Court did not address that argument. Likewise, the Government remained silent on the matter and did not submit any specific argument to counter the applicant's assertion on that point, even though an examination of the various items of evidence made available to the Court bears out his contentions.

139. Accordingly, unlike the Constitutional Court (see paragraph 42 above), the Court considers that it is not necessary to examine these items of evidence, which were obtained long after the applicant's initial detention, to ascertain whether the suspicion grounding the order for his detention was "reasonable". It should be noted in this connection that in the context of the present case, the Court's task is to examine whether the applicant's initial detention on 20 July 2016 was based on reasonable suspicion, and not whether such suspicion persisted during his ongoing detention. In accordance with the Court's consistent approach to this matter, although the subsequent gathering of evidence in relation to the charge against the applicant could have reinforced a suspicion linking him to the commission of terrorist-type offences, it could not have formed the sole basis of a suspicion justifying his initial detention (see, to similar effect, *Fox, Campbell and Hartley*, cited above, § 35). In any event, the Court considers that the subsequent gathering of such evidence does not release the national authorities from their obligation to provide a sufficient factual

basis that could justify an applicant's detention. To conclude otherwise would defeat the purpose of Article 5 of the Convention, namely to prevent arbitrary or unjustified deprivations of liberty.

140. The Court observes that the applicant was clearly not suspected of having been involved in the events of 15 July 2016. Admittedly, on 16 July 2016, the day after the coup attempt, the Ankara public prosecutor's office issued instructions describing the applicant as a member of the FETÖ/PDY terrorist organisation and calling for his pre-trial detention (see paragraph 16 above). However, the Government have not produced any "facts" or "information" capable of serving as a factual basis for these instructions by the prosecutor's office.

141. The fact that, before being placed in pre-trial detention, the applicant was questioned on 20 July 2016 in connection with an offence of membership of an illegal organisation reveals, at most, that the police genuinely suspected him of having committed that offence; but that fact alone would not satisfy an objective observer that the applicant could have committed the offence in question.

142. In particular, the Court notes that it does not appear from the order by the magistrate for the applicant's detention that that measure was based on any factual evidence indicating the existence of a strong suspicion, such as witness statements, or any other fact or information giving cause to suspect the applicant of having committed the offence in question (see paragraph 20 above). Admittedly, the magistrate sought to justify his decision by referring to Article 100 of the CCP and to the evidence in the file. However, he simply cited the wording of the provision in question and listed the material in the file (namely the evidence as it stood, the records included in the file, the decisions of 17 July 2016 by the presidents' offices at the Court of Cassation and the Supreme Administrative Court, the reports on searches and seizures and the entire contents of the case file), without taking the trouble to specify the individual items in question, even though they concerned not only the applicant but also thirteen other suspects. In the Court's view, the vague and general references to the wording of Article 100 of the CCP and to the evidence in the file cannot be regarded as sufficient to justify the "reasonableness" of the suspicion on which the applicant's detention was supposed to have been based, in the absence either of a specific assessment of the individual items of evidence in the file, or of any information that could have justified the suspicion against the applicant, or of any other kinds of verifiable material or facts (see, *mutatis mutandis*, *Lazoroski v. the former Yugoslav Republic of Macedonia*, no. 4922/04, § 48, 8 October 2009, and *Ilgar Mammadov*, cited above, § 97).

143. For the reasons set out above, the Court considers that no specific facts or information giving rise to a suspicion justifying the applicant's detention were mentioned or produced during the initial proceedings, which

nevertheless concluded with the adoption of such a measure in respect of him.

144. The Court is mindful of the fact that the applicant's case has been taken to trial. It notes, however, that the complaint before it relates solely to his initial detention. Moreover, it would emphasise that the fact that he has been convicted by the Court of Cassation, hearing the case as a first-instance court (see paragraph 44 above), has no bearing on its conclusions concerning this complaint, in the examination of which it is called upon to determine whether the measure in issue was justified in the light of the facts and information available at the relevant time, that is, on 20 July 2016.

145. In view of its above analysis, the Court considers that the evidence before it is insufficient to support the conclusion that there was a reasonable suspicion against the applicant at the time of his initial detention. Since the Government have not provided any other indications, "facts" or "information" capable of satisfying it that there was a "reasonable suspicion", at the time of the applicant's initial detention, that he had committed the alleged offence, it finds that their explanations do not meet the requirements of Article 5 § 1 (c) regarding the "reasonableness" of a suspicion justifying an individual's detention.

(ii) Article 15 of the Convention

146. As regards the notion of "reasonableness" of the suspicion on which arrest or detention must be based during the state of emergency, the Court observes that the Constitutional Court has already examined the applicability of Article 15 of the Turkish Constitution to a detention order whose lawfulness had been challenged. It held, in particular, that the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence (see paragraph 64 above). This conclusion is also valid for the Court's examination (see *Mehmet Hasan Altan*, cited above, § 140).

147. Furthermore, as already noted (see paragraph 135 above), the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016 are undoubtedly a contextual factor which the Court must fully take into account in interpreting and applying Article 5 of the Convention in the present case. Indeed, this consideration played a significant role in the Court's analysis above (see paragraphs 134-36 and 140 above). This does not mean, however, that the authorities have carte blanche under Article 5 to order the detention of an individual during the state of emergency without any verifiable evidence or information or without a sufficient factual basis satisfying the minimum requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion. After all, the "reasonableness" of the suspicion on which deprivation of liberty must be based forms an essential

part of the safeguard laid down in Article 5 § 1 (c) (see, *mutatis mutandis*, *O'Hara*, cited above, § 34).

148. More specifically, concerning the order for the applicant's pre-trial detention on 20 July 2016, the Court notes that it has found that the evidence before it is insufficient to support the conclusion that there was a reasonable suspicion against the applicant at the time of his initial detention (see paragraph 145 above). That being so, the suspicion against him at that time did not reach the required minimum level of reasonableness. Although it was imposed under judicial supervision, the detention order was based on a mere suspicion of membership of a criminal organisation. Such a degree of suspicion cannot be sufficient to justify an order for a person's detention. In these circumstances, the measure in issue cannot be said to have been strictly required by the exigencies of the situation. To conclude otherwise would negate the minimum requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion justifying deprivation of liberty and would defeat the purpose of Article 5 of the Convention.

In the Court's view, these considerations are especially important in the present case, given that it involves the detention of a judge serving on a high-level court, in this instance the Constitutional Court.

149. The Court therefore concludes that there has been a violation of Article 5 § 1 of the Convention in the present case on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence.

C. Alleged lack of reasons for the order for the applicant's pre-trial detention

150. Having regard to its finding under Article 5 § 1 of the Convention (see paragraph 149 above), the Court considers that it is unnecessary to examine whether in the present case the authorities satisfied their requirement to give relevant and sufficient reasons for detention – in addition to the persistence of reasonable suspicion that the arrested person had committed an offence – from the time of the first decision ordering pre-trial detention, that is to say "promptly" after the arrest.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

151. Article 41 of the Convention provides:

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

A. Damage and costs and expenses

152. The applicant alleged that he had sustained pecuniary damage corresponding to the wages he would have received as a judge had he not been dismissed, and to the loss of earnings resulting from restrictions to his civic rights. He claimed 1,000,000 euros (EUR) on that account. In addition, he sought an award of EUR 200,000 in respect of non-pecuniary damage. He also claimed EUR 9,500 in respect of costs and expenses incurred before the Court, without producing any supporting documents.

153. The Government contested those claims.

154. The Court observes that this judgment concerns the applicant's initial pre-trial detention, and not his dismissal as ordered on 4 August 2016. Accordingly, it cannot discern a causal link between the violation it has found and the pecuniary damage alleged, and rejects the applicant's claim under that head.

155. As regards non-pecuniary damage, the Court observes that it has found that the applicant, a judge serving on the Constitutional Court at the material time, was placed in pre-trial detention without being afforded the protection available under Turkish legislation and in the absence of reasonable suspicion, at the time of his initial detention, that he had committed an offence. On that account, it considers that he must have sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. It therefore awards the applicant the sum of EUR 10,000 in respect of non-pecuniary damage.

156. As regards the claim in respect of costs and expenses, the Court reiterates that an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. It reiterates in addition that Rule 60 §§ 2 and 3 of the Rules of Court requires the applicant to submit itemised particulars of all claims, together with any relevant supporting documents, failing which the Court may reject the claims in whole or in part. In the present case, seeing that the applicant did not produce any documents in support of his claim, the Court decides to reject it in its entirety (see *Paksas v. Lithuania* [GC], no. 34932/04, § 122, ECHR 2011 (extracts)).

B. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaints concerning the lawfulness of the applicant's initial pre-trial detention, the alleged lack of reasonable suspicion that he had committed an offence and the alleged failure to provide reasons for his detention admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicant's initial pre-trial detention;

3. *Holds*, by six votes to one, that there has been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence;

4. *Holds*, unanimously, that there is no need to examine the complaint under Article 5 §§ 1 (c) and 3 of the Convention as to the alleged failure to provide reasons for the applicant's pre-trial detention;

5. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the sum of EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 16 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President

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

R.S
S.H.N

PARTLY DISSENTING OPINION OF JUDGE MERT

1. I respectfully dissent from the majority's finding that there has been a violation of Article 5 § 1 and Article 5 § 1 (c) of the Convention in the present case on account of the unlawfulness of the applicant's pre-trial detention and the lack of reasonable suspicion, at the time of his initial pre-trial detention, that he had committed an offence.

I

2. The majority conclude that there has been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicant's initial pre-trial detention.

3. The applicant was arrested on 16 July 2016, immediately after the coup attempt, and was taken into police custody on the same day. He was placed in pre-trial detention on 20 July 2016 on suspicion of being a member of the FETÖ/PDY armed terrorist organisation, which is regarded as the instigator of the 15 July 2016 coup attempt.

4. The applicant claimed that under section 16 of Law no. 6216, the opening of a criminal investigation in respect of members of the Constitutional Court was subject to a decision by the plenary court, and that since he was accused of being a member of a terrorist organisation, there could not be a case of *in flagrante delicto*. The first subsection of section 16 of Law no. 6216 reads as follows:

> "The opening of an investigation in respect of the President and members [of the Constitutional Court] for offences allegedly committed in connection with or during the performance of their official duties, ordinary offences and disciplinary offences shall be subject to a decision by the plenary court. However, in cases of discovery *in flagrante delicto* falling within the jurisdiction of the assize courts, the investigation shall be conducted in accordance with the rules of ordinary law."

5. The applicant's argument that he was entitled to the status granted to members of the Constitutional Court by Law no. 6216 was not accepted by the magistrate who ordered his pre-trial detention. The magistrate found that the criminal investigation was governed by the rules of ordinary law, on the grounds that the suspect's alleged offence – membership of an armed terrorist organisation – was a "continuing offence" and that there had been a case of discovery *in flagrante delicto*.

6. This decision was based on the settled case-law of the Court of Cassation to the effect that the offence of membership of an armed organisation is a "continuing offence" falling within the jurisdiction of the assize courts. The magistrate had also taken into account the state of the evidence and other circumstances in his decision (see paragraph 20 of the judgment).

7. The plenary criminal divisions of the Court of Cassation subsequently confirmed the above-mentioned settled case-law in their leading decision of 10 October 2017, by accepting that "there is a situation of discovery *in flagrante delicto* at the time of the arrest of judges suspected of the offence of membership of an armed organisation, and [consequently] the investigation must be carried out in accordance with the provisions of ordinary law" (see paragraph 63 of the judgment).

8. The majority criticise the case-law of the Court of Cassation as amounting to an "extensive interpretation" of the concept of discovery *in flagranto delicto*, which negates the procedural safeguards that members of the judiciary are afforded in order to protect them from interference by the executive. According to the majority, Article 2 of the Code of Criminal Procedure (CCP) provides a conventional definition of the concept of *in flagrante delicto*, but the interpretation by the domestic courts in their case-law was contrary to the wording of the applicable law (see paragraphs 111 and 112 of the judgment).

9. Cases of discovery *in flagrante delicto* are defined in Article 2 of the CCP as follows:

> "...
>
> (j) the following shall be classified as cases of discovery *in flagrante delicto*:
>
> 1. an offence in the process of being committed;
>
> 2. an offence that has just been committed, and an offence committed by an individual who has been pursued immediately after carrying out the act and has been apprehended by the police, the victim or other individuals;
>
> 3. an offence committed by an individual who has been apprehended in possession of items or evidence indicating that the act was carried out very recently.
>
> ..."

10. As can be seen, there are three different cases of discovery *in flagrante delicto* set forth in the CCP. The situation of the applicant falls into the first category of these cases, as is apparent from the case-law of the Court of Cassation. Since the offence of membership of a terrorist organisation is a "continuing" offence, it is considered to be "an offence in the process of being committed".

11. In other words, as established in the Court of Cassation's case-law and by legal scholars, joining a criminal organisation, affiliation with it and subordination to the hierarchical power prevailing in the organisation are regarded as constituting membership of an organisation. Joining an organisation is also possible on the basis of unilateral will, and the consent of the executives of the organisation is not necessary. The offence of membership of a terrorist organisation is unlike offences such as murder and theft, which are committed through an act confined to a certain amount of time and completed upon the commission of that act. For this reason,

membership of an organisation continues to be committed as long as the organisation itself and the affiliation with its hierarchical structure continue to exist.

12. In the framework of the definition of discovery *in flagrante delicto* under Article 2 (j-1) of the CCP, as long as a person knowingly and willingly remains a member of a terrorist organisation, the continuous character persists and the offence is considered to be a continuing offence. Therefore, in consideration of this explanation, it can be said that the Court of Cassation's interpretation of the concept of discovery *in flagranto delicto* in its case-law is in conformity with Article 2 of the CCP.

13. On the other hand, the Court says that "... according to the case-law of the Court of Cassation ..., a suspicion – within the meaning of Article 100 of the CCP – of membership of a criminal organisation may be sufficient to characterise a case of discovery *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act" (see paragraph 111 of the judgment). The judgment also states that "In the Court's view, the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law in the present case ... appear manifestly unreasonable" (see paragraph 115).

14. I think that there is a misinterpretation by the Court on this point. The key aspect here is that a distinction should be drawn between the procedural provisions on pre-trial detention for an offence and the level of proof required for such detention. From this point of view, the case-law of the Court of Cassation lays down the principle that membership of a criminal organisation is a continuing offence, which is being committed throughout membership. The case-law does not say that there is no need to establish any evidence or indication of an offence that is being committed. The presence of a factual basis in relation to a continuing offence is another issue, to be considered separately.

15. The applicant's argument that his pre-trial detention was not "in accordance with a procedure prescribed by law" was also raised before the Constitutional Court, and following a detailed analysis, that court held, with reference to the case-law of the Court of Cassation, that the measure in question, ordered in accordance with the rules of ordinary law, had complied with the relevant legislation.

16. For these reasons, in my view, the interpretation by the Court of Cassation and the application by the national courts of the concept of discovery *in flagrante delicto* have a reasonable legal basis.

17. When evaluating this issue, we also need to fully take into account the severity of the threat to Turkey which has been posed by the 15 July 2016 coup attempt. In addition, it is crucial to keep in mind the *sui generis* covert structure of the FETÖ/PDY organisation, which had extensively infiltrated influential State institutions and the judiciary under the guise of lawfulness (for general information on the events that occurred during the

coup attempt and the aim and structure of the FETÖ/PDY organisation, see paragraphs 11-15 and 18 of the partly dissenting opinion of Judge Ergül in *Mehmet Hasan Altan v. Turkey,* no. 13237/17, 20 March 2018). Likewise, the applicant's complaints should be assessed in the light of the notice of derogation given on 21 July 2016 under Article 15 of the Convention, a day after the Government had declared a state of emergency.

18. In this regard, I agree with the findings expressed in the judgment that "the attempted military coup had disclosed the existence of a 'public emergency threatening the life of the nation' within the meaning of the Convention" (see paragraph 73) and that "In any event, the Court observes that the applicant's detention ... occurred a very short time after the attempted coup – the event that prompted the declaration of a state of emergency ... This is undoubtedly a contextual factor that should be fully taken into account in interpreting and applying Article 5 of the Convention in the present case" (see paragraph 75). However, I regret to say that the judgment has not sufficiently taken into consideration the specific circumstances which Turkey experienced immediately after the coup attempt, and the notice of derogation.

19. Of course, the judiciary has a special role in a democratic society (see paragraph 102 of the judgment) and it is necessary to fully respect the independence of judges. Nevertheless, when considering this matter, it is essential to keep in mind the unlawful aims of the FETÖ/PDY organisation and its covert structure in the judiciary, including the Constitutional Court. It is well known that members of this terrorist organisation within the judiciary acted only in accordance with the demands of the organisation and irrespective of any legal principles or rules. Accordingly, abusing judicial powers and safeguards – granted to members of the judiciary in order to exercise their functions independently and impartially – by acting under the instructions of a terrorist organisation should not give rise to a broadly interpreted form of legal protection.

20. As mentioned in the judgment, "It is well established in the Court's case-law on Article 5 § 1 of the Convention that ... where the 'lawfulness' of detention is in issue, ... the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof" (see paragraph 101). In the present case, the investigation in respect of the applicant was conducted in accordance with the rules of ordinary law, pursuant to section 16(1) of Law no. 6216, since there had been a case of discovery *in flagrante delicto* falling within the jurisdiction of the assize courts; the pre-trial detention order was given by the competent judge; and the conditions for detention set forth in Article 100 of the CCP were satisfied. The judicial practice applied was in conformity with the substantive and procedural rules of Turkish law. Also, the relevant legislation – *as outlined in paragraphs 45-57 of the judgment* – was foreseeable and there was no problem in terms of the principle of legal

certainty. So, under these circumstances, I can say that the order for the applicant's pre-trial detention was not arbitrary and was made "in accordance with a procedure prescribed by law".

21. Therefore, I disagree with the conclusion in the judgment that there has been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicant's pre-trial detention.

II

22. The majority conclude that there has been a violation of Article 5 § 1 (c) of the Convention on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence.

23. It can be seen that the competent magistrate detained the applicant because of the indication of a strong suspicion that he was a member of a terrorist organisation, with reference to Article 100 of the CCP and the evidence in the file. In addition to other documents, he especially referred to the reports on searches and seizures in the file. The magistrate also indicated that there was a risk that individuals who had links to the FETÖ/PDY organisation might abscond, tamper with evidence or take advantage of the disorder that had emerged after the coup attempt.

24. The aforesaid reports of the searches and seizures dated 16 July 2016, the day on which the applicant was arrested, mention that there was a list of members of the Constitutional Court (known by the authorities to be) linked to the FETÖ/PDY organisation. It is understood that the applicant's name was on that list. On the basis of this information and other evidence, appropriate steps were taken by the competent judicial authorities.

25. As specified in the judgment, "Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities have obtained sufficient evidence to bring charges at the time of arrest. The purpose of questioning during detention ... is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion at the initial stage need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation" (see paragraph 127). In other words, "the standard of proof required for making an arrest [and ordering pre-trial detention] is lower than that required for a criminal charge and subsequently a conviction" (see B. Rainey, E. Wicks, and C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights,* 7th edition, 2017, p. 246).

26. Such an approach would provide relevant justification that the factual basis was sufficient for pre-trial detention in the present case. As a matter of fact, the evidence assessed by the authorities during the investigation, such as the witness statements, ByLock messages and other

facts, confirmed the initial suspicion that the applicant had committed the alleged offence. As a consequence of the trial before the Court of Cassation, the applicant was sentenced to eleven years and three months' imprisonment on 6 March 2019 for the offence of membership of an armed terrorist organisation.

27. In this context, due consideration should also be given to the above-mentioned specific circumstances of the coup attempt, the illegal activities of the FETÖ/PDY organisation, and the notice of derogation. On this point, the observation that "such ... circumstances might mean that the 'reasonableness' of the suspicion justifying detention cannot be judged according to the same standards as are applied in dealing with conventional offences" (see paragraph 135 of the judgment) is highly valid. In other words, in the case of fighting against terrorism, especially in extraordinary times, the level of "reasonable suspicion" needs to be lower than for ordinary offences.

28. The Court, in principle, "considers that the very specific context of the present case calls for a high level of scrutiny of the facts. In this connection, it is prepared to take into account the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016" (see paragraph 134 of the judgment). However, I cannot see that the relevant circumstances have been considered thoroughly in the judgment in the present case.

29. On the other hand, following the individual application lodged by the applicant, the evidence and the special circumstances of this case were assessed in detail by the Constitutional Court in its decision. It observed that "in view of the very specific circumstances surrounding the attempted coup, the extent to which the FETÖ/PDY organisation had infiltrated the administrative and judicial authorities and the fact that the alleged offence was among the so-called 'catalogue' offences, the order for the applicant's pre-trial detention could be said to have been based on justifiable grounds and proportionate" (see paragraph 42 of the judgment). In the Constitutional Court's view, "there was a risk that individuals involved in the coup attempt and those who had not been directly involved but had links to the FETÖ/PDY organisation – which was identified as the instigator of the attempted coup – might abscond, tamper with evidence or take advantage of the disorder that had emerged during or after the coup attempt ... These particular circumstances entailed a higher risk than might arise in what could be described as 'normal' circumstances ... It was obvious that the applicant, as a member of that court himself, might be in an easier position than others to interfere with the evidence" (ibid.).

30. In my opinion, the findings in the decision of the Constitutional Court are more relevant to the present case. In the light of the explanations above, it cannot be said that there was a lack of reasonable suspicion at the time of the applicant's pre-trial detention.

31. Therefore, I do not subscribe to the conclusion in the judgment that there has been a violation of Article 5 § 1 (c) of the Convention.