



Detention of Alparslan Altan, a judge at the Turkish Constitutional Court, was unlawful and in breach of the Convention

In today's Chamber judgment¹ in the case of [Alparslan Altan v. Turkey](#) (application no. 12778/17) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights on account of the unlawfulness of the applicant's initial pre-trial detention, and

a violation of Article 5 § 1 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.

The case concerned the detention of a Turkish Constitutional Court judge following the attempted coup of 15 July 2016.

Mr Altan was deprived of his liberty primarily on suspicion of membership of an armed terrorist organisation, FETÖ/PDY. The Constitutional Court found that this constituted the factual and legal basis for a case of discovery *in flagrante delicto*. In a judgment adopted on 10 October 2017 the Court of Cassation had held that a situation of discovery *in flagrante delicto* arose at the time of a judge's arrest on suspicion of membership of an armed organisation. The Court found that this extension by the courts of the scope of the concept of *in flagrante delicto* meant that Mr Altan could not have known that the fact of being suspected of membership of a criminal organisation was sufficient to deprive him of the procedural safeguards afforded to Constitutional Court members.

Regarding the order for Mr Altan's pre-trial detention on 20 July 2016, the Court found that the evidence before it did not support the conclusion that there had been a reasonable suspicion at the time of his initial detention. That being so, the suspicion against him at that time had not reached the minimum level of "reasonableness" required by Article 5 § 1 (c). Although it had been imposed under judicial supervision, the detention order had been based on a mere suspicion of membership of a criminal organisation, independently of any pending criminal proceedings. Such a degree of suspicion could not be sufficient to justify an order for the detention of a judge serving on a high-level court, in this instance the Constitutional Court.

The Court also observed that the measures taken against the applicant could not be said to have been strictly required by the exigencies of the situation for the purposes of Article 15 (derogation in time of emergency) of the Convention.

Principal facts

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

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 Parliament, Government and President of Turkey. The day after the coup attempt,

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

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

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.

On 20 July 2016 the Government declared a state of emergency. 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.

The Government stated that during and after the coup attempt, the prosecuting authorities had initiated criminal investigations in respect of individuals involved in the attempt and others who had links to the FETÖ/PDY organisation, including members of the judiciary. On 16 July 2016 some 3,000 judges and prosecutors, including two judges of the Constitutional Court and more than 160 judges of the Court of Cassation and the Supreme Administrative Court, were taken into police custody and subsequently placed in pre-trial detention. In addition, warrants were issued for the arrest of 30 judges of the highest courts who were deemed to be fugitives.

The state of emergency was lifted on 18 July 2018.

On 16 July 2016, in the course of a criminal investigation opened by the Ankara public prosecutor's office, Mr Altan was arrested and taken into police custody on the instructions of the same office, which described him as a member of the FETÖ/PDY organisation and urged that he be placed in pre-trial detention.

On 20 July 2016 Mr Altan, together with 13 other suspects, appeared before a magistrate on suspicion of attempting to overthrow the constitutional order and being members of the FETÖ/PDY organisation. Mr Altan denied all the accusations against him. On the same day, the magistrate ordered the pre-trial detention of Mr Altan and the other suspects. Mr Altan immediately lodged an objection against the order for his pre-trial detention, arguing that there was no concrete evidence that could justify his detention, and that such a measure did not comply with domestic law. He asked for alternative measures to be applied on the grounds that his son was severely disabled and dependent on his personal assistance.

On 4 August 2016 the Constitutional Court, meeting in plenary session, dismissed Mr Altan from his post. It found, on the basis of Article 3 of Legislative Decree no. 667, that “information from the social environment” and the “common opinion emerging over time” among members of the Constitutional Court suggested that he had links to the organisation in question and was no longer fit to practise his profession.

On 9 August 2016 the magistrate dismissed Mr Altan’s objection against the order for his detention. Mr Altan made several applications for release on bail, which were refused by the competent magistrates. On several occasions the Criminal Division of the Court of Cassation reviewed whether it was necessary to keep him in pre-trial detention and ordered the extension of that measure.

On 7 September 2016 Mr Altan lodged an individual application with the Constitutional Court.

On 11 January 2018 the Constitutional Court gave judgment, finding that the accusation had been based on statements by anonymous witnesses and a suspect, messages exchanged via the ByLock messaging service and mobile telephone signals. Addressing the complaint about the lawfulness of Mr Altan’s initial detention, it held that this issue should be examined under Article 15 of the Constitution, by which, in a state of 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 could be taken. As to the merits of the complaint, it noted that the alleged offence – membership of an armed terrorist organisation – was an ordinary offence punishable by a heavy sentence and falling within the jurisdiction of the assize courts. The

Constitutional Court also observed that, in view of the very specific circumstances surrounding the attempted coup and the extent to which FETÖ/PDY had infiltrated the administrative and judicial authorities, the order for Mr Altan's pre-trial detention could be said to have been proportionate and based on justifiable grounds.

On 15 January 2018 the public prosecutor's office at the Court of Cassation filed a bill of indictment in respect of Mr Altan, charging him in particular, under Article 314 of the Criminal Code, with being a member of an armed terrorist organisation, namely FETÖ/PDY.

In a summary judgment of 6 March 2019 the 9th Criminal Division of the Court of Cassation sentenced Mr Altan to 11 years and three months' imprisonment for membership of an armed terrorist organisation. Two further individual applications lodged by Mr Altan with the Constitutional Court are currently pending.

Complaints, procedure and composition of the Court

The applicant complained that he had been arbitrarily placed in pre-trial detention, in breach of domestic law, namely Law no. 6216. He 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. 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 considered it appropriate to examine these complaints under Article 5 §§ 1 and 3 (right to liberty and security) of the Convention.

The application was lodged with the European Court of Human Rights on 16 January 2017.

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

Robert Spano (Iceland), *President*,
Paul Lemmens (Belgium),
Julia Laffranque (Estonia),
Ivana Jelić (Montenegro),
Arnfinn Bårdsen (Norway),
Darian Pavli (Albania), and
Harun Mert (Turkey), *ad hoc judge*,

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

Article 5 §§ 1 and 3

Lawfulness of the applicant's pre-trial detention

The Court observed that it had not been alleged that Mr Altan had been 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, had also mentioned the offence of attempting to overthrow the constitutional order. The latter offence had not been taken into consideration by the magistrate who had subsequently questioned Mr Altan and ordered his pre-trial detention.

The applicant had therefore been deprived of his liberty primarily on suspicion of membership of FETÖ/PDY, considered by the investigating authorities and the Turkish courts to be an armed terrorist organisation that had planned the attempted coup.

The Constitutional Court found that this constituted the factual and legal basis for the finding by the investigating authorities that there had been a case of discovery *in flagrante delicto*.

The Court noted that in its leading judgment adopted on 10 October 2017, the Court of Cassation had held that a situation of discovery *in flagrante delicto* arose when a judge was arrested on suspicion of the offence of membership of an armed organisation. The leading judgment indicated that in cases involving an alleged offence of membership of a criminal organisation, it was sufficient that the conditions laid down in Article 100 of the Code of Criminal Procedure (CCP) were satisfied in order for a suspect who was a member of the judiciary to be placed in pre-trial detention on the grounds that there was a case of discovery *in flagrante delicto*.

The Court observed, however, that Article 2 of the CCP provided a conventional definition of the concept of *in flagrante delicto*, linked to the discovery of an offence while it was being committed or immediately afterwards. Yet according to the above-mentioned precedent of the Court of Cassation, a suspicion of membership of a criminal organisation could 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. Furthermore, from a reading of the Court of Cassation's judgment of 10 October 2017 it was not clear 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 related to the existence of a current criminal act, as provided in Article 2 of the CCP. In the Court's view, the national courts' extension of the scope of that concept and their application of domestic law in the present case were not only problematic in terms of the principle of legal certainty, but also appeared 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, had not taken place in accordance with a procedure prescribed by law, as required by Article 5 § 1.

The Court found that an extensive interpretation of the concept of *in flagrante delicto* could clearly not be regarded as an appropriate response to the state of emergency. Such an interpretation, which, moreover, had not been adopted in response to the exigencies of the state of emergency, was not only problematic in terms of the principle of legal certainty, but also negated the procedural safeguards which members of the judiciary were afforded in order to protect them from interference by the executive. It had legal consequences reaching far beyond the context of the state of emergency, and was in no way justified by the special circumstances arising in that context.

The Court concluded that the decision to place the applicant in pre-trial detention, which had not been taken "in accordance with a procedure prescribed by law", could not be said to have been strictly required by the exigencies of the situation.

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

Alleged lack of reasonable suspicion that the applicant had committed an offence

The Court had to have regard to all the relevant circumstances in order to determine whether there had been any objective information showing that the suspicion against the applicant had been "reasonable" at the time of his initial detention.

The Court found that the very specific context of the case called for a high level of scrutiny of the facts. It took into account the difficulties facing Turkey in the aftermath of the attempted military coup and accepted that the coup attempt had posed a major threat to democracy in Turkey. The Government had 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. In the Court's view, such alleged circumstances might mean that the "reasonableness" of

the suspicion justifying detention could not be judged according to the same standards as were applied in dealing with conventional offences.

Nevertheless, the exigencies of dealing with organised crime could not justify stretching the notion of “reasonableness” to the point where the essence of the safeguard secured by Article 5 § 1 (c) of the Convention was impaired. The Court’s task in the present case was to ascertain whether there had been sufficient objective elements at the time of Mr Altan’s initial detention to satisfy an objective observer that he could have committed the offence of which he had been accused by the prosecuting authorities. In so doing, it had to assess whether the measure in question had been justified on the basis of the facts and information available at the relevant time that had been submitted to the scrutiny of the judicial authorities ordering the measure.

The Court noted that after describing the characteristics of the FETÖ/PDY organisation and its covert structure within the judiciary, the Constitutional Court had referred to the statements of two anonymous witnesses; statements by a former rapporteur of the Constitutional Court accused of belonging to FETÖ/PDY; messages exchanged via ByLock between other individuals; information about telephone lines; and records of journeys abroad. These items of evidence had been gathered long after the applicant’s initial detention. The first item to be obtained had been recorded on 4 August 2016, more than two weeks after the applicant had been placed in pre-trial detention. The other statements and evidence had been obtained a considerable time afterwards. The applicant had repeatedly drawn the national courts’ attention to that fact, arguing in particular that there had been no concrete evidence that could have justified his detention. However, in the reasoning that had led it to dismiss Mr Altan’s application, the Constitutional Court had not addressed that argument. Likewise, the Government had remained silent on the matter.

Accordingly, unlike the Constitutional Court, the Court did not consider it necessary to examine these items of evidence, which had been obtained long after the applicant’s initial detention, to ascertain whether the suspicion grounding the detention order had been “reasonable”. It had to be borne in mind that the Court’s task was to examine whether Mr Altan’s initial detention on 20 July 2016 had been based on a reasonable suspicion, and not whether such a suspicion had persisted during his ongoing detention.

In any event, the Court considered that the subsequent gathering of evidence did 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 deprivation of liberty.

The Court observed that Mr Altan had clearly not been suspected of having been involved in the events of 15 July 2016. On 16 July 2016 the Ankara public prosecutor’s office had issued instructions describing him as a member of the FETÖ/PDY terrorist organisation and calling for his pre-trial detention; however, the Government had not produced any facts or information capable of serving as a factual basis for the prosecutor’s instructions.

In particular, the Court noted that it did not appear from the order by the magistrate for the applicant’s detention that that measure had been 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. In the Court’s view, the magistrate’s vague and general references to the wording of Article 100 of the CCP and to the evidence in the file could not be viewed as sufficient to justify the “reasonableness” of the suspicion on which the detention order 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.

The Court thus found that no specific facts or information giving rise to a suspicion justifying Mr Altan's detention had been mentioned or produced during the initial proceedings, which had nevertheless concluded with the order for his pre-trial detention.

On the basis of the above analysis, the Court held that the evidence before it was insufficient to support the conclusion that there had been a reasonable suspicion against the applicant at the time of his initial detention. It found that the Government's explanations did not meet the requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion justifying an individual's detention.

As regards the notion of "reasonableness" of the suspicion on which arrest or detention had to be based during the state of emergency, the Court observed that the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016 were undoubtedly a contextual factor which had to be fully taken into account in interpreting and applying Article 5 of the Convention in the present case. This did not mean, however, that the authorities had *carte blanche* under Article 5 to order an individual's detention 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 had to be based formed an essential part of the safeguard laid down in Article 5 § 1 (c).

Concerning the order for the applicant's pre-trial detention on 20 July 2016, the Court observed that it had been based on a mere suspicion of membership of a criminal organisation, although it had been imposed under judicial supervision. Such a degree of suspicion could not be sufficient to justify an order for a person's detention. In such circumstances, the measure in issue could not 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. Moreover, the Court found these considerations to be especially important in the present case, given that it involved the detention of a judge serving on a high-level court, namely the Constitutional Court.

The Court therefore concluded that there had been a violation of Article 5 § 1 on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed the offence in question. Having regard to that finding, the Court considered that it was unnecessary to examine whether the authorities had satisfied the requirement to give relevant and sufficient reasons for depriving the applicant of his liberty.

Just satisfaction (Article 41)

The Court held that Turkey was to pay the applicant 10,000 euros in respect of non-pecuniary damage.

Separate opinion

Judge Mert expressed a partly dissenting opinion. The opinion is annexed to the judgment.

The judgment is available in English and French.

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