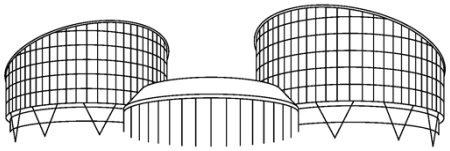

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BAŞ v. TURKEY

(Application no. 66448/17)

JUDGMENT

Art 5 § 1 • Procedure prescribed by law • Pre-trial detention of a judge on the basis of an unreasonable extension of the concept of *in flagrante delicto* • Negation of procedural safeguards afforded to judges
Art 5 § 1 (c) • Reasonable suspicion • Detention based on mere suspicion of membership of an illegal organisation, without any specific incriminating evidence
Art 5 § 4 • Speediness of review • Detainee yet to be charged not given a hearing before a court throughout investigation lasting approximately one year and two months
Art 15 • Derogation in time of emergency • not "strictly required"

STRASBOURG

3 March 2020

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 Baş v. Turkey,

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

Robert Spano, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Saadet Yüksel, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 28 January 2020,

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

PROCEDURE

1. The case originated in an application (no. 66448/17) 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 Hakan Baş ("the applicant"), on 30 January 2017.

2. The applicant was represented by Mr A. Benlahcen, a lawyer practising in Paris. 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 §§ 1 and 3 of the Convention and that the proceedings concerning his objections against his detention had not satisfied the requirements of Article 5 § 4 of the Convention.

4. On 19 June 2018 the Government were given notice of the complaints concerning Article 5 §§ 1, 3 and 4 of the Convention and the remainder of the application was declared inadmissible. The applicant and the Government each filed observations on the admissibility and merits of the case. In addition, third-party comments were received from the International Commission of Jurists (ICJ), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and lives in Kocaeli.

A. Background to the case

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

6. 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 National Assembly, government and President of Turkey.

7. During the coup attempt, the instigators, using fighter planes and helicopters, bombarded several strategic State buildings, including the National Assembly building and the presidential compound, as well as the police special operations command and the secret services headquarters, attacked the hotel where the President of Turkey was staying, held the Chief of General Staff hostage, attacked and occupied a number of institutions, including Türksat (a Turkish satellite telecommunications operator in Ankara), occupied television channels, sealed off bridges over the Bosphorus and Istanbul Airport and fired shots at demonstrators. During the night of violence, 251 people were killed and 2,194 were injured.

8. 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 referred to by the Turkish authorities as "FETÖ/PDY" ("Gülenist Terror Organisation/ Parallel State Structure").

9. On 16 July 2016 the Bureau for Crimes against the Constitutional Order at the Ankara public prosecutor's office initiated a criminal investigation.

In instructions issued to the Directorate General of Security on the same day, the Ankara Chief Public Prosecutor noted that the offence of attempting to overthrow the government and the constitutional order by force was still ongoing and that there was a risk that members of the FETÖ/PDY terrorist organisation who were suspected of committing the offence in question might flee the country. He asked the Directorate General of Security to contact all the regional authorities with a view to taking into police custody all the judges and public prosecutors whose names were listed in the appendix to the instructions – among them the applicant – and to ensure that they were brought before a public prosecutor to be placed in pre-trial detention under Article 309 § 2 of the Criminal Code (CC).

10. During and after the coup attempt, acting on the instructions of the Ankara public prosecutor's office, regional and provincial prosecutors' offices initiated criminal investigations in respect of individuals suspected of being involved in the attempt and others who were not directly involved but were alleged to have links to the FETÖ/PDY organisation, including certain members of the judiciary.

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.

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 (for the contents of the notice, see paragraph 109 below).

13. During the state of emergency, the Council of Ministers passed several legislative decrees under Article 121 of the Constitution (see paragraph 52 below). One of them, Legislative Decree no. 667, published in the Official Gazette on 23 July 2016, provided in Article 3 that the Council of Judges and Prosecutors (*Hakimler ve Savcılar Kurulu* – "the HSK") was authorised to dismiss any judges or prosecutors 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.

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

2. Suspensions and dismissals

15. On 16 July 2016 the 3rd Chamber of the HSK noted that, in accordance with the instructions of the Ankara Chief Public Prosecutor, a criminal investigation had been initiated in respect of judges and prosecutors suspected of being members of FETÖ/PDY. It decided to submit a proposal to the chairman of the HSK to approve the opening of an investigation, to be carried out by an inspector from the HSK, in accordance with section 82 of Law no. 2802 on judges and prosecutors ("Law no. 2802").

16. On the same day, the 2nd Chamber of the HSK held an extraordinary meeting. It noted that the proposal by the 3rd Chamber to approve an investigation had been accepted by the chairman of the HSK and that the presidency of the Inspection Board of the Ministry of Justice had appointed a chief inspector. On the basis of the report drawn up by the chief inspector, the 2nd Chamber of the HSK suspended 2,735 judges and prosecutors – including the applicant – from their duties for a period of three months, pursuant to sections 77(1) and 81(1) of Law no. 2802, on the grounds that there was strong suspicion that they were members of the terrorist organisation that had instigated the attempted coup and that keeping them in their posts would hinder the progress of the investigation and undermine the authority and reputation of the judiciary. Its decision was based on information and documents in the investigation files that it had been sent prior to the coup attempt and on information obtained following research by the intelligence services.

17. In reaching its 669-page decision, the 2nd Chamber of the HSK had regard to the following: information and documents sent by the Ankara

public prosecutor's office; the activities of the judges and prosecutors concerned during their training; information about their attendance of in-service and external training courses; information about their appointment to special courts and public prosecutors' offices or to administrative posts requiring special authorisation, and the criteria taken into consideration for that purpose; and information relating to appointments within the Inspection Board of the Ministry of Justice or the administrative authorities. The 2nd Chamber of the HSK also had regard to: information and documents in the judges' and prosecutors' personnel files (*özlük dosyası*); their posts on social media; complaints and reports to the HSK about them, and the investigation files produced and decisions issued as a result; acts carried out by the judges and prosecutors responsible for cases relating to FETÖ/PDY and any decisions delivered in that context; and lastly, disciplinary files concerning investigations it had conducted in respect of the judges and prosecutors with links to FETÖ/PDY.

18. In its decision the 2nd Chamber of the HSK mentioned detailed information about the activities of FETÖ/PDY within the judicial system, concerning in particular: the organisation's strategy within the judiciary; the hierarchical structure among the judges and prosecutors belonging to the organisation; action taken by the organisation against judges and prosecutors not belonging to it, in particular the opening of illegal disciplinary investigations by inspectors; the links between judges and prosecutors belonging to the organisation; the financial support provided to the organisation; the conduct of certain members of the organisation; activities carried out to ensure the selection of organisation members for posts at the highest courts and other prominent positions within the judiciary; unlawful investigations and proceedings conducted by members of the organisation for the purpose of supplanting the judiciary and the State administrative authorities; instructions received by judges and prosecutors belonging to the organisation from their superiors in the organisation in delivering their decisions; activities carried out by the organisation to infiltrate the judges' and prosecutors' trade union; and the use of the ByLock messaging system by judges and prosecutors belonging to the organisation.

19. In its decision the 2nd Chamber of the HSK also provided detailed information about the unlawful activities uncovered during the disciplinary investigations initiated in respect of judges and prosecutors with links to FETÖ/PDY (pages 246-436 of the decision).

20. Furthermore, on pages 437-535 of its decision, the 2nd Chamber of the HSK referred to posts on social media discovered in the course of the disciplinary investigations carried out in respect of the judges and prosecutors suspected of belonging to the organisation, praising acts and actions carried out by suspected members of the organisation.

21. On 24 August 2016, applying Article 3 of Legislative Decree no. 667, the plenary HSK dismissed 2,847 judges and prosecutors – including the applicant – considered to be members of or affiliated or linked to FETÖ/PDY.

In addition to the material referred to in the decision of 16 July 2016, the HSK considered evidence such as messages exchanged via the encrypted messaging systems used by the organisation's members, statements taken from judges and prosecutors during the investigations in respect of them, and statements by informers. The HSK found that the position of the judges and prosecutors concerned within structures that were incompatible with the principles of independence and impartiality and their activities within the organisation's hierarchy, coupled with their underlying sense of allegiance, were likely to undermine the reputation and authority of the judiciary. It held that the fact that judges and prosecutors obeyed the instructions of a hierarchical structure outside the State apparatus represented a genuine obstacle to the right of citizens to a fair trial.

22. On 29 November 2016 the plenary HSK rejected an application by the applicant for a review of the decision to dismiss him.

B. The applicant's personal situation

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

23. On 16 July 2016, in the context of the investigation opened by the Ankara public prosecutor's office, the Kocaeli public prosecutor initiated a criminal investigation in respect of the judges serving in Kocaeli suspected of being members of FETÖ/PDY.

24. On 18 July 2016 the applicant was placed under police supervision at the hospital where he had been admitted for treatment.

25. Also on 18 July 2016, the Kocaeli 1st Magistrate's Court decided, on the basis of Article 153 § 3 of the Code of Criminal Procedure (CCP), to restrict the applicant's and his lawyer's access to the investigation file in order to avoid hindering the progress of the investigation.

26. On 19 July 2016 the applicant left hospital to give evidence to the Kocaeli public prosecutor. The prosecutor informed him that he had been suspended from his duties as a result of the HSK's decision of 16 July 2016, on the grounds of his suspected membership of FETÖ/PDY. The applicant denied being a member of or having any links with that organisation. His lawyer stated that neither he nor his client knew on what evidence he had been accused of the offence in question.

27. Later on 19 July 2016, at about 9 p.m., the applicant was brought before the Kocaeli 1st Magistrate's Court. On that occasion he reiterated the statement he had given to the public prosecutor and complained that no evidence whatsoever had been produced to substantiate the accusations against him.

Following questioning, on 20 July 2016 the magistrate decided to place the applicant in pre-trial detention on suspicion of membership of a terrorist organisation. He noted that the coup attempt was still ongoing, that the applicant had been suspended from his duties by the HSK on the grounds that he was a member of the organisation that had instigated the attempted coup, and that the HSK had asked for an investigation to be opened by the Bureau for Crimes against the Constitutional Order at the Ankara public prosecutor's office. The magistrate took into consideration the nature of the alleged offence, the state of the evidence and the potential sentence. He also noted that investigations into the coup attempt were being conducted across the country, that statements had not yet been taken from all the suspects and that the alleged offence was among the "catalogue" offences listed in Article 100 § 3 of the CCP. The judge held that detention appeared to be a proportionate measure at that stage and that judicial supervision would be insufficient. Lastly, he found that there was a situation of discovery *in flagrante delicto* governed by section 94 of Law no. 2802.

In addition, he held that it was unnecessary to detain the applicant in connection with the offence of attempting to overthrow the constitutional order.

28. On 29 July 2016 the Kocaeli 2nd Magistrate's Court dismissed an objection by the applicant against the order for his detention, on the same grounds as those put forward in the original order. On that occasion the magistrate did not seek the opinion of the public prosecutor.

2. Decisions concerning the applicant's continued pre-trial detention and the dismissal of his objections, adopted before his application to the Constitutional Court

29. On 19 August 2016 the Kocaeli 1st Magistrate's Court, in the course of its automatic periodic review of the detention of several suspects, ruled on applications for release submitted by the applicant on 4 and 9 August 2016, thus acting in accordance with paragraph 1 (ç) of Article 3 of Legislative Decree no. 668 (see paragraph 81 below). The magistrate observed that the public prosecutor had requested a review of the detention under Article 108 of the CCP and had sought its continuation. He also noted that many of the individuals suspected of being members of FETÖ/PDY had absconded and were still wanted. In view of the resources available to FETÖ/PDY and the nature of the organisation, there was a risk not only of absconding but also of collusion and reoffending. The magistrate also emphasised the serious nature of the alleged offence and the fact that not all the evidence had yet been gathered, and found that the decision to detain the applicant had been consistent with the information, documents and evidence in the investigation file. He added that there was still a clear and present danger associated with the attempted coup. Detention appeared to be a proportionate measure at that stage, and judicial supervision would be

insufficient. Accordingly, the magistrate upheld the public prosecutor's request and ordered the applicant's continued pre-trial detention.

30. On 7 September 2016 the Kocaeli 2nd Magistrate's Court, in the course of its automatic periodic review of detention, considered an application for release submitted by the applicant on 22 August 2016, thus acting in accordance with paragraph 1 (ç) of Article 3 of Legislative Decree no. 668. The magistrate observed that the public prosecutor had requested a review of the detention under Article 108 of the CCP and had sought its continuation. He upheld the public prosecutor's request, which also concerned thirty-two other suspects. The magistrate relied mainly on the same grounds as in his previous decision of 29 July 2016. He pointed out that as the suspects were former judges and prosecutors, there was a risk that they might attempt to exert influence or pressure on serving judges and prosecutors. He also dismissed the suspects' objections to the application of section 94 of Law no. 2802, and held that this was a case of discovery *in flagrante delicto*.

31. On 26 September 2016 the Kocaeli 2nd Magistrate's Court dismissed an objection by the applicant against the decision of 19 August 2016 to continue his detention, relying mainly on the same grounds as in its previous decisions. On that occasion the magistrate did not seek the opinion of the public prosecutor.

32. On 27 September 2016 the Kocaeli public prosecutor's office forwarded the file to the Ankara public prosecutor's office.

33. On 10 October 2016, following an automatic review of the detention of several suspects, including the applicant, the Ankara 2nd Magistrate's Court ordered their continued pre-trial detention. The magistrate explained that the independence and impartiality of the judiciary sought to protect the fundamental values of a democratic society, that these were universal and modern values, and that the general principles of law included a prohibition on abuses of rights and abuses of power. He added that when the judiciary was used in such a way as to be diverted from its true function and purpose, the justice system risked losing its legitimacy. There had been an attempted uprising against the democratic regime, as attested by reports from various authorities and the decision by the HSK, and specific facts giving rise to strong suspicion had been established. Furthermore, the offences of which the suspects were accused were among the "catalogue offences" listed in Article 100 § 3 of the CCP. In addition, the evidence and suspicion needed for a detention order to be made at the investigation stage was not of the same nature or scale as was required to reach a finding of guilt beyond reasonable doubt at the trial stage, and it was therefore unnecessary, when ordering pre-trial detention, to have the proof that would be needed to establish guilt. There was a risk of absconding given the nature of the alleged offence and the potential sentence, and at the start of the investigation stage there was also a risk of tampering with evidence. The

magistrate therefore concluded that judicial supervision would be insufficient and that detention was not a disproportionate measure.

34. On 14 October 2016 the Ankara 8th Magistrate's Court, in the course of its automatic review of detention, considered applications for release submitted by certain suspects. The magistrate observed that the public prosecutor had requested a review of the detention under Article 108 of the CCP and had sought its continuation for the thirty-three suspects concerned, among them the applicant. The magistrate upheld the public prosecutor's request and ordered the continued pre-trial detention of the suspects. He stated that the file contained evidence that the suspects had committed the alleged offence and again referred to the risk of absconding, tampering with evidence and reoffending. He also mentioned the nature of the alleged offence and the fact that it was a "catalogue" offence, and held that detention was a proportionate measure.

35. On 7 November and 5 December 2016 and 6 January 2017 the Ankara magistrates' courts conducted automatic reviews of the detention of thirty suspects, including the applicant, and decided to extend the measure on the same grounds as referred to previously.

3. The applicant's application to the Constitutional Court

36. On 26 December 2016 the applicant lodged an individual application with the Constitutional Court. In it he complained that he had been detained in breach of the procedural safeguards afforded to judges in domestic law, that he could not reasonably be suspected of having committed the offence in question and that the reasons given for his detention had been insufficient. He argued that neither the order for his detention nor the decisions extending it had referred to any evidence of a reasonable suspicion that he had committed the alleged acts and that the grounds for his detention were neither relevant nor sufficient. He also contended that there had been a breach of the principle of equality of arms because of the lack of a hearing during the review of his detention, the non-disclosure of the public prosecutor's opinion and the restriction of access to the investigation file. Lastly, he complained that the magistrates deciding on his detention had been neither independent nor impartial and had lacked jurisdiction to rule on the matter.

37. On 27 December 2017 the Constitutional Court declared the application inadmissible, finding that the applicant's complaints were manifestly ill-founded.

38. Examining the lawfulness of the applicant's initial pre-trial detention, the Constitutional Court held that, according to the indictment, he was a user of the ByLock messaging application. Bearing in mind the features of that application, it was acceptable that its use or installation with a view to use should have been treated by the investigating authorities as evidence of a link to FETÖ/PDY. It referred in that connection to its *Aydın*

Yavuz and Others judgment, delivered on 20 June 2017. For that reason, in view of the features of the messaging software in question, the Constitutional Court found that the investigating authorities or courts that had ordered the applicant's detention could not be said to have pursued a groundless and arbitrary approach in accepting that his use of the application could, in the circumstances of the case, be regarded as "strong evidence" of the commission of the offence of membership of FETÖ/PDY. In addition, having regard to the reasons mentioned in the decisions ordering the detention and dismissing the applicant's subsequent objection, the Constitutional Court held it could not be maintained that no reasons had been given for the detention or that it was a disproportionate measure.

39. As regards the complaint that no hearing had been held during the review of the applicant's detention, the Constitutional Court saw no reason to depart from its finding in the *Aydın Yavuz and Others* judgment that the lack of a hearing during the review of detention over a period of approximately nine months had not infringed the right to liberty and security, viewed in the light of Article 15 of the Constitution.

40. As to the restriction of access to the investigation file, the Constitutional Court found, after examining the records of questioning, the detention orders, the objections by the applicant or his lawyer against his detention, and the documents and information in the investigation file, that the applicant had been informed of the material forming the main basis for his detention, that he had had sufficient knowledge of its contents and that he had been given an opportunity to challenge his detention.

41. The Constitutional Court noted that the applicant had also argued that the magistrates were neither independent nor impartial and that their examination of his objections had deprived him of an effective remedy in respect of his detention. It observed that it had examined similar complaints in a number of other cases and, in view of the structural characteristics of the magistrates' courts as an institution, had declared the complaints manifestly ill-founded. After citing its leading judgments in this area, the Constitutional Court found that there was no reason to reach a different conclusion in the applicant's case.

42. The Constitutional Court also declared inadmissible the complaint that certain procedural safeguards attached to the status of judges or prosecutors had not been observed, and the complaint that the magistrates' courts lacked jurisdiction to order detention. It held that, having regard to the nature of the alleged offence and the manner in which it had been committed, it had been appropriate to accept the jurisdiction of the magistrates who had ordered the applicant's detention, and that there had been no error of assessment or any arbitrariness. The Constitutional Court referred to the conclusions set out in its previous judgments (*Mustafa Başer and Metin Özçelik*, application no. 2015/7908, 20 January 2016, and

Süleyman Bağrıyanık and Others, application no. 2015/9756, 16 November 2016; see paragraphs 101-03 below).

4. Decisions extending the applicant's detention after his application to the Constitutional Court, and his indictment, trial and conviction

43. On 6 January 2017 Legislative Decree no. 680 came into force, amending the rules on territorial jurisdiction laid down in section 93 of Law no. 2802. Following the amendment, the Ankara public prosecutor's office transferred the case to the Istanbul public prosecutor's office.

44. On 7 February, 8 March, 4 April, 3 May and 31 May 2017, various Istanbul magistrates' courts reviewed the applicant's detention and ordered its extension. During the review of his detention on 4 April 2017, the Istanbul 10th Magistrate's Court relied on a police report about the ByLock messaging application (entitled "*ByLock CBS Sorgu Raporu*"), drawn up by the Anti-Smuggling and Organised Crime Department ("the KOM"), which named the applicant as a ByLock user.

45. On 9 June 2017 the applicant was charged with membership of a terrorist organisation under Article 314 § 2 of the Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713).

46. On 19 June 2017 the Istanbul 29th Assize Court accepted the indictment, and the trial subsequently began in that court. The 29th Assize Court ordered the applicant's continued pre-trial detention, and instructed the Directorate General of Security and the KOM to provide more detailed information about his use of ByLock. An objection lodged against that decision was dismissed.

47. On 14 July, 11 August and 8 September 2017 the 29th Assize Court ordered the applicant's continued pre-trial detention in the context of its automatic review of the detention.

Objections were lodged against the three decisions adopted by the court, but were all dismissed. In examining the objections, the judges relied not only on the applicant's use of the ByLock messaging application but also on statements by a witness, C.U., to the effect that the applicant was a member of FETÖ/PDY.

48. On 19 September 2017 the 29th Assize Court held its first hearing on the merits of the case, following which it ordered the applicant's continued pre-trial detention. During the hearing, in which he took part via the SEGBİS sound and image information system (*Ses ve Görüntü Bilişim Sistemi*), the applicant stated that the police report on ByLock had been included in the file some eight months after he had first been detained and that the prosecution had not produced any concrete evidence at the time of his initial detention. Following the second hearing, held on 25 October 2017 and attended by the applicant, the 29th Assize Court again ordered his continued pre-trial detention, relying mainly on his use of ByLock and the evidence given by C.U. At the hearing, the applicant submitted that the

Istanbul Assize Court lacked jurisdiction *ratione materiae* and *ratione loci* to try his case. Arguing that the case concerned an offence committed in connection with or in the course of his official duties, he submitted that the subject matter fell within the jurisdiction of the Court of Cassation. In the event that his alleged offence had been treated as a personal offence within the meaning of section 93 of Law no. 2802, he contended the court with territorial jurisdiction would have been the Kocaeli Assize Court. The 29th Assize Court dismissed the objection.

49. During the trial, the 29th Assize Court carried out regular reviews of the applicant's detention and ordered its extension.

50. At the end of the last hearing, held on 19 March 2018, the 29th Assize Court found the applicant guilty of the offence with which he was charged (membership of an armed terrorist organisation), sentenced him to seven years and six months' imprisonment and, taking into account the period already spent in detention, ordered his release. In reaching its decision, the Assize Court relied on the applicant's use of the ByLock application. It observed that between 21 September 2014 and 17 October 2014 he had logged on to the ByLock server on fifty occasions, as had been confirmed by an inspection of base-station data, which had established that the communications had taken place. It also relied on the statement by C.U. about the applicant's membership of the organisation in question: the witness had stated that he and the applicant had worked at the same court, that they had been divided into two groups formed by the organisation and that, during the election of members of the HSK, the applicant had campaigned to secure votes for the organisation's candidate.

51. The applicant's conviction was upheld on appeal.

The case is currently pending before the Court of Cassation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

52. The relevant parts of the provisions of the Constitution pertaining to the present case read as follows:

Article 15

"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."

Article 19

"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.

...

Everyone who is deprived of his or her liberty for any reason whatsoever shall be entitled to apply to a competent judicial authority for a speedy decision on his or her case and for his or her immediate release if the detention is not lawful. ..."

Article 121 (repealed on 21 January 2017)

"... During the state of emergency, the Council of Ministers, chaired by the President of the Republic, may issue legislative decrees on matters necessitated by the state of emergency. ..."

Article 138

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

No questions may be asked, debates held, or statements made in the legislative assembly with respect to the exercise of judicial power in the context of an ongoing trial.

The bodies of executive and legislative power and the authorities must comply with court decisions; they cannot in any circumstances modify court decisions or defer enforcement thereof."

Article 139

"Judges and public prosecutors shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights attaching to their status, even as a result of the abolition of a court or post.

Exceptions shall be permitted in the case of judges or prosecutors who have been convicted of an offence requiring their dismissal, those whose unfitness to carry out their duties for medical reasons has been conclusively established or those whose continued service has been judged undesirable."

53. The same principles of the independence of the judiciary and the irremovability of judges are enshrined in Article 140 of the Constitution.

54. The constitutional principles of independence are reproduced in legislation; for example, Law no. 2802 on judges and prosecutors specifies that judges and public prosecutors perform their functions in accordance with the principles of the independence of the courts and the irremovability of judges, and that no organ, authority or individual may give orders or instructions to the courts concerning the exercise of judicial power. The legislation states clearly that any act undermining the autonomy and independence of the courts and the judiciary is prohibited. Furthermore, Article 277 of the Criminal Code makes it a criminal offence to attempt to "influence persons vested with judicial powers".

Article 142

"The formation of the courts, their duties and powers, their functioning and proceedings before them shall be governed by law."

Article 159
(as in force at the material time)

"The High Council of Judges and Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of the judiciary.

The High Council of Judges and Prosecutors shall have a total of twenty-two members ...; it shall comprise three chambers.

The Minister of Justice shall be the chairman of the Council. The Under-Secretary of the Ministry of Justice shall be an *ex officio* member of the Council. Four titular members of the Council, whose qualifications shall be specified by law, shall be appointed by the President of Turkey from among the teaching staff in the field of law at higher education institutions and/or from among practising lawyers; three members ... shall be appointed by the plenary Court of Cassation from among the members of that court; two members ... shall be appointed by the plenary Supreme Administrative Court from among its members; one member ... shall be appointed by the general assembly of the Justice Academy of Turkey from among its members; seven members ... shall be elected from among the judges and public prosecutors of the first rank ... at the ordinary courts; three members ... shall be elected from among the judges and public prosecutors of the first rank ... at the administrative courts, for a term of four years. Members may be re-elected on the expiry of their term of office. ..."

55. Pursuant to a law of 21 January 2017, the "High Council of Judges and Prosecutors" became the "Council of Judges and Prosecutors".

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

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

"Anyone who attempts to overthrow by force and 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."

57. Article 312 § 1 of the Criminal Code, on crimes against the government, provides:

"Anyone who attempts to overthrow the Government of the Republic of Turkey by force and violence or to prevent it, whether fully or in part, from discharging its duties shall be sentenced to life imprisonment."

58. 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."

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

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

"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. ..."

60. Article 20 of the CCP provides:

"Acts carried out by a judge or court lacking territorial jurisdiction shall not be deemed null and void (*hükümsüz*) simply as a result of the lack of territorial jurisdiction."

61. The relevant parts of Article 100 of the CCP, on grounds for detention, provide:

"1. If there is concrete evidence 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 pre-trial 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 strong 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.

62. Article 108 of the CCP, concerning the review of detention, reads as follows:

“1. During the investigation phase [and] throughout the suspect’s detention, at intervals not exceeding thirty days, a magistrate shall, on an application by the public prosecutor [and] having regard to the provisions of Article 100, review whether continued detention is necessary, after hearing the suspect or the suspect’s lawyer.

2. A review of detention may also be requested by the suspect within the time indicated in the previous paragraph.

3. The judge or court shall automatically give a decision on whether the accused’s continued detention is necessary at each hearing or, if the circumstances so require, between hearings or within the time indicated in the first paragraph above.”

63. The relevant parts of Article 141 § 1 of the CCP provide:

“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;

...

(d) who, even if he or she was detained lawfully during the investigation or trial, has not been brought before a judicial authority within a reasonable time and has not obtained a judgment on the merits within a reasonable time; ...”

64. Article 161 § 8 of the CCP, governing the functions and powers of the public prosecutor, reads as follows:

“In the case of the offences referred to in Articles 302, 309, 311, 312, 313, 314, 315 and 316 of the Turkish Criminal Code, an investigation shall be directly initiated by a public prosecutor even if the alleged offence was committed in connection with or in the course of official duties. ...”

D. Law no. 2802 on judges and prosecutors and Law no. 6087 on the Council of Judges and Prosecutors, and relevant case-law

65. Section 35 of Law no. 2802, concerning appointments by transfer, reads as follows:

“Judges and public prosecutors, in accordance with the regulations of the Council of Judges and Prosecutors on appointments and transfers, shall be appointed within the same judicial district or in other districts to posts of equivalent or a higher level, with their acquired rights, salary level and rank.

Judicial districts for the ordinary and administrative courts shall be established according to geographical and economic characteristics, social, medical and cultural

facilities, degree of isolation, accessibility and other features, and the term of office in each judicial district shall be determined accordingly."

66. Sections 82-92 of Law no. 2802 lay down the rules applicable in relation to the investigation and prosecution of offences committed by judges and public prosecutors in connection with or in the course of their official duties. Section 93 of the Law concerns offences committed by judges and prosecutors in their personal capacity. Section 94 of the Law is a common provision covering both scenarios.

67. The relevant provisions of Law no. 2802 read as follows:

Section 82

"The opening of a preliminary examination (*inceleme*) or an investigation (*soruşturma*) in respect of judges and prosecutors for offences committed in connection with or in the course of their official duties, [and for] attitudes and conduct incompatible with their status and functions shall be subject to authorisation by the Ministry of Justice. The Ministry of Justice may entrust the preliminary examination or investigation to judicial inspectors or to a more senior judge or prosecutor than the person under investigation."

Section 85

"At the investigation stage, applications for detention orders shall be considered and determined by the authority with jurisdiction to decide on the institution of criminal proceedings (*son soruşturma açılmasına karar vermeye yetkili merci*)."

Section 88

"(1) Except for cases of discovery *in flagrante delicto* falling within the jurisdiction of the assize courts, judges and prosecutors suspected of committing an offence may not be arrested, subjected to a personal or home search or questioned. However, the Ministry of Justice shall be immediately informed of the situation.

(2) Where members and officers of the security forces act in breach of the provisions of the first subsection above, an investigation shall be conducted directly by the competent public prosecutor in accordance with the provisions of ordinary law and proceedings shall be instituted."

Section 89

"Where the institution of criminal proceedings against judges or prosecutors for offences committed in connection with or in the course of their official duties is deemed necessary, the file shall be sent by the Ministry of Justice to the public prosecutor's office at the closest assize court to the judicial district [in which the person concerned serves], or, [if the person is employed at one of the central departments of the Ministry of Justice or one of the bodies attached to it], to the Ankara public prosecutor's office.

The public prosecutor shall draw up the indictment within five days and shall forward it to the assize court for a decision on whether or not to proceed to the trial stage.

..."

Section 93 (as in force prior to 2 January 2017)

"The investigation of personal offences (*kişisel suçları*) committed by judges and prosecutors shall be conducted by the chief public prosecutor at the closest assize court to the judicial district covering the assize court within whose jurisdiction the person concerned serves, and the trial shall be conducted by the assize court at the same location."

Article 7 of Legislative Decree no. 680 of 2 January 2017 amended section 93 of Law no. 2802 as follows:

Section 93 (as in force since 2 January 2017)

"Jurisdiction to investigate and try personal offences (*kişisel suçları*) committed by judges and prosecutors shall be conferred [respectively] on the public prosecutor's office and the assize court for the judicial district covering the court of appeal within whose jurisdiction the person concerned serves."

Section 94

"In cases of discovery *in flagrante delicto* of ordinary offences within the jurisdiction of the assize courts, the preliminary investigation shall be conducted in accordance with the rules of ordinary law. The preliminary investigation shall be conducted in person by the competent public prosecutors."

68. As regards Law no. 6087 on the HSK, some of its provisions were amended by Law no. 6524 of 15 February 2014, which conferred powers on the Minister of Justice, including the power to decide on the assignment of members within the three chambers of the HSK, to appoint the president and vice-president of the Inspection Board of the Ministry of Justice, to initiate a disciplinary investigation and to allow the opening of an investigation into members of the HSK.

69. In a judgment of 10 April 2014 (E.2014/57-K.2014/81), published in the Official Gazette on 14 May 2014, the plenary Constitutional Court struck down some of the provisions of the new Law, including those concerning the transfer of the above-mentioned powers to the Minister of Justice, declaring them unconstitutional on account of their incompatibility with the principles of independence of the judiciary and the irremovability of judges. Since the Constitutional Court's judgments do not have retroactive effect, any consequences that had in the meantime resulted from the provisions declared unconstitutional were not erased.

70. In a judgment of 19 February 2013 (E.2011/5-137, K.2013/58) the plenary criminal divisions of the Court of Cassation, ruling on the case of a judge accused of corruption *in flagrante delicto*, stated that sections 82-92 of Law no. 2802 concerned offences linked to the status of judges and prosecutors.

E. Law no. 5235 on the organisation of the courts and related case-law

71. The criminal magistrates' courts were established by Law no. 6545 of 18 June 2014, which came into force on 28 June 2014, amending section 10 of Law no. 5235 on the organisation of the courts. The criminal courts of first instance were abolished and their powers in relation to preventive measures at the investigation stage were transferred to the criminal magistrates' courts.

72. Section 10 of Law no. 5235 on the organisation of the courts, as amended by section 34 of Law no. 6545, reads as follows, in so far as relevant:

> "Except in cases where additional powers have been conferred by law, the criminal magistrates' courts shall be established to take decisions and measures requiring judicial intervention at the investigation stage and to examine objections against them.
>
> Several criminal magistrates' courts may be established in places where the caseload so requires. In that event, the magistrates' courts shall each be assigned a number. Judges appointed to magistrates' courts may not be transferred to other courts or assigned other duties by the justice commission for the judicial district (*adli yargı adalet komisyonlarınca*). ..."

73. According to the general explanatory memorandum on Law no. 6545, as submitted to the National Assembly by the Ministry of Justice's Directorate General of Legislation, the replacement of the criminal courts of first instance by magistrates' courts was designed, firstly, to end the dual system of first-instance courts in criminal matters (criminal courts of first instance and criminal courts) and, secondly, to introduce specialisation regarding preventive measures. The criminal courts of first instance had previously been responsible for a considerable variety of tasks in addition to their judicial function. The tasks in question were not taken into account for the purpose of judges' career progression but were regarded as ancillary and little attention was paid to them as a result. The magistrates' courts were therefore established to take decisions requiring judicial intervention at the investigation stage. In this way, the purpose of the new legislation was to promote specialisation regarding preventive measures and to ensure more effective protection of fundamental rights and freedoms.

74. According to the specific explanations given for the provision amending section 10 of Law no. 5235 on the organisation of the courts, the fact that there were no judges with special responsibility for preventive measures had given rise to differing practices and operational problems, and there had also been strong criticism of the insufficient reasons given in decisions on preventive measures, the lack of a uniform approach among courts and the fact that the judge who had made a detention order was subsequently required to determine the merits of the case. Thus, according to the specific explanations for the provision in question, the establishment

of the magistrates' courts would, above all, ensure that there was a degree of specialisation and harmonisation in the implementation of preventive measures. The aim pursued by the new provision was therefore, in due course, to achieve a countrywide standard for decisions on preventive measures by fostering interaction between magistrates' courts.

75. In a judgment of 14 January 2015 (E.2014/164-K.2015/12), published in the Official Gazette on 22 May 2015, the plenary of the Constitutional Court dismissed a challenge to the constitutionality of certain provisions, namely section 10 of Law no. 5235 on the organisation of the courts and paragraph 3 (a) and (b) of Article 268 of the CCP, in the context of objections of unconstitutionality raised by the Eskişehir 1st Magistrate's Court. In support of the objections, the magistrate in question had argued that the outcome of criminal investigations in Turkey was now left to the discretion of the political authorities, via a limited number of magistrates' courts, and that this undermined the "natural judge" principle and the independence of the judiciary.

In its judgment the Constitutional Court noted that the magistrates' courts had been established pursuant to Article 142 of the Constitution so that decisions requiring judicial intervention at the investigation stage could be taken by specialised judges. It also drew attention to the aim pursued by the magistrates' courts as an institution, as set out in the general explanatory memorandum on Law no. 6545.

76. Next, the Constitutional Court stated that the "natural judge" principle could not be construed as prohibiting a newly established court or a judge recently appointed to an existing court from hearing a case concerning an offence committed prior to the establishment of the court or the judge's appointment. It specified that unless the case was limited to a single event, person or group, the examination by a newly established court or a recently appointed judge of a case arising prior to the establishment or appointment in question did not constitute an infringement of the right to a lawfully established court. The Constitutional Court emphasised that to accept the contrary would effectively make it impossible to set up new courts within a country. After noting that the impugned rule had been applied, following its entry into force, to all disputes falling within its scope, the Constitutional Court found that the rule was not in breach of the "natural judge" principle.

77. In so far as the independence and impartiality of the magistrates' courts had been challenged, the Constitutional Court, referring to the Court's case-law, observed that the magistrates – like all other judges – were appointed by the HSK, that they enjoyed the safeguards afforded to judges and prosecutors by Article 139 of the Constitution, that they were not in a different position from other judges and prosecutors as regards independence, and that there was no evidence to support the view that the guarantee of their independence was diminished.

78. The Constitutional Court added that the magistrates could not be accused of a lack of objective impartiality, in view of the constitutional and legislative provisions governing the independence of judges and the guarantees as to their independence and impartiality. It held that there were sufficient safeguards available to ensure that magistrates acted entirely impartially when discharging their duties. Moreover, if any lack of impartiality on a magistrate's part was established on the basis of concrete, objective and decisive evidence, procedural rules were in place that would disqualify the magistrate from dealing with the case in question.

79. As regards the challenge to the constitutionality of the objection procedure on the grounds that having an objection examined by another magistrate's court would render that particular remedy ineffective, the Constitutional Court observed that the magistrates' courts had jurisdiction to review the decision complained of and to determine the merits of the case, and that an objection was therefore an effective remedy. It added that there were no constitutional provisions requiring objections against magistrates' decisions to be reviewed at a higher level of jurisdiction; provided that an effective review was secured, there was no obligation for the objection to be examined by a higher court. The Constitutional Court further noted that the different "divisions" of a particular court could not be regarded as forming a single court, and that arranging the courts in the same judicial district into "divisions" was an administrative decision relating to the organisation of the courts. Thus, the magistrate's court examining an objection was to be seen as an independent and separate court from the magistrate's court that had delivered the decision being challenged. Lastly, the Constitutional Court stated that having objections reviewed by judges with such a high degree of specialisation in preventive measures pursued a public-interest objective.

80. In another judgment, delivered on 8 April 2015, the Constitutional Court dismissed similar complaints raised in an individual application (*Hikmet Kopar and Others*, application no. 2014/14061). In support of their allegations of a lack of independence and impartiality on the part of the magistrates' courts, the applicants had relied mainly on statements made by the executive, and in particular the Prime Minister. They had also submitted that a magistrate had shared comments praising the Prime Minister on social media and that judges who had ordered the release of individuals arrested during police operations conducted on 17 and 25 December 2013 had been appointed as magistrates. In its judgment the Constitutional Court noted that magistrates discharged their duties on the basis of general legislative provisions and following their appointment by the HSK. Accordingly, it held that in the absence of any proof of acts or conduct indicating prejudice against the applicants, it could not be accepted that facts whose existence and nature had not been convincingly established or comments made in the context of political debates constituted proof that the judges concerned had

displayed a lack of independence and impartiality, for political or personal reasons.

F. Legislative Decrees nos. 667 and 668 and Law no. 7145

81. Two successive legislative decrees, nos. 667 and 668, which came into force on 23 July 2016 and 27 July 2016 respectively, introduced amendments to certain investigative and procedural steps. Article 6, paragraph 1 (ı), of Legislative Decree no. 667 provides that the question of continued detention, objections against detention and applications for release "may" be examined on the basis of the file. Article 3, paragraph 1 (ç), of Legislative Decree no. 668 provides that applications from detainees to be released are to be examined on the basis of the file at the time of the automatic review carried out at thirty-day intervals in accordance with Article 108 of the CCP.

82. Section 13 of Law no. 7145, which was passed on 25 July 2018 and came into force on 31 July 2018, added a provisional section 19 to the Prevention of Terrorism Act (Law no. 3713), the relevant parts of which provide:

> "Provisional section 19 – During a period of three years from the entry into force of this section, in relation to the offences defined in the Second Book, Fourth Part, Fourth, Fifth, Sixth and Seventh Chapters of Law no. 5237 instituting the Criminal Code and offences falling under the Prevention of Terrorism Act (Law no. 3713), or offences committed as part of an organisation's activities:
>
> ...
>
> (c) 1. Objections against detention and applications for release may be examined on the basis of the file.
>
> 2. Applications for release may be examined on the basis of the file at intervals of no more than thirty days.
>
> 3. A review of detention in accordance with Article 108 of Law no. 5271 of 4 December 2004 instituting the Code of Criminal Procedure shall be carried out automatically at intervals of no more than thirty days on the basis of the file, and every ninety days after the [detainee] or his or her lawyer has been heard."

G. Relevant case-law

1. Case-law of the Court of Cassation

83. 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 ..."

84. 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 ..."

85. 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 ..."

86. In two other judgments delivered on 6 and 13 February 2017 by its 16th Criminal Division, the Court of Cassation reiterated the principle that membership of an armed terrorist organisation was a continuing offence and that the continuing nature of that offence ended at the time of arrest (E.2015/2361, K.2017/427 and E.2017/139, K.2017/785).

87. In a leading judgment delivered on 24 April 2017 (E.2015/3, K.2017/3) the 16th Criminal Division of the Court of Cassation, sitting as a first-instance court, found two judges, M.B. and M.M., guilty of being members of FETÖ/PDY and of abuse of power. In reaching its guilty

verdict, the 16th Criminal Division relied on evidence including the defendants' use of the ByLock messaging system. The 16th Criminal Division also addressed the argument raised by one of the two defendants concerning the jurisdiction of the Bakırköy 2nd Assize Court. It stated that Law no. 6526, which had added paragraph 8 to Article 161 of the CCP (see paragraph 64 above), did not contain any special provisions on the investigative measures that could be taken by a judge at the investigation stage and that as a result, in accordance with Law no. 2802 on judges and prosecutors as then in force, the Assize Court undoubtedly had jurisdiction.

88. In a judgment of 26 September 2017 (E. 2017/16-956, K. 2017/370) the plenary criminal divisions of the Court of Cassation upheld the judgment of the 16th Criminal Division. As to whether there was a case of discovery *in flagrante delicto* regarding the offence of membership of an armed organisation, the Court of Cassation 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 ..."

89. The Court of Cassation also examined the applicants' complaint that the indictment was unlawful. It observed that since Law no. 2802 did not contain detailed and clear provisions governing the different stages of the investigation and the proceedings, the question had to be settled on the basis of the CCP. Accordingly, it found that this matter was clearly dealt with in Article 1 of the CCP, which provides: "This Code governs the rules of criminal procedure and the rights, functions and duties of those taking part in this process." It held that in the absence of any provisions to the contrary, the provisions of the CCP were applicable to investigations governed by a special procedure or to proceedings conducted by special judicial authorities.

90. On 10 October 2017 the plenary criminal divisions of the Court of Cassation delivered two judgments along similar lines to its judgment of 26 September 2017 on the issue of whether the offence of membership of an armed organisation was to be examined as a case of discovery *in flagrante delicto* (E. 2017/1000, K.2017/395 and E. 2017/1001, K.2017/396). Ruling on a case where judges had been accused of belonging to FETÖ/PDY, the Court of Cassation held that at the time of their arrest, there had been a situation of discovery *in flagrante delicto* for the purposes of section 94 of Law no. 2802. It noted that sections 82-92 of Law no. 2802 concerned offences linked to the official duties of judges and prosecutors but that the offence of which the applicants had been accused – membership of an

illegal organisation – was a personal offence covered by section 93 of Law no. 2802. The trial court therefore had to be determined on the basis of that provision.

2. *Case-law of the Constitutional Court*

(a) *Aydın Yavuz and Others* judgment (application no. 2016/22169, 20 June 2017)

91. In its leading judgment in the case of *Aydın Yavuz and Others*, adopted unanimously, the Constitutional Court examined whether there was a reasonable suspicion that the applicants had committed the offence of which they were accused, namely attempting to overthrow the constitutional order. It held that, in view of the features of the ByLock application, its use by a person or its installation with a view to use could be treated by the investigating authorities as an indication of the existence of links between the person concerned and FETÖ/PDY. The Constitutional Court found that the strength of that indication could vary from case to case, depending on factors such as the person's actual use of the application, the manner and frequency of such use, the position and importance of the contacts within FETÖ/PDY, and the content of messages exchanged via the application. Thus, in its view, bearing in mind the features of the messaging system in question, it could not be concluded that the investigating authorities or courts that had ordered the detention had pursued an unjustified or arbitrary approach in accepting, in the context of investigations relating to the attempted coup or to FETÖ/PDY, that the use of the application could, depending on the circumstances of the case, be regarded as "strong evidence" that the offence in question had been committed.

92. In its judgment the Constitutional Court also examined a complaint about the failure to hold a hearing for a period of eight months and eighteen days during the review of the applicants' detention and concluded that this did not amount to a violation of Article 19 § 8 of the Constitution, read in conjunction with Article 15 of the Constitution, concerning the suspension of fundamental rights and freedoms during a state of emergency (a translation by the Constitutional Court of the relevant parts of its judgment is available on its website: https://www.anayasa.gov.tr/media/2723/2016-22169.pdf). After noting that in the light of its case-law, the lack of a hearing for a period of eight months and eighteen days was contrary to the requirements of Article 19 § 8 of the Constitution, the Constitutional Court considered it necessary to examine whether that situation was justified from the standpoint of Article 15 of the Constitution. It held that for the purposes of assessing the proportionality of the interference in question, consideration had to be given to the circumstances leading to the declaration of the state of emergency and the resulting conditions, and also to the period during which

the applicants had been deprived of their liberty without being brought before a judge.

93. The Constitutional Court observed that, following the declaration of the state of emergency, a criminal investigation had been opened in respect of 162,000 people, more than 50,000 people had been detained in that context and more than 47,000 had been released subject to judicial supervision. The investigating authorities had therefore suddenly been required to initiate and conduct investigations in respect of tens of thousands of suspects because of this unexpected situation. The Constitutional Court further noted that, given the characteristics of the FETÖ/PDY organisation (confidentiality, cell-type structure, infiltration of all public institutions, self-professed holiness, and action based on obedience and devotion), investigations relating to it were more complex and difficult. In that context, the judicial and investigating authorities had had to handle an unforeseeable workload, and at the same time, more than 4,000 judges and prosecutors had been dismissed from office. Furthermore, various measures had been taken in the wake of the coup attempt, in particular to alleviate the serious situation facing the investigating and judicial authorities and to preserve the proper functioning of the justice system (arrangements had been made to increase the number of judges and prosecutors: shortening of the internship periods for trainee judges and prosecutors, administrative measures to recruit trainee judges and prosecutors, and reinstatement of judges and prosecutors who had previously retired or resigned).

94. The Constitutional Court emphasised that despite the restrictions on hearings introduced by Legislative Decrees nos. 667 and 668 during the state of emergency, detainees – including those involved in the attempted coup – still had the opportunity to apply to a judge for their release: under Article 104 of the CCP, they could apply for release at any stage of the investigation, and such applications were examined at the time of the automatic review every thirty days; furthermore, detainees were entitled to lodge objections against any decisions relating to their detention.

95. The Constitutional Court thus concluded that, having regard to the combined effect of the unforeseeably heavy workload with which the investigating and judicial authorities had been confronted after the coup attempt, the suspension and dismissal by the HSK of a considerable number of judges and prosecutors with links with FETÖ/PDY who would have been expected to deal with this workload and thus ensure the proper functioning of the judicial system (approximately one third of all judges and prosecutors), and the dismissal of a significant number of judicial support staff and law-enforcement officers who would have been involved in the conduct of the investigations and criminal proceedings, it had to be acknowledged that carrying out reviews on the basis of the case file alone, without holding a hearing, for individuals detained in connection with

certain offences should be viewed as a proportionate measure required by the exigencies of the state of emergency.

96. The Constitutional Court further noted that a number of prison officers and gendarmerie personnel responsible for ensuring the safety and protection of prisoners, as well as a significant proportion of the police officers who could have been assigned to protect detainees if necessary, had been dismissed or suspended because of their links with terrorist organisations; the reduction in the number of these members of the security forces had been accompanied by an increase in the number of people detained on grounds linked to terrorist offences, resulting in prison overcrowding. Nor should it be overlooked that the transfer of tens of thousands of detainees to courthouses or other locations where they could be questioned via the SEGBİS sound and image information system in connection with the review of their detention would give rise to serious security problems. The Constitutional Court thus considered that conducting reviews of detention for the offences in question without holding a hearing had been necessary for the preservation of public safety in the context of the state of emergency declared following the coup attempt of 15 July 2016.

97. The Constitutional Court concluded that the continued detention of the applicants over a period of eight months and eighteen days on the basis of decisions given without a hearing had been "required by the exigencies of the situation". Accordingly, the interference in issue, despite being contrary to the guarantees provided for in Article 19 § 8 of the Constitution, had complied with the criteria set forth in Article 15 of the Constitution.

(b) *Selçuk Özdemir* judgment (application no. 2016/49158, 26 July 2017)

98. In its *Selçuk Özdemir* judgment, adopted unanimously, the Constitutional Court for the first time examined the lawfulness of the pre-trial detention of a judge in connection with the attempted coup. Referring to the conclusion it had reached in its leading judgment in *Aydın Yavuz and Others* and reiterating the characteristics of the ByLock messaging application, it held that treating the use of ByLock or its installation with a view to use as a "strong indication" that the applicant had committed the offence of which he was accused (namely membership of FETÖ/PDY) could not be regarded, in the circumstances of the case and having regard to the features of ByLock, as an unjustified and arbitrary approach.

99. In its judgment the Constitutional Court stated that in the years leading up to the coup attempt, there had been a large number of investigations and prosecutions linked to FETÖ/PDY for the following offences: destruction of evidence; illegal interception of communications of State institutions and senior officials; disclosure of secret State activities; acquisition and disclosure of examination questions for entry to the civil service or for career advancement; and attempting to overthrow the government by force or prevent it from discharging its duties. The

Constitutional Court added that on 16 June 2016, following a trial concerning FETÖ/PDY, the assize court dealing with the case had concluded that the organisation in question had built up structures within the armed forces, the police and the judicial institutions, that it had developed outside the State structure, and that it was an armed terrorist organisation. It further noted that the HSK had instituted disciplinary proceedings against several judges and prosecutors on account of irregularities committed in connection with the organisation and had ordered their dismissal.

The Constitutional Court added that from the summer of 2014 onwards, many judges and prosecutors widely believed to have links with FETÖ/PDY had been removed from posts regarded as important in the judicial system (chief and deputy chief public prosecutors, committee chairs, presidents of assize courts, presidents of commercial courts, judicial inspectors and judge rapporteurs) and assigned to other duties while retaining their status as judges or prosecutors.

The Constitutional Court also provided information about the number of judges and prosecutors who were under criminal investigation or had been dismissed. As of 24 July 2017, 4,664 judges and prosecutors were the subject of a criminal investigation, and 2,431 of them were currently in detention, the others having been released (in some cases under judicial supervision), having absconded or not having been the subject of a detention order. The Constitutional Court stated that the HSK had dismissed 2,847 judges and prosecutors on 24 August 2016, 543 on 31 August 2016, 66 on 4 October 2016, 203 on 15 November 2016, 227 on 13 February 2017, 202 on 17 March 2017, 45 on 3 April 2017 and 107 on 5 May 2017.

The Constitutional Court also described the structure of FETÖ/PDY within the judiciary.

(c) *Mehmet Hasan Altan* judgment (application no. 2016/23672, 11 January 2018)

100. In its *Mehmet Hasan Altan* judgment the Constitutional Court examined a complaint concerning the lawfulness of the detention of a journalist (see the Court's judgment in *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 the applicant's pre-trial detention was disproportionate to the strict exigencies of the situation and concluded by a majority (eleven votes to six) that his right to liberty and security, as safeguarded by Article 19 § 3 of the Constitution, had been breached.

(d) *Mustafa Başer and Metin Özçelik* judgment (application no. 2015/7908, 20 January 2016) and *Süleyman Bağrıyanık and Others* judgment (application no. 2015/9756, 16 November 2016)

101. In its judgment in *Mustafa Başer and Metin Özçelik*, adopted by a majority (four votes to one), the Constitutional Court examined a complaint as to the jurisdiction of the Bakırköy 2nd Assize Court, which specialised in dealing with terrorist offences, and held that that court had jurisdiction under section 89 of Law no. 2802 to institute criminal proceedings and that accordingly it was entitled to order the applicants' detention in accordance with section 85 of the same Law.

102. In its *Süleyman Bağrıyanık and Others* judgment, adopted unanimously, the Constitutional Court reviewed the lawfulness of the pre-trial detention of four public prosecutors suspected of offences committed in connection with their official duties. After the authorisation procedure under section 82 of Law no. 2802 had been initiated, the applicants had been placed in pre-trial detention by the Tarsus 2nd Assize Court. In response to the applicants' complaint that that court, which specialised in dealing with terrorist offences, lacked jurisdiction and that the case should have been heard by the duty assize court, the Constitutional Court noted that the 2nd Assize Court had jurisdiction under section 89 of Law no. 2802 to institute criminal proceedings and that accordingly it was entitled to order the applicants' detention under section 85 of the same Law.

103. In response to the applicants' complaint under section 88 of Law no. 2802, the Constitutional Court observed that that Law did not contain any provisions prohibiting the adoption of preventive measures in respect of judges and prosecutors once the initiation of an investigation had been authorised in accordance with the procedure laid down in Law no. 2802. It noted that by the date of the applicants' initial detention, the preliminary investigation procedure had been completed and permission to initiate a criminal investigation had been given. The Constitutional Court further noted that the Mersin Assize Court, which had examined an objection by the applicants against the order for their detention, had found that the prohibition in section 88(1) of Law no. 2802 related only to actions that could be taken by the security forces and did not preclude the judicial authorities from taking preventive measures. The Constitutional Court held that this interpretation and application of domestic law had been neither unreasonable nor arbitrary and that the applicants' detention was therefore lawful.

(e) *Mustafa Açay* judgment (application no. 2016/66638, 3 July 2019) and *E.A.* judgment (application no. 2016/78293, 3 July 2019)

104. In two judgments adopted on the same day by a majority (three votes to two) and published in the Official Gazette on 11 September 2019, the Constitutional Court ruled on the lawfulness of the pre-trial detention of two judges who had been suspended following a decision by the HSK on 16 July 2016 and subsequently dismissed on 24 August 2016. It concluded that the implementation of measures entailing suspension and/or dismissal could not in itself be regarded as proof of strong suspicion that the individuals concerned had committed the offence of which they were accused, namely membership of FETÖ/PDY. Nor did the other available evidence form a basis for such suspicion. Next, examining their complaint in the light of Article 15 of the Constitution, it held 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 found that the judges' pre-trial detention was disproportionate to the exigencies of the situation and that their right to liberty and security, as safeguarded by Article 19 § 3 of the Constitution, had been breached.

H. Data and statistics

105. The Government provided the following information and statistics about applications for release and objections lodged following the adoption of decisions relating to detention.

106. In 2016 59,001 applications for release were submitted; the magistrates' courts granted 10,990 applications and ordered the release of the detainees concerned. In 2017 there were a total of 51,930 applications for release; 9,938 of them were granted and the detainees concerned were released. In 2018 (January to August) 17,549 applications for release were submitted and 4,318 of them led to a favourable outcome in the form of release.

107. In 2016 the number of objections lodged against decisions on detention reached a total of 450,596. Of these objections, 5,067 were upheld. In 2017 567,810 objections were lodged in respect of decisions on detention, and the magistrates' courts upheld 4,645 of them. In 2018 (January to August) 249,841 objections were lodged, of which 2,325 led to a favourable outcome.

III. RELEVANT COUNCIL OF EUROPE INSTRUMENTS

108. On 13 March 2017 the European Commission for Democracy through Law (Venice Commission) published an opinion (no. 852/2016) on the duties, competences and functioning of the criminal peace judgeships

(magistrates' courts). In the concluding part of its opinion, it stated that the jurisdiction and practice of the magistrates' courts gave rise to concerns, and criticised the "system of horizontal appeals". This part of the opinion reads as follows:

> "101. Peace judges are formally lawful judges and are appointed by a judicial council. However, upon close examination their jurisdiction and their practice give rise to numerous concerns.
>
> 102. The official purpose of establishing peace judgeships was to enable peace judges to devote sufficient time to the drafting of the reasoning of human rights sensitive matters. However, this goal was not implemented properly and the peace judges are bogged down with work not related to 'protective measures'.
>
> 103. Another official purpose of establishing peace judgeships was to avoid that the same judge decide first on protective measures, then on the merits. According to this reason, it is difficult to understand why the criminal judgeships of peace are necessary at the investigation phase, while at the prosecution (trial) phase the same judge can take protective measures and then decide on the merits without being biased.
>
> 104. The system of horizontal appeals among a small number of peace judges within each region or courthouse is problematic, prevents the unification of case-law, establishes a closed system and cannot be justified with the need for specialisation.
>
> 105. There are numerous instances where peace judges did not sufficiently reason decisions which have a drastic impact on human rights of individuals. Their heavy workload does not leave them sufficient time to provide sufficiently individualised reasoning, notably in cases of detention and when shutting down Internet sites.
>
> 106. Therefore, the Venice Commission recommends:
>
> 1. The competence of the criminal judgeships of peace on protective measures during the investigation phase ('protective measures') should be removed. Ordinary judges should be entrusted with the protective measures on personal liberties during the investigation and prosecutorial phases.
>
> 2. If the system of peace judgeships were retained, in order to live up to the goal of specialisation of the peace judges, they should be relieved of all duties that do not relate to 'protective measures', notably the blocking of Internet sites and traffic offenses which take up a considerable amount of their time. Consequently, they should no longer have any jurisdiction on the merits and real appeals should be introduced in these matters, including the blocking of Internet sites.
>
> 3. The horizontal system of appeals between the peace judges should be replaced by a vertical system of appeals to either the criminal courts of first instance or possibly to the courts of appeal.
>
> 4. For persons who have been detained on the basis of insufficiently reasoned decisions by peace judges prosecution should request their release as soon as possible, unless a trial court has taken over responsibility for their detention."

IV. NOTICE OF DEROGATION BY TURKEY

109. 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.

..."

110. The notice of derogation was withdrawn on 8 August 2018, following the end of the state of emergency.

THE LAW

I. PRELIMINARY QUESTION CONCERNING THE DEROGATION BY TURKEY

111. 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 therefor. 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

112. The Government submitted that in availing itself of its right to make a derogation from the Convention under Article 15, 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.

113. 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.

114. 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", a condition that was not satisfied in the present case. He added that the Government's arguments concerning Article 15 of the Convention had not been taken into consideration by the Constitutional Court. Moreover, most of his complaints were not covered by the notice of derogation, which related solely to the measures taken pursuant to Article 6 of Legislative Decree no. 667 and Article 3 of Legislative Decree no. 668. He argued that only complaints explicitly covered by the derogation could be examined under Article 15 of the Convention.

B. The Court's assessment

115. The Court 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. With regard to the scope *ratione temporis* and *ratione materiae* of the derogation by Turkey – a question which the Court could raise of its own motion, seeing that the date of the applicant's initial detention was 20 July 2016, one day before the state of emergency took effect – the Court observes that the applicant was detained a very short time after the coup attempt, the event that prompted the declaration of the 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, and *Alparslan Altan v. Turkey*, no. 12778/17, § 75, 16 April 2019).

116. As to whether the measures taken in the present case were strictly required by the exigencies of the situation and consistent with the other obligations under international law, the Court considers it necessary to examine the applicant's complaints on the merits, and will do so below.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Complaints under Article 5 §§ 1 and 3 of the Convention

117. The applicant complained that he had been placed in pre-trial detention in breach of domestic law and in the absence of reasonable suspicion that he had committed the offence of which he was accused. He further submitted that the domestic courts had given insufficient reasons for their decisions on his detention.

1. Complaints under Article 5 § 1 of the Convention

118. The Government urged the Court to reject the complaints under Article 5 § 1 of the Convention concerning an alleged breach of domestic law and the lack of reasonable suspicion that the applicant had committed an offence, for failure to make use of the compensatory remedy provided for by Article 141 of the CCP.

119. The Court reiterates that Article 35 of the Convention requires only the exhaustion of remedies which are effective and available – that is to say, remedies which are accessible, are capable of providing redress in respect of the applicant's complaints and offer reasonable prospects of success (see, among other authorities, *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

120. In the present case, the Court notes that the applicant raised his complaints under Article 5 § 1 of the Convention in his application to the Constitutional Court, which examined the merits of those complaints and declared them inadmissible as being manifestly ill-founded in its decision of 27 December 2017 (see paragraphs 38 and 42 above).

121. The Court considers that, regard being had to the rank and authority of the Constitutional Court in the Turkish judicial system and to that court's conclusion reached by that court in respect of these complaints, a compensation claim under Article 141 of the CCP would have had, and indeed would still have, no prospects of success (see, to similar effect, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 27, Series A no. 332, and *Carson and Others v. the United Kingdom* [GC],

no. 42184/05, § 58, ECHR 2010). Accordingly, the Court considers that the applicant is not required to make use of this compensatory remedy. It therefore dismisses the Government's objection in this respect.

2. Complaint under Article 5 § 3 of the Convention

122. The Government urged the Court to declare the complaint about the length of the applicant's pre-trial detention inadmissible for non-exhaustion of domestic remedies, on two grounds. They contended, firstly, that the applicant had not raised a complaint under Article 5 § 3 of the Convention in his application to the Constitutional Court and, secondly, that he still had the opportunity to bring a compensation claim under Article 141 of the CCP.

123. The Court observes that the application lodged with it does not in itself concern the length of the applicant's pre-trial detention; in his application form the applicant mainly complained that insufficient reasons had been given in the order for his pre-trial detention, while also criticising the lack of reasoning in the decisions extending it.

124. The Court therefore dismisses the Government's objection in so far as it concerns the alleged failure to raise the matter before the Constitutional Court and to lodge a compensation claim under Article 141 of the CCP.

B. Complaints under Article 5 § 4 of the Convention

125. The applicant complained that no hearing had been held in the course of the reviews of his detention, that the public prosecutor's opinion had not been disclosed to him and that access to the investigation file had been restricted. In addition, he argued that the magistrates reviewing his detention had not been independent and impartial. Lastly, he submitted that specific facts and arguments he had raised in his applications for release and his objections had not been taken into consideration by the magistrates.

1. Incompatibility ratione personae

126. The Government submitted that the applicant's complaint of a lack of independence and impartiality on the part of the magistrates' courts amounted to an *actio popularis*, because he had simply alleged in general terms that none of the magistrates' courts in the Turkish legal system were independent or impartial. The applicant had not provided any concrete explanation as to the lack of independence and impartiality of the magistrates who had given decisions on his detention.

127. The Court notes that the applicant was the subject of several decisions by magistrates' courts whose independence and impartiality he challenged. He was therefore personally and directly affected by the situation of which he complained. The fact that he disputed the

independence and impartiality of the magistrates' courts on account of structural, and hence general, deficiencies does not in itself render his complaint abstract, given that he can claim to be the "victim" of the alleged violation. It follows that the Government's objection on this point must be dismissed.

2. Failure to lodge an application with the Constitutional Court and an application for rectification

128. The Government objected that the applicant had not exhausted domestic remedies in respect of his complaints under Article 5 § 4 of the Convention, arguing that he had not raised them in an individual application to the Constitutional Court. Regarding specifically the complaint about the non-disclosure of the public prosecutor's opinion, the Government admitted that although this complaint had been raised by the applicant in his application to the Constitutional Court, it had not been addressed by that court. Nevertheless, it had been open to the applicant to apply to the Constitutional Court under Article 82 of its internal regulations for rectification of this mistake. They explained that that provision entitled applicants to apply to the Constitutional Court for rectification of a clerical error found in a judgment that had already been delivered.

129. The Court notes that the applicant did indeed raise his complaints under Article 5 § 4 of the Convention with the Constitutional Court, before submitting them to the Court. It therefore dismisses the Government's objection on this point.

As regards the possibility of applying to the Constitutional Court under Article 82 of its internal regulations, the Court considers that it is not necessary to examine this objection, since the complaint concerning the non-disclosure of the public prosecutor's opinion is in any event inadmissible, for the reasons set out below (see paragraph 247 below).

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

130. The applicant complained that he had been placed in pre-trial detention in breach of domestic law and disputed that there had been a case of discovery *in flagrante delicto* for the purposes of section 94 of Law no. 2802. In that regard he argued that the magistrates' courts had lacked jurisdiction to decide on his initial detention and its continuation. He also argued that there had been no specific evidence giving rise to a reasonable suspicion that he had committed the offence of which he had been accused and thus necessitating his pre-trial detention. Lastly, he submitted that the domestic courts had given insufficient reasons for the decisions on his detention. He alleged a violation of Article 5 §§ 1, 3 and 4 of the Convention on that account.

131. 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."

132. The Government contested the applicant's argument.

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

1. The parties' submissions

(a) The applicant

133. The applicant challenged the application of section 94 of Law no. 2802. He submitted that on account of his position as a judge, he enjoyed a special status in criminal investigations and proceedings of which he was the subject. In accordance with section 82 of Law no. 2802, the initiation of a criminal investigation in respect of judges or prosecutors for offences committed in connection with or in the course of their official duties was subject to authorisation by the Ministry of Justice. In the case of offences committed in a personal capacity or discovered *in flagrante delicto*, which were governed respectively by sections 93 and 94 of Law no. 2802, no such authorisation was required before initiating a criminal investigation. The fact that the HSK had given its permission for the opening of an investigation (see paragraph 16 above) proved that he had been detained in connection with an offence linked to his official duties. The applicant thus submitted that the acts of which he had been accused related to his judicial functions. By subjecting him to the procedural rules governing offences discovered *in flagrante delicto*, the national authorities had clearly breached section 88 of Law no. 2802.

134. The applicant submitted that following the entry into force of Legislative Decree no. 680 on 6 January 2017, the investigation file for his case had been transferred from the Ankara public prosecutor's office to the

Istanbul public prosecutor's office. The authorities had thus treated his case as falling under section 93 of Law no. 2802. Even assuming that the offence of which he had been accused was a personal offence, the decisions on his detention had been given by judges and courts lacking jurisdiction. In that event, the decisions on his detention should have been taken from the outset by the Sakarya Assize Court in accordance with section 85 of Law no. 2802.

135. The applicant disputed that there had been a case of discovery *in flagrante delicto* governed by section 94 of Law no. 2802. He submitted that he had not been accused of having taken part in the attempted coup and that there could therefore have been no question of his having been caught in the act. Moreover, his situation clearly did not fall into any of the categories listed in Article 2 of the CCP. And even accepting the Government's argument that there had been a case of discovery *in flagrante delicto* governed by section 94 of Law no. 2802, decisions on his detention should have been taken by the Kocaeli magistrate's court throughout the investigation. However, in reality his detention had been ordered initially by the Kocaeli magistrate's court and then in turn by the Ankara and Istanbul magistrates' courts, whose jurisdiction *ratione loci* and *ratione materiae* he contested. In the applicant's submission, the attempted coup had been used as a pretext to deprive judges and prosecutors of the safeguards afforded by domestic law, and the provisions of domestic law had been interpreted arbitrarily.

(b) The Government

136. The Government submitted that the applicant's pre-trial detention had complied with domestic legislation. It had been ordered in accordance with the rules of ordinary law (Articles 100 et seq. of the CCP) because there had been a case of discovery *in flagrante delicto* governed by section 94 of Law no. 2802. In ordering the applicant's initial pre-trial detention, the Kocaeli magistrate's court had acted in accordance with the Court of Cassation's case-law on the concept of "*in flagrante delicto*", as expounded in its judgment of 26 September 2017 (see paragraph 88 above). The Government added that the Court of Cassation had reached a similar conclusion in cases predating the applicant's case, concerning the offence of membership of terrorist organisations other than FETÖ/PDY. It was for the national courts to interpret the concept of "*in flagrante delicto*" and, having regard to the characteristics of the present case and the well-established case-law of the Court of Cassation, the conclusion reached by the Kocaeli magistrate's court could not be regarded as arbitrary or manifestly unfounded. That being so, the Government concluded that there had been a case of discovery *in flagrante delicto* of the offence of membership of an armed terrorist organisation.

137. In the alternative, should the Court decide that there had not been a case of discovery *in flagrante delicto*, the Government submitted that the

offence of which the applicant had been accused was a personal offence governed by section 93 of Law no. 2802 and could not be regarded as an offence committed in connection with or in the course of official duties. They relied in that connection on a judgment delivered on 28 September 2010 by the plenary criminal divisions of the Court of Cassation (E.2010/162-K.210/179), which had found that the offence of which the defendant (a former public prosecutor) was accused, namely forging official documents, constituted an offence connected to official duties in that the defendant had been acting in his capacity as a prosecutor when forging the documents in question. The Government emphasised that in the case cited, the offence of membership of an armed terrorist organisation, of which the defendant had also been accused, had not been treated as an offence committed in connection with or in the course of official duties.

138. The Government stated that section 93 of Law no. 2802 related only to the rules of jurisdiction *ratione loci* and did not introduce any special rules concerning investigation and prosecution. In other words, pursuant to section 93, the investigation should be conducted by the chief public prosecutor at the nearest assize court, in accordance with the provisions of ordinary law. In the present case, the applicant's pre-trial detention had been ordered by the Kocaeli magistrate's court, whereas, under the aforementioned section 93, the magistrate's court with jurisdiction *ratione loci* had been the one in Sakarya. That fact, however, did not mean that the order for the applicant's pre-trial detention had been unlawful under domestic law.

139. The Government further submitted that the applicant's allegations that the decisions on his detention should have been taken by an assize court were unfounded. They pointed out that sections 82-92 of Law no. 2802 and Article 159 of the Constitution applied only to offences committed in connection with or in the course of official duties, as was borne out by practice. To illustrate their argument, they produced an order for the detention of a judge on suspicion of a personal offence (the judge in question, serving in Ankara, had been suspected of homicide; the criminal investigation had been entrusted to the Sincan public prosecutor's office, which had territorial jurisdiction in accordance with section 93 of Law no. 2802, and the suspect had been placed in pre-trial detention by the Sincan magistrate's court pursuant to the provisions of the CCP).

140. The Government submitted that the fact that the applicant's detention had been ordered by a magistrate's court in Kocaeli and not Sakarya had to be assessed in the light of the circumstances that had given rise to the declaration of a state of emergency and the notice of derogation under Article l5 of the Convention. In that connection, they noted that investigations had been initiated in respect of several thousand judges and prosecutors the day after the coup attempt, that it had been impossible for them all to be brought before the magistrate's court with jurisdiction for the

purposes of section 93 of Law no. 2802, and that this explained why the judges and prosecutors concerned had been placed in detention by the magistrate's court closest to the place of their arrest.

141. Lastly, the Government added that consideration had to be given to Article 161 § 8 of the CCP, which provided that investigations into certain offences – including the one of which the applicant was suspected – were conducted directly by the public prosecutor, even if the offence had been committed in connection with or in the course of official duties. In other words, pursuant to Article 161 § 8, the special rules of procedure laid down in Law no. 2802 should not apply to proceedings involving the offence of membership of a terrorist organisation.

2. The Court's assessment

142. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

(a) Relevant principles

143. The relevant principles for the examination of the applicant's complaint under Article 5 § 1 of the Convention were set forth by the Court in *Mooren v. Germany* ([GC], no. 11364/03, 9 July 2009), the relevant passages of which read:

"*(i) Recapitulation of the relevant principles*

72. 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. 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 (see, *inter alia*, *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI; *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008). 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 (compare *Baranowski v. Poland*, no. 28358/95, §§ 51-52, ECHR 2000-III; *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; and *Nasrulloyev v. Russia*, no. 656/06, § 71, 11 October 2007).

(α) Principles governing the examination of compliance with domestic law

73. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should therefore review whether this law has been complied with (see, *inter alia*, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III; *Baranowski*, cited above, § 50; *Ječius*, cited above, § 68; and *Ladent v. Poland*, no. 11036/03, § 47, 18 March 2008).

74. However, the Court has clarified, particularly in its more recent case-law, that not every fault discovered in a detention order renders the underlying detention as such unlawful for the purposes of Article 5 § 1. A period of detention is, in principle, 'lawful' if it is based on a court order. A subsequent finding of a superior domestic court that a lower court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention (see, *inter alia*, *Benham*, cited above, § 42; *Douiyeb v. the Netherlands* [GC], no. 31464/96, § 45, 4 August 1999; *Minjat v. Switzerland*, no. 38223/97, § 41, 28 October 2003; and *Khudoyorov v. Russia*, no. 6847/02, § 128, ECHR 2005-X (extracts)).

75. In its more recent case-law, the Court, referring to a comparable distinction made under English law (compare *Benham*, cited above, §§ 43-46; and *Lloyd and Others v. the United Kingdom*, nos. 29798/96 and others, §§ 102, 105 et seq., 1 March 2005), further specified the circumstances under which the detention remained lawful in the said underlying period for the purposes of Article 5 § 1: For the assessment of compliance with Article 5 § 1 of the Convention a basic distinction has to be made between ex facie invalid detention orders – for example, given by a court in excess of jurisdiction (see *Marturana v. Italy*, no. 63154/00, § 78, 4 March 2008) or where the interested party did not have proper notice of the hearing (see *Khudoyorov*, cited above, § 129; and *Liu v. Russia*, no. 42086/05, § 79, 6 December 2007) – and detention orders which are prima facie valid and effective unless and until they have been overturned by a higher court (ibid.). A detention order must be considered as ex facie invalid if the flaw in the order amounted to a 'gross and obvious irregularity' in the exceptional sense indicated by the Court's case-law (compare *Liu*, cited above, § 81; *Garabayev v. Russia*, no. 38411/02, § 89, 7 June 2007; and *Marturana*, cited above, § 79). Accordingly, unless they constitute a gross and obvious irregularity, defects in a detention order may be remedied by the domestic appeal courts in the course of judicial review proceedings.

(β) The required quality of domestic law

76. The Court must moreover ascertain whether the domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied (see *Baranowski*, cited above, §§ 51-52; *Ječius*, cited above, § 56; and *Khudoyorov*, cited above, § 125). In laying down that any deprivation of liberty must be 'lawful' and be effected 'in accordance with a procedure prescribed by law', Article 5 § 1 does not merely refer back to domestic law; like the expressions 'in accordance with the law' and 'prescribed by law' in the second paragraphs of Articles 8 to 11, it also relates to the 'quality of the law', requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. 'Quality of the law' in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III; and *Nasrulloyev*, cited above, § 71).

(γ) Principles governing the notion of arbitrary detention

77. No detention which is arbitrary can be compatible with Article 5 § 1, the notion of 'arbitrariness' in this context extending beyond the lack of conformity with national law. As a consequence, a deprivation of liberty which is lawful under domestic law can still be arbitrary and thus contrary to the Convention. While the Court has not previously formulated a global definition as to what types of conduct on the part of

the authorities might constitute 'arbitrariness' for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis. It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see *Saadi*, cited above, §§ 67-68).

78. One general principle established in the case-law is that detention will be 'arbitrary' where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (compare *Bozano v. France*, 18 December 1986, § 59, Series A no. 111, and *Saadi*, cited above, § 69) or where the domestic authorities neglected to attempt to apply the relevant legislation correctly (see *Benham*, cited above, § 47; *Liu*, cited above, § 82; and *Marturana*, cited above, § 80).

79. Furthermore, in the context of sub-paragraph (c) of Article 5 § 1, the reasoning of the decision ordering detention is a relevant factor in determining whether a person's detention must be considered as arbitrary. The Court has considered the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time to be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1 (see *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002; *Nakhmanovich v. Russia*, no. 55669/00, § 70, 2 March 2006; and *Belevitskiy v. Russia*, no. 72967/01, § 91, 1 March 2007). Conversely, it has found that an applicant's detention could not be said to have been arbitrary if the domestic court gave certain grounds justifying the continued detention on remand (compare *Khudoyorov*, cited above, § 131), unless the reasons given are extremely laconic and without reference to any legal provision which would have permitted the applicant's detention (compare *Khudoyorov*, cited above, § 157)."

144. 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 (see *Alparslan Altan*, cited above, § 102).

(b) Application of these principles in the present case

(i) Article 5 § 1 of the Convention

145. Since the subject of the present complaint is the applicant's initial detention, the first question to be determined is whether, as a judge at the material time, he was "lawfully" detained for the purposes of Article 5 § 1 of the Convention, and whether he was deprived of his liberty "in accordance with a procedure prescribed by law". In determining this question, the Court will first examine whether the applicant's detention complied with Turkish law.

146. The Court observes that in Turkish law, investigations and proceedings concerning offences committed by judges and public prosecutors other than the most senior ones are governed by Law no. 2802. This Law differentiates between offences committed in connection with or in the course of official duties and personal offences, which are any offences not linked to the duties of a judge or public prosecutor. Lastly, section 94 of the Law, governing both offences linked to official duties and personal offences, provides that the rules of ordinary law apply in the case of discovery *in flagrante delicto*.

147. The Court notes that it was not disputed among the parties that the applicant's pre-trial detention was ordered on the basis of the ordinary rules governing detention, that is, Articles 100 et seq. of the CCP. The subject of the dispute in the present case is whether the applicant's detention, ordered under the rules of ordinary law, may be said to have satisfied the "quality of the law" requirement.

148. In this connection, the Court observes that in circumstances similar to those of the present case – in the context of the pre-trial detention of a member of the Constitutional Court – it held that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law appeared manifestly unreasonable and were also problematic in terms of the principle of legal certainty (see *Alparslan Altan*, cited above, § 115, a case in which the application of domestic law by the national courts was found to have negated the procedural safeguards afforded by Turkish law to the applicant, a judge serving on the Constitutional Court and hence entitled to such protection under Law no. 6216 on the establishment and rules of procedure of the Constitutional Court). Following its examination of the present case, and in the light of the arguments submitted by the parties, the Court can see no reason to reach a different conclusion as regards the courts' interpretation of the concept of *in flagrante delicto* and the application of section 94 of Law no. 2802 in the circumstances of the present case.

149. The Court observes firstly 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, mentioned the commission of the offence of attempting to overthrow the constitutional order. In fact, the latter offence was not taken into consideration by the Kocaeli magistrate's court in ordering the applicant's pre-trial detention (see paragraph 27 above); the applicant was 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. According to the Kocaeli magistrate's court that ordered the applicant's pre-trial detention, there was a situation of discovery *in flagrante delicto* within the meaning of section 94 of Law no. 2802. The magistrate did not provide any legal basis for that finding.

150. The Court notes that in its leading judgment adopted on 26 September 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 88 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.

151. 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).

152. 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 (see paragraph 59 above). 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.

153. 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. As a result, this interpretation negates the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive (see *Alparslan Altan*, cited above, § 112).

154. 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 144 above). The purpose of such protection 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, the Court observes, moreover, that Turkish legislation does not prohibit the prosecution of judges for offences linked to their official duties, provided that the safeguards enshrined in the Constitution and Law no. 2802 are observed.

155. Furthermore, from a reading of the Court of Cassation's judgment of 26 September 2017 (see paragraph 88 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 59 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 83-85 above).

156. 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, namely section 94 of Law no. 2802, in the present case are not only problematic in terms of legal certainty, but also appear manifestly unreasonable (see *Alparslan Altan*, cited above, § 115).

157. The Court takes note of the Government's argument that since the offence of which the applicant was accused was a personal offence governed by section 93 of Law no. 2802, the application of section 94 in his

case did not have the effect of depriving him of the procedural safeguards in place for offences committed in connection with or in the course of official duties, but simply meant that the decision to detain him was taken by a magistrate's court lacking territorial jurisdiction. It further notes that the Government contended that Law no. 2802 differed from Law no. 6216 on the establishment and rules of procedure of the Constitutional Court in that it made a distinction between offences linked to judges' official duties and personal offences, affording procedural safeguards only in respect of the former, whereas Law no. 6216 provided for judicial immunity in respect of both types of offence.

158. The Court cannot accept the Government's position. It observes that the applicant's core argument is that the HSK's permission for the opening of an investigation proved that he had been detained in connection with an offence linked to his official duties. He also alleged that the acts of which he had been accused related to his judicial functions (see paragraph 133 above). According to the applicant, by subjecting him to the procedural rules governing offences discovered *in flagrante delicto*, the national authorities had clearly breached section 88 of Law no. 2802 (see paragraph 133 above). The Court notes that in the detention order of 20 July 2016 (see paragraph 27 above), no position was taken explicitly on whether the applicant's alleged membership of a terrorist organisation constituted an offence committed "in connection with or in the course of [his] official duties", regulated by sections 82-92 of Law no. 2802, or a "personal offence" within the meaning of section 93 of the same Law (see paragraph 67 above). The magistrate merely referred to section 94 of the Law, which applies to both types of offences, in support of his finding that the applicant's alleged offence constituted a "situation of discovery *in flagrante delicto*" governed by that provision. However, the Court points out that under Law no. 2802, the distinction as to whether a criminal offence allegedly perpetrated by a judge constitutes an offence committed in connection with or in the course of his or her official duties or a personal offence is fundamental for the procedural safeguards afforded to judges such as the applicant. In this connection, the Court does not consider it appropriate, or even necessary, to undertake an analysis of the scope of the safeguards afforded by Turkish law to judges suspected of having committed an offence. Nevertheless, it considers that a crucial factor for the purposes of its assessment as to the lawfulness of the measure in question is that the magistrate's application of the concept of *in flagrante delicto*, within the meaning of section 94 of Law no. 2802, was decisive for depriving the applicant of the safeguards afforded to all judges by Law no. 2802. Therefore, taking account of the reasoning adduced by the magistrate in detaining the applicant, the Court does not accept the Government's argument that the only consequence of applying section 94 was that the decision to detain him was taken by a magistrate's court

lacking territorial jurisdiction. It must be emphasised that it is not for the Court to determine into which category of offences the applicant's alleged conduct falls. However, the Court observes that the requirements of legal certainty become even more paramount when it reviews "the manner in which a detention order was implemented from the standpoint of the provisions of the Convention" (see paragraph 144 above), where a judge has been deprived of his liberty. Therefore, the Court considers that in view of its previous finding that the extensive interpretation of the concept of *in flagrante delicto*, as applied by the domestic courts, was not in conformity with the requirements of the Convention, the mere application of that concept and the reference to section 94 of Law no. 2802 in the magistrate's detention order of 20 July 2016 did not, in the circumstances of the present case, fulfil the requirements of Article 5 § 1 of the Convention.

(ii) Article 15 of the Convention

159. The Court observes 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 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 this case, namely Article 100 of the CCP and the provisions of Law no. 2802, did not undergo any amendments during the state of emergency. 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.

160. 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 156 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 (see *Alparslan Altan*, cited above, § 118).

161. In the light of the foregoing, the Court concludes 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, and, more recently, *Alparslan Altan*, cited above, § 119).

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

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

1. The parties' submissions

(a) The applicant

163. The applicant submitted that there had been 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 of his initial detention, the Kocaeli magistrate's court had not even had the decision by the HSK or the file on the investigation by the Ankara public prosecutor's office in its possession. He pointed out that he was not concerned by the disciplinary investigations initiated before the coup attempt of 15 July 2016 in respect of judges suspected of being members of FETÖ/PDY. Furthermore, the evidence referred to in the Constitutional Court's judgment had been obtained after he had been placed in pre-trial detention.

164. The applicant also complained that the successive magistrates' courts that had decided on his detention had not referred to any concrete evidence linked to the alleged offence. Not until 4 April 2017, more than eight months after his initial detention, had a decision on the subject been based on a specific item of evidence, namely the police report on the ByLock messaging application (*ByLock CBS Sorgu Raporu*), indicating his use of the application. The applicant also disputed the reliability of the statements by the witness C.U., who had likewise been suspected and detained on grounds linked to the FETÖ/PDY organisation and had subsequently been released after giving evidence against him.

(b) The Government

165. The Government submitted in reply that the magistrate's court that had ruled on the applicant's detention had based its finding of a reasonable suspicion that he had committed the offence of membership of a terrorist organisation on the decision by the HSK (dated 16 July 2016) to suspend large numbers of judges and prosecutors, including the applicant. Having regard to the HSK's decision and to the fact that judges and prosecutors belonging to that organisation had been carrying out unlawful activities, the Government contended that the conclusion reached by the Kocaeli magistrate's court as to the existence of a reasonable suspicion had been justified, and that the applicant could not be said to have been detained arbitrarily. In other words, the evidence and information on which the Kocaeli magistrate's court had based its decision to detain him had been

capable of satisfying an objective observer that there was genuinely a reasonable suspicion, as required by Article 5 § 1 (c) of the Convention and Article 100 of the CCP. The Government submitted that suspicions about the applicant's links to FETÖ/PDY had first emerged in the course of the disciplinary investigation conducted in respect of him.

166. The Government added that the reasonable suspicion that had already existed at the time of the applicant's initial detention had become stronger following the discovery of new evidence during the investigation: the applicant's dismissal from his post, ordered on 24 August 2016 by the HSK, and his use of the ByLock messaging system. Moreover, the available evidence had been sufficient to charge the applicant with membership of a terrorist organisation, and on 19 March 2018 he had been found guilty as charged and had been convicted.

167. The Government further stated that the applicant's complaint of a lack of reasonable suspicion that he had committed the alleged offence had been examined by the Constitutional Court.

168. Lastly, the Government submitted that the Court should have 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.

In addition, they drew the Court's attention to the decision taken on 16 July 2016 by the HSK. The decision in question referred to many examples of how judges and prosecutors suspected of being members of FETÖ/PDY had made use of their powers and responsibilities in line with the instructions issued by that organisation.

The Government further submitted that the applicant's detention in the present case had been in accordance with domestic law in the light of the circumstances at that time and that it had responded to the needs of the moment, for the following reasons: the coup attempt had not been conclusively ended; the organisation had a structure based on secrecy; there had been a large number of suspects; investigations had been ongoing across the country; public order had been severely disrupted; and the judges and public prosecutors belonging to the organisation in question had been in a position to influence the ongoing investigations. The Government added that, owing to the resources available to the organisation in other countries, many suspects had fled abroad.

2. The Court's assessment

169. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

(a) Relevant principles

170. 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).

171. 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).

172. 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).

173. 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).

174. 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).

175. The Court would also reiterate that the suspicion 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 the initial detention (see *Ilgar Mammadov*, cited above, § 90). In addition, 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 has committed an offence – already applies at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest (see *Buzadji v. the Republic of Moldova* ([GC], no. 23755/07, § 102, 5 July 2016).

(b) Application of these principles in the present case

176. The Court notes that the applicant in the present case complained that his detention had not been based on a "reasonable" suspicion at any time, whether during the initial period immediately after his arrest or during the subsequent periods when his pre-trial detention had been extended by the magistrates' courts. It nevertheless observes that the decisions on the extension of the applicant's detention are not central to his complaint before the Court, which primarily concerns the order for his pre-trial detention.

177. In this connection, the Court observes that the review conducted by the Constitutional Court related solely to the order for the applicant's initial pre-trial detention and not to the subsequent decisions on his detention. Admittedly, in his application to the Constitutional Court the applicant contended that the decisions extending his detention after the initial detention order likewise did not refer to any evidence grounding a reasonable suspicion that he had committed the alleged offence. However, it should be acknowledged that the applicant raised this complaint in a vague manner, more as a means of supporting the grievance at the heart of his application to the Constitutional Court, relating to the initial order for his pre-trial detention. It should also be pointed out that, according to the evidence in the file, the applicant did not raise a clear and distinct complaint before the Constitutional Court concerning the extension of his detention. Lastly, the Court observes that the applicant's detention for the purposes of Article 5 §§ 1 (c) and 3 ended with his conviction at first instance on 19 March 2018 (see paragraph 50 above). In view of the foregoing, and in line with the approach pursued by the Constitutional Court in the present case, the Court will limit its examination to the central issue raised by this complaint, namely whether there was reasonable suspicion at the time of the applicant's initial pre-trial detention.

(i) Article 5 § 1 (c) of the Convention

178. The Court observes that the applicant was placed in pre-trial detention on 20 July 2016 on suspicion of being a member of a terrorist organisation and was charged on 9 July 2017. The public prosecutor sought his conviction under Article 314 of the Criminal Code for membership of the FETÖ/PDY organisation. On 19 March 2018 the applicant was found guilty of that offence and was sentenced by the Istanbul 29th Assize Court.

179. The Court takes note of the applicant's position that there had been 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, namely the use of ByLock, had been obtained a long time after his initial detention and that as a result, at the time of the detention order, the investigating and judicial authorities had had no evidence that could justify such a measure.

180. 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.

181. It takes note of the Government's argument that in view of the very specific circumstances surrounding the coup attempt and the extent to which the FETÖ/PDY organisation had infiltrated the administrative and judicial authorities, the applicant's pre-trial detention had been the only conceivable measure, and that there had been no way of dealing with such a "sneaky" terrorist organisation in ordinary judicial proceedings. 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.

182. 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).

183. In this connection, the Court takes note of the Government's argument that the organisation in question was atypical in nature and had extensively infiltrated influential State institutions and the judicial system under the guise of lawfulness. 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).

184. The Court nevertheless emphasises that the exigencies of dealing with terrorist 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 for the applicant, a judge at the time he was placed in pre-trial detention.

185. The Court notes that when examining the measure in issue, the Constitutional Court referred to the applicant's use of the ByLock messaging application. It should be noted, however, that the relevant evidence was not adduced until long after the applicant's initial detention. The magistrates ruling on his detention relied on the evidence in question for the first time in the decision given on 4 April 2017, more than eight months after he had been placed in pre-trial detention. 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, an assertion he also reiterated before the Court. However, in the reasoning that led it to dismiss the applicant's application, the Constitutional Court did not address that argument and did not explain how evidence obtained several months after the applicant's initial pre-trial detention could have formed a basis for a reasonable suspicion that he had committed the offence of which he was accused.

186. Accordingly, unlike the Constitutional Court (see paragraph 38 above), the Court considers that it is not necessary to examine this evidence in order to ascertain whether the suspicion existing on the date of his initial detention was "reasonable". It should be noted in this connection that in the context of the present case, the Court is called upon to examine whether the applicant's initial detention was based on reasonable suspicion, and not whether such suspicion persisted in relation to his continued detention.

187. In the present case, the Court observes that it appears from the order for the applicant's pre-trial detention, and also from the information provided by the Government, that the Kocaeli magistrate's court based its finding of a reasonable suspicion that the applicant had committed the alleged offence on the decision taken by the HSK on 16 July 2016 and on the request by the Ankara public prosecutor's office to initiate an investigation in respect of him. It notes that in its decision, the HSK suspended 2,735 judges and public prosecutors, including the applicant, on the basis of strong suspicion that they were members of the terrorist organisation that had instigated the attempted coup. In so finding, the HSK relied on information and documents in the files on the investigations it had conducted prior to the coup attempt, and on information subsequently

obtained following research by the intelligence services, assessing all of this evidence as a whole (see paragraph 16 above).

188. It notes that in its 669-page decision, after giving a detailed description of the structure and operating methods of FETÖ/PDY, the HSK referred to a number of disciplinary and criminal investigations that had been initiated before the coup attempt of 15 July 2016 in respect of a number of judges and public prosecutors suspected of having committed illegal acts by following instructions from the organisation. Although the decision clearly indicates the extent to which suspected members of FETÖ/PDY had infiltrated influential State institutions, in particular the judiciary, it does not contain any "facts" or "information" relating directly and personally to the applicant. He does not feature among the individuals mentioned as being the subject of disciplinary and criminal investigations in the decision, and his name does not appear at all. The Government's assertion that the initial indications of the applicant's links to FETÖ/PDY were discovered during the disciplinary investigation in respect of him is not substantiated in any way. Furthermore, according to the applicant, the only disciplinary investigation concerning him dates back to 2015 and was initiated following a complaint by the Kocaeli provincial governor, who was not satisfied with a decision given by the applicant as an administrative judge. The Government have not argued that the disciplinary investigation in question had any connection to FETÖ/PDY. Accordingly, the disciplinary and criminal investigations mentioned in the HSK's decision could not have formed the basis for the suspicion giving rise to the order for the applicant's detention.

189. The Court further notes that in its decision, the HSK made a general reference to information from the intelligence services, without providing any clarification or explaining how it related to the applicant and his situation. In such circumstances, and without addressing the question whether information from the intelligence services can be taken into consideration as the basis for detention, the Court takes the view that in the present case the Government have not provided a sufficient factual basis for the HSK's decision.

190. The Court therefore considers that the mere reference by the Kocaeli magistrate's court to the HSK's decision is insufficient to support the conclusion that there was reasonable suspicion justifying the applicant's pre-trial detention (on this subject, see the recent *Mustafa Açay* and *E.A.* judgments of the Constitutional Court (cited in paragraph 104 above) in which it found that the HSK's decision of 16 July 2016 could not in itself be treated as proof of the existence of strong suspicion as to the commission of the offence of membership of FETÖ/PDY). Admittedly, the magistrate's court sought to justify its decision by referring to Article 100 of the CCP and to the evidence in the file. However, it simply cited the wording of the provision in question. 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).

191. 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 9 above). However, the Government have not produced any "facts" or "information" capable of serving as a factual basis for these instructions by the Ankara prosecutor's office.

192. The fact that, before being placed in pre-trial detention, the applicant was questioned by the Kocaeli 1st Magistrate's Court on 19 and 20 July 2016 in connection with an offence of membership of an illegal organisation reveals, at most, that the authorities 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.

193. 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 the applicant, who was a judge at the time.

194. 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 at first instance and on appeal (see paragraphs 50-51 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.

195. 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 the applicant was "reasonably suspected", at the time of his initial detention, of having committed the alleged offence, it finds that the requirements of Article 5 § 1 (c) regarding

the "reasonableness" of a suspicion justifying detention have not been satisfied.

(ii) Article 15 of the Convention

196. The Court reaffirms that when it comes to consider a derogation under Article 15 of the Convention, 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).

197. The Court observes at the outset that this complaint does not strictly involve a measure taken to derogate from the Convention during the state of emergency. The Kocaeli magistrate's court ordered the applicant's pre-trial detention on suspicion of membership of a terrorist organisation in accordance with Article 100 of the CCP, a provision that was not amended during the state of emergency. The applicant's detention was therefore ordered on the basis of legislation which was in force prior to the declaration of the state of emergency, and which, moreover, is still applicable.

198. Next, the Court observes that the Constitutional Court has already examined the notion of "reasonableness" of the suspicion on which arrest or detention must be based during the state of emergency, in connection with the application of Article 15 of the 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 paragraphs 100 and 104 above). This conclusion is also valid for the Court's examination (see *Mehmet Hasan Altan*, cited above, § 140).

199. Furthermore, as already noted (see paragraph 182 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 204-06 above). This does not mean, however, that the authorities have carte blanche under Article 5 of the Convention 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) of the Convention (see, *mutatis mutandis*, *O'Hara*, cited above, § 34).

200. 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 195 above). That being so, the suspicion against him at that time did not reach the required minimum level of reasonableness. In such 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.

201. The Court therefore concludes 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.

C. Alleged failure to provide sufficient reasons for the applicant's pre-trial detention

202. The applicant submitted that the Kocaeli magistrate's court had not provided sufficient reasons for its decision on his pre-trial detention. He alleged a violation of Article 5 §§ 1 (c) and 3 of the Convention on that account.

Having regard to its finding under Article 5 § 1 of the Convention (see paragraph 201 above), the Court considers that it is unnecessary to examine whether the authorities satisfied their requirement to give relevant and sufficient reasons for depriving the applicant of his liberty from the time of the initial order for his pre-trial detention, that is to say "promptly" after the arrest.

IV. ALLEGED VIOLATIONS OF ARTICLE 5 § 4 OF THE CONVENTION

203. The applicant complained of an infringement of the principle of equality of arms on account of the lack of a hearing during the reviews of his detention, the failure to provide him with a copy of the public prosecutor's opinion and the restriction of access to the investigation file. He also submitted that the magistrates' courts had not taken account of

specific facts and arguments he had included in his applications for release and his objections.

In addition, the applicant complained of a lack of independence and impartiality on the part of the magistrates who had decided on his pre-trial detention.

In support of his complaints the applicant relied on Article 5 § 4 of the Convention, which reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Lack of a hearing during the review of detention

1. The parties' submissions

(a) The applicant

204. The applicant complained that the reviews of his detention had taken place without a hearing for a period of approximately fourteen months and that this could not be deemed proportionate from the standpoint of Article 15 of the Convention.

(b) The Government

205. The Government stated that after he had been placed in pre-trial detention on 20 July 2016, the applicant had been brought before a judge for the first time at the first hearing held in the Assize Court on 19 September 2017. They added that the last decision on an objection by the applicant had been adopted by the Assize Court on 15 August 2017. Accordingly, as of that date the applicant had not appeared before a court for approximately one year and fifteen days.

206. The Government stated that they were aware of the Court's case-law concerning Article 5 § 4 of the Convention. They submitted, however, that the cases in which the Court had found a violation of that provision had not related to a period covered by a derogation under Article 15 of the Convention and that the present case should therefore be assessed in the light of its particular circumstances.

207. The Government stated that the Constitutional Court had examined the applicant's complaint that no hearing had been held during the review of his detention and had found, with reference to its judgment in *Aydın Yavuz and Others*, that the examination of the applicant's objections without a hearing could be regarded as legitimate from the standpoint of Article 15 of the Constitution. They drew the Court's attention to the reasons set out in that judgment. In their submission, bearing in mind the information provided by the Constitutional Court about the situation in the Turkish

judicial system in the aftermath of the attempted coup, it had been simply impossible to hold hearings when objections were examined at that time.

208. The Government added that even after the notice of derogation had been submitted, decisions on detention had been given by a magistrate or a court, as happened in "normal times", and detainees had retained their right of appeal. This indicated that there was effective judicial supervision affording a safeguard against abuses. Furthermore, all decisions on detention were subject to review by another magistrate or court, thus minimising the risk of arbitrariness.

209. The Government pointed out that the applicant's detention had been reviewed without a hearing, in accordance with the provisions of Legislative Decrees nos. 667 and 668, and that those instruments had ceased to apply on 18 July 2018, when the state of emergency had ended.

210. The Government concluded by accepting that a measure that might have breached the requirements of Article 5 § 4 had been taken, but emphasised that it should be viewed in the context of Article 15 of the Convention. The general interest in restoring public order, which had been disrupted following the coup attempt, and arresting members of FETÖ/PDY significantly outweighed the damage allegedly suffered by the applicant as a result of the review of his detention without a hearing. Lastly, the measure taken had been strictly required by the exigencies of the situation, and an approach to the contrary would have hindered any progress in ongoing investigations and prosecutions.

2. The Court's assessment

211. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

(a) Relevant principles

212. The Court reiterates that Article 5 § 4 of the Convention entitles arrested or detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in terms of Article 5 § 1 of the Convention, of their deprivation of liberty. In order to determine whether proceedings falling under Article 5 § 4 of the Convention provide the necessary guarantees, regard must be had to the particular nature of the circumstances in which they take place (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A). The primary procedural guarantee flowing from Article 5 § 4 of the Convention is the right to an effective hearing by the court determining an appeal against detention (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II; *Włoch v. Poland*, no. 27785/95, § 126, ECHR 2000-XI; and *Reinprecht v. Austria*, no. 67175/01, § 31,

ECHR 2005-XII). Furthermore, it should be possible "at reasonable intervals" to exercise the right to a hearing by the court determining an appeal against detention (see *Knebl v. the Czech Republic*, no. 20157/05, § 85, 28 October 2010).

213. The Court further reiterates that Article 15 of the Convention provides that States may take measures derogating from their obligations under the Convention only "to the extent strictly required by the exigencies of the situation". When the Court comes to consider a derogation under Article 15 of the Convention, 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. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities (see *Ireland v. the United Kingdom*, 18 January 1978, § 207, Series A no. 25).

214. Nevertheless, the Court would emphasise that States do not enjoy an unlimited discretion in this respect. It is for the Court to rule whether, *inter alia*, States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by European supervision. 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, for example, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, §§ 48-66, Series A no. 258-B, and *Aksoy v. Turkey*, 18 December 1996, §§ 71-84, *Reports* 1996-VI). In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (see *Brannigan and McBride*, cited above, § 43, and *A. and Others v. the United Kingdom*, cited above, § 173).

(b) Application of these principles in the present case

(i) Article 5 § 4 of the Convention

215. The Court notes that the applicant was placed in pre-trial detention on 20 July 2016 after being heard by the Kocaeli magistrate's court (see paragraph 27 above) and that he next appeared before a court at the first hearing on 19 September 2017, after his trial had begun. It accordingly observes that throughout this period of approximately one year and two months, the applicant did not appear before any of the courts deciding on his detention; both his applications for release and his objections were

examined by the courts without a hearing. The last objection lodged by the applicant during this period was dismissed by the Assize Court on 15 August 2017, without a hearing (see paragraph 47 above).

216. However, the Court considers that where personal liberty is at stake, a period of one year and two months without a court hearing – as in the present case – cannot be described as "reasonable" (see, to similar effect, regarding periods of approximately four months, six months and nine months respectively, *Erişen and Others v. Turkey*, no. 7067/06, § 53, 3 April 2012; *Karaosmanoğlu and Özden v. Turkey*, no. 4807/08, § 77, 17 June 2014; and *Gamze Uludağ v. Turkey*, no. 21292/07, § 44, 10 December 2013).

217. The Court takes notes of the Government's argument that the situation complained of by the applicant was covered by the notice of derogation under Article 15 of the Convention submitted by the Turkish authorities on 21 July 2016. It must therefore examine whether the lack of a hearing in the present case could have been justified under that Article.

(ii) Article 15 of the Convention

218. The Court notes firstly that the situation complained of by the applicant – namely the lack of a hearing during the review of his detention – resulted from measures taken to derogate from the Convention during the state of emergency. During this period, the Council of Ministers, chaired by the President of Turkey and acting in accordance with Article 121 of the Constitution, adopted thirty-seven legislative decrees (nos. 667-703). The decrees placed significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention. Among these instruments, Legislative Decrees nos. 667 and 668 permitted reviews of detention on the basis of the case file alone, without a hearing (see paragraph 81 above).

219. The Court observes that the Constitutional Court, when examining the measure in issue in the context of the individual application lodged by the applicant, found that there was no reason to depart from its leading judgment in the case of *Aydın Yavuz and Others* and declared the applicant's complaint concerning the lack of a hearing during the review of his detention inadmissible as being manifestly ill-founded.

220. In this connection, the Court notes that in its *Aydın Yavuz and Others* judgment the Constitutional Court determined whether Article 15 of the Constitution was applicable to the restriction forming the subject of the present complaint. It concluded that the fact that no hearing had been held for a period of eight months and eighteen days had not breached Article 19 § 8 of the Constitution, read in conjunction with Article 15 of the Constitution, on the grounds that this was proportionate to the exigencies of the state of emergency. In so holding, the Constitutional Court had regard to the difficulties facing Turkey in the aftermath of the coup attempt, namely

the opening of a considerable number of investigations in respect of individuals involved in the coup attempt or with links to FETÖ/PDY and the recourse to pre-trial detention for the majority of them, the complexity of these investigations, the emergence of an unforeseeably heavy workload for the courts and investigating authorities, the suspension and dismissal of large numbers of judges and prosecutors immediately after the coup attempt, and lastly the dismissal of judicial support staff, prison officers and gendarmerie personnel responsible for ensuring the safety and protection of prisoners. The Constitutional Court also took into account the possibility for detainees to apply for release and lodge objections with a view to regaining their liberty, and the automatic review of detention at intervals of thirty days (see paragraphs 92-97 above).

221. The Court reiterates that the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016 are a contextual factor which it must fully take into account in interpreting and applying Article 15 of the Convention in the present case (see *Alparslan Altan*, cited above, § 147).

222. In the Court's view, given the difficult situation in the Turkish judicial system in the aftermath of the coup attempt, as outlined by the Constitutional Court in its *Aydın Yavuz and Others* judgment (see paragraphs 92-97 above), the restriction by Legislative Decrees nos. 667 and 668 of the right of detainees to appear before the judges deciding on their detention was undoubtedly a genuine response to the state of emergency and was justified in the light of the very special circumstances of the emergency. The Constitutional Court's reasoning on this point appears pertinent. The Court also accepts that the legislation applicable in the present case would not have been sufficient to deal efficiently with the situation prevailing in Turkey after the coup attempt: Article 108 of the CCP requires a review of detention at thirty-day intervals during the investigation stage, with the detainee or his or her lawyer being heard in person, and detainees may also apply for release at any stage of the investigation or trial and submit renewed applications without having to wait for a certain period to elapse. Accordingly, the Court accepts the relevant conclusion reached by the Constitutional Court in the case of *Aydın Yavuz and Others*, to the effect that the measures implemented in the aftermath of the coup attempt and the fact for a period of eight months and eighteen days the applicants did not appear before the judges deciding on their detention could reasonably be said to have been strictly required for the protection of public safety.

223. The Court observes, however, that in the present case the applicant did not appear before a court for approximately one year and two months, a much longer period than the one assessed by the Constitutional Court in its *Aydın Yavuz and Others* judgment. In examining the application lodged by the applicant, the Constitutional Court found that there was no reason to depart from its conclusions in the *Aydın Yavuz and Others* case, notwithstanding this difference in length.

224. However, the Court considers that the reasoning adopted by the Constitutional Court in the case of *Aydın Yavuz and Others* – which the Court itself has accepted – inevitably becomes less relevant with the passage of time, in view of the changing circumstances. While it is true that the difficulties with which the country, and specifically its judicial system, had to contend in the first few months after the coup attempt were such as to justify a derogation under Article 15 of the Convention, the same considerations have gradually become less forceful and relevant as the public emergency threatening the life of the nation, while still persisting, has declined in intensity. The exigency criterion must therefore be applied more stringently.

225. The Court notes that the provisions in issue – Article 6, paragraph 1 (ı), of Legislative Decree no. 667 and Article 3, paragraph 1 (ç), of Legislative Decree no. 668 – remained in force throughout the duration of the state of emergency, a period of about two years. The restrictions were not eased during that period; legislation and practice have not evolved in the direction of increasing respect for individual liberty (see *Ireland v. the United Kingdom*, cited above, § 220).

226. In this connection, while it is true that it did not appear possible to hold a hearing during the automatic review of detention and of applications for release, this was apparently not the case regarding the examination of objections. The wording of Article 6, paragraph 1 (ı), of Legislative Decree no. 667 specified that objections "could" be examined without a hearing. This provision therefore did not preclude the possibility of holding a hearing. However, all the objections lodged by the applicant were examined and dismissed without a hearing, including the ones examined at a late stage of his detention, such as the objection that gave rise to the last decision given by the Assize Court on 15 August 2017. The applicant quite simply did not appear before a judge during the entire investigation, even though he had been detained without being charged.

227. The Court further notes that on 31 July 2018, just a few days after the end of the state of emergency, Law no. 7145 came into force, containing similar provisions to those of Legislative Decrees nos. 667 and 668 in relation to reviews of detention without a hearing. The provisional section 19 inserted in the Prevention of Terrorism Act introduced exceptions to the rules laid down in the CCP concerning the holding of hearings during reviews of detention: whereas Article 108 of the CCP provides for a hearing

every thirty days, the amendment introduced by Law no. 7145 provides for a hearing every ninety days in the case of offences falling under the Prevention of Terrorism Act.

228. The Court accepts that the remedies by which the lawfulness of detention could be reviewed – namely applications for release and objections – and the automatic reviews at regular intervals provided a significant measure of protection against arbitrary detention (see *Brogan and Others v. the United Kingdom*, 29 November 1988, §§ 63-65, Series A no. 145-B). It notes, however, that in the applicant's case, the manner in which the courts reviewed his detention, particularly during the first few months, does not suggest that they considered whether the measure was lawful on its merits. When giving their decisions on the applicant's detention, the judges in question were doing the same for dozens of other detainees without providing specific reasons in each individual case, and the decisions do not contain any indication that consideration was given to the arguments put forward by the applicant in his applications for release and his objections.

229. The Court acknowledges that when a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of Article 15 of the Convention must leave a place for progressive adaptations.

230. The Court nevertheless considers that in a situation entailing interference with a fundamental Convention right, such as the right to liberty, and given the potential adverse impact of detention without charge (see *A. and Others v. the United Kingdom*, cited above, § 186), the fact that for such a lengthy period the applicant did not appear before the courts deciding on his detention impaired the very essence of the right guaranteed by Article 5 § 4 of the Convention, and this lack of a hearing cannot reasonably be regarded, even in the situation outlined above, as having been strictly required for the preservation of public safety. The Court therefore cannot accept the conclusion reached by the Constitutional Court when examining this complaint in the application brought by the applicant.

231. The Court therefore concludes that there has been a violation of Article 5 § 4 of the Convention in the present case on account of the length of time during which the applicant did not appear in person before a judge.

B. Restriction of access to the investigation file

1. The parties' submissions

232. The applicant asserted that he had been unable to obtain a copy of the HSK's decisions on the opening of an investigation and his suspension. The only document in the file on his case had been the instructions from the Ankara Chief Public Prosecutor to arrest 2,735 judges and public prosecutors. The list appended to that document had been drawn up long before the coup attempt. Moreover, the only evidence that could have formed a basis for his detention was his alleged use of the ByLock messaging application. However, the data on that application had been saved onto a hard drive and a memory stick kept at the Ankara Chief Public Prosecutor's office, and neither he nor his lawyer had had any access to the data in question.

233. The Government submitted in reply that before he had been interviewed by the public prosecutor, the applicant had been informed that he was suspected of being a member of FETÖ/PDY on the grounds that his name appeared in the decision given by the HSK on 16 July 2016. He had also been heard by the magistrate, with the assistance of counsel, and had given a statement on the alleged offence. Furthermore, the magistrate had noted that the applicant had been suspended from his duties by the HSK and that the Ankara public prosecutor's office had asked for an investigation to be opened in respect of him, and in his application of 22 August 2016 for release, the applicant had explicitly referred to the HSK's decision. In addition, after permission to prosecute him had been granted on 19 June 2017, the restriction on access to the file had been automatically lifted. The applicant's complaint in this regard had, moreover, been examined by the Constitutional Court, which had declared it inadmissible. The Government submitted, in the light of the reasoning adopted by the Constitutional Court, that the applicant had had sufficient knowledge of the contents of the relevant documents and had had the opportunity to challenge the grounds for his detention. Lastly, they emphasised that the Court would have to take into account the notice of derogation under Article 15 of the Convention. Thus, bearing in mind the context that had given rise to the notice of derogation, the restriction complained of, which had been ordered so as not to undermine the purpose of the investigation, had been strictly required by the exigencies of the situation.

2. The Court's assessment

234. The Court observes that the order for the applicant's pre-trial detention was based on the decision by the HSK (see paragraph 187 above). In this connection, the applicant submitted that he had not been aware of the contents of that decision at the time of his hearing in the Kocaeli

magistrate's court, and this assertion, moreover, was not disputed by the Government.

235. The Court considers, however, that it is unnecessary to examine this issue any further. It points out that it has found that the HSK's decision did not support the conclusion that there was a reasonable suspicion at the time of the applicant's initial detention, in that the decision did not contain sufficient objective evidence to satisfy an objective observer that he could have committed the offence of which he was accused. It was accordingly not a document of crucial importance for an effective challenge to the lawfulness of the detention. In view of that conclusion, it appears unnecessary to determine whether the applicant or his lawyer had access to the HSK's decision.

236. In so far as the applicant complained that he had not had access to the data relating to the ByLock messaging system, the Court notes that the examination of the physical evidence consisting of the external hard drive and memory stick was in any event of no consequence for the initial detention order, since this evidence was obtained long after he was first detained. The Court thus finds it unnecessary to examine this complaint.

C. Non-disclosure to the applicant or his lawyer of the public prosecutor's request under Article 108 of the CCP for a review of detention

1. Article 5 § 4 of the Convention

(a) The parties' submissions

237. The applicant complained of the non-disclosure of the public prosecutor's "opinion" during the review of his detention. In rejecting his application for release on 7 September 2016, the Kocaeli 2nd Magistrate's Court had referred to the public prosecutor's request under Article 108 of the CCP for a review of his detention, but he had not been notified of the request or asked to comment. Furthermore, during the automatic review of his detention on 19 August 2016, the Kocaeli 1st Magistrate's Court had not examined the applications for release which he had submitted on 4 and 9 August 2016, and had explicitly referred to the request submitted by the public prosecutor. Lastly, during the automatic review carried out on 10 October 2016, concerning some 2,500 judges, the Ankara 2nd Magistrate's Court had likewise referred to the public prosecutor's request.

238. The Government noted that the applicant had submitted four different decisions to the Court in connection with his complaint.

They stated that the first two decisions were the ones adopted by the Kocaeli 2nd Magistrate's Court on 29 July and 26 September 2016 and pointed out that during the reviews in question, the public prosecutor's opinion had not been sought.

239. The Government added that the third decision was the one taken by the Ankara 8th Magistrate's Court on 14 October 2016. That decision had not resulted from an application by the applicant, but from an automatic review under Article 108 of the CCP. Consequently, the decision in question could not be examined under Article 5 § 4 of the Convention.

240. Lastly, the final decision was the one adopted by the Kocaeli magistrate's court on 7 September 2016. In the Government's submission, the magistrate in question had performed an automatic review of the applicant's detention under Article 108 of the CCP, and in doing so had given a decision, in accordance with Article 3 of Legislative Decree no. 668, on the application for release submitted by the applicant on 22 August 2018. On that occasion, the magistrate had not obtained the public prosecutor's opinion on the applicant's application for release; the prosecutor had simply requested an automatic review at intervals of no more than thirty days, in accordance with Article 108 of the CCP, and the magistrate had not asked for the prosecutor's opinion.

(b) The Court's assessment

241. The Court observes firstly that the Kocaeli 2nd Magistrate's Court did not obtain the public prosecutor's opinion when examining the objections lodged by the applicant on 29 July and 26 September 2016.

242. As regards the decision given by the Ankara 2nd Magistrate's Court on 10 October 2016, the Court notes that it resulted from a review of the applicant's detention under Article 108 of the CCP. In accordance with that provision, the magistrate's court examines the question of the suspect's continued pre-trial detention, further to a request by the public prosecutor (without the need for the detainee to have applied for release), at regular intervals throughout the investigation (at least every thirty days).

243. The Court reiterates that Article 5 § 4 of the Convention applies to court proceedings following a challenge to the lawfulness of detention, in other words proceedings concerning applications for release or appeals against the extension of detention. Accordingly, this provision is applicable only after an appeal has been lodged against a decision extending detention, and not as soon as such a decision has been taken by the court of its own motion (see *Knebl*, cited above, § 76). It is therefore not for the Court to rule, for the purposes of Article 5 § 4 of the Convention, on decisions adopted automatically on the extension of detention (see, among many other authorities, *Hebat Aslan and Firas Aslan v. Turkey*, no. 15048/09, § 60, 28 October 2014). It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

244. It thus remains for the Court to examine the decisions given on 19 August 2016 by the Kocaeli 1st Magistrate's Court, on 7 September

2016 by the Kocaeli 2nd Magistrate's Court and on 14 October 2016 by the Ankara 8th Magistrate's Court.

On those occasions, the magistrates considered the question of the continued pre-trial detention of several suspects, among them the applicant, in accordance with Article 108 of the CCP. In the course of their reviews, they also examined applications for release by the suspects, including the applicant, under paragraph 1 (ç) of Article 3 of Legislative Decree no. 668.

The magistrates found that the public prosecutor had requested a review of the applicant's detention in accordance with Article 108 of the CCP and had sought its continuation. They upheld the prosecutor's request and ordered the applicant's continued pre-trial detention.

245. As the Court has already noted, following the entry into force of Legislative Decree no. 668, applications by detainees for release were examined at the time of the automatic review at thirty-day intervals pursuant to Article 108 of the CCP. The review in the present case thus related not only to the proceedings conducted by the magistrates of their own motion, but also to their examination of the applicant's appeals against his detention. In other words, the proceedings concerning the automatic review coincided with the proceedings concerning the application for release, forming a single procedure. The Court therefore finds that Article 5 § 4 of the Convention is applicable in the present case to the proceedings in question.

246. It has not been established in the present case that in his requests for a review of the applicant's detention the public prosecutor referred to any new facts that had not been brought to the applicant's attention and would have required comments on his part (see, along similar lines, *Kılıç and Others v. Turkey* (dec.), no. 33162/10, § 32, 3 December 2013, concerning the non-disclosure of State Counsel's opinion in the context of proceedings in the Supreme Administrative Court). It has to be noted in this connection that the requests for a review of detention concerned several dozen detainees, at least during the first few months of the detention, and that as a result they were unlikely to contain specific arguments relating to the applicant's individual case. Be that as it may, the applicant himself has not alleged that in response to the public prosecutor's requests, he could have adduced any new evidence of relevance for the consideration of the case.

247. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

D. Alleged lack of independence and impartiality of the magistrates' courts

1. The parties' submissions

(a) The applicant

248. The applicant alleged that the magistrates' courts that had ordered his initial and continued pre-trial detention had not been independent, since they had not based their decisions on specific evidence showing that he had committed the offence of which he had been accused and they had given irrelevant and hence futile reasons for his detention. He noted that the day after the coup attempt, the magistrates' courts had ordered the pre-trial detention of 2,735 judges and prosecutors, acting on the instructions of the Ankara public prosecutor and relying solely on the decision by the HSK.

249. In addition, the applicant criticised the magistrates' courts and the 29th Assize Court for ordering his pre-trial detention on the basis of documents issued by the police concerning his use of the ByLock messaging application, without checking the accuracy of the information. All the magistrates' courts and other judicial bodies in Turkey, including the Court of Cassation, which had cited the use of ByLock as the basis for their decisions and had relied on reports by the police, the intelligence services, the BTK or the prosecuting authorities, had lost their independence by failing to question the authenticity of the information concerned. Referring to press articles, the applicant asserted that judges who had expressed the view that the ByLock application could not be used as evidence in judicial proceedings had been dismissed from their posts. The executive had thus conveyed a message to the entire judiciary that such evidence – which in the applicant's view was unlawful – should be treated as lawful, and in that way had compelled the judiciary to accept the ByLock messaging system as lawful and decisive evidence. It had also emerged from articles in the press that intelligence officers had gone to courthouses to provide explanations about ByLock to judges and prosecutors. Lastly, the applicant complained that in a statement made on 6 October 2016, the chairman of the HSK had said that ByLock was used exclusively by members of FETÖ/PDY and that this constituted the most important piece of evidence. This statement by the chairman of the HSK had had a considerable influence on judges.

250. The applicant submitted that the Constitutional Court had likewise ceased to be independent in that, even before the Court of Cassation had adopted its leading judgment of 26 September 2017, the Constitutional Court had described FETÖ/PDY as a terrorist organisation in its own leading judgment in the case of *Aydın Yavuz and Others*. Members of the Constitutional Court were exposed to a threat of dismissal and criminal prosecution and no longer enjoyed security of tenure. The applicant submitted that under section 26 A of Law no. 7145, which had entered into

force on 31 July 2018, certain powers conferred in connection with the state of emergency could remain valid for a further period of three years, and the administrative authorities could dismiss judges. Members of the Court of Cassation likewise no longer enjoyed security of tenure. Lastly, the applicant deplored the fact that a law that had come into force on 23 July 2016 had ended the term of office of all members of the Court of Cassation.

251. In support of his allegations, the applicant also referred to reports published by non-governmental organisations (NGOs): a rapport entitled "Turkish Criminal Peace Judgeships, A Comprehensive Analysis", published in 2018 by the NGO Platform for Peace and Justice, and a report entitled "The Turkish Criminal Peace Judgeships and International Law", published in the same year by the International Commission of Jurists (ICJ).

252. In addition, the applicant referred to the contents of a report issued on 8 March 2017 by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe on "The functioning of democratic institutions in Turkey". The report suggested that judges and prosecutors had been dismissed by the HSK the day after the coup attempt on the basis of lists which had been drawn up in advance, emphasised the impact of these collective dismissals on the functioning and independence of the judiciary, and referred to the conclusions reached in the Venice Commission's opinion on Legislative Decrees nos. 667-676 adopted following the failed coup of 15 July 2016 (paragraph 148 of the opinion).

253. The applicant also mentioned the European Commission's "Turkey 2018 Report" (SWD(2018) 153 final) and the European Parliament's resolution of 8 February 2018 on the current human rights situation in Turkey (2018/2527(RSP)). In its report the European Commission had suggested that the independence of the Turkish judiciary had been severely undermined by the mass dismissal of judges and prosecutors following the attempted coup, that the dismissals had had a chilling effect on the judiciary as a whole and that constitutional changes in relation to the HSK had further undermined its independence from the executive. In its resolution the European Parliament had expressed its deep concern at the judiciary's lack of independence. The applicant also referred to the "Memorandum on freedom of expression and media freedom in Turkey" published by the Council of Europe Commissioner for Human Rights on 15 February 2017.

254. Lastly, the applicant relied on the opinion issued by the Venice Commission (see paragraph 108 above).

(b) The Government

255. The Government submitted that the applicant was not specifically contesting the independence and impartiality of the Kocaeli magistrate's court that had ordered his pre-trial detention, but the independence and

impartiality of all the magistrates in the Turkish judicial system. In that connection, they noted that the magistrates' courts had been established by law and that the magistrates were appointed, like all other judges, by the HSK in accordance with section 4 of Law no. 6087 on the HSK and section 35 of Law no. 2802. Furthermore, judges and public prosecutors were appointed in accordance with the Court's case-law by the HSK, which was independent of the executive and the legislature.

256. With regard to the structure of the HSK on the date of the applicant's initial detention, the Government stated that of the twenty-two members of the HSK, sixteen had been chosen by their colleagues. The 1st Chamber had been in charge of the appointment and dismissal of judges and prosecutors at that time, and five of its seven members had been chosen by their colleagues. That being so, the structure of the HSK was in conformity with international standards.

257. Regarding the duration of judges' terms of office, the Government stated that section 35 of Law no. 2802 was also applicable to magistrates. The applicant had not alleged that the magistrates who had ordered his detention had moved to a different judicial district before the expiry of their term of office. In so far as the applicant had complained that certain judges had been transferred before their term of office had expired, the Government submitted that the transfers in question had taken place in accordance with the principles set forth in Law no. 2802. The provisions of that law concerning transfers afforded sufficient guarantees for the judges and prosecutors concerned, who were entitled to request a review of the decisions relating to their appointment and could lodge an objection with the plenary HSK.

258. Regarding the safeguards afforded to the judiciary against outside pressure, the Government submitted that the Constitution and statute law provided judges with sufficient guarantees enabling them to discharge their duties entirely independently. Magistrates enjoyed the same guarantees as other judges. Accordingly, in view of the constitutional safeguards afforded to members of the judiciary, it would be impossible for the HSK to give instructions to judges or public prosecutors or to make recommendations about any ongoing cases. Indeed, the applicant had not submitted any allegations to that effect.

259. Lastly, the Government drew the Court's attention to the fact that, under Article 271 of the CCP, any judge examining an objection could amend the original decision and order release on finding that the conditions prescribed by law were not satisfied. In relation to that point, they asked the Court to take account of the statistics they had provided concerning the number of releases ordered after objections had been lodged (see paragraphs 106-07 above).

260. In conclusion, the Government submitted that in the present case there was no objective basis for any doubts as to the independence and

impartiality of the magistrates who had ordered the applicant's detention. The applicant had failed to substantiate his allegations of a lack of independence and impartiality on the part of the magistrates' courts. Moreover, having regard to the statistics concerning the decisions given by magistrates (see paragraphs 106-07 above), the Government submitted that objections and applications for release were effective remedies and offered genuine prospects of success.

(c) The third party

261. The ICJ submitted that in its report entitled "Justice Suspended: Access to Justice and the State of Emergency in Turkey", it had found that the lack of institutional independence of the judiciary, the chilling effect of the mass dismissals and the diminished quality and experience among members of the judiciary had posed a serious threat to the rule of law and the structural independence of the judiciary. It also criticised the new composition of the HSK resulting from the April 2017 constitutional reform. Under the current constitutional framework, the HSK could not be considered fully structurally independent owing to the influence of the executive over the appointment of its members. The HSK did not have any institutional safeguards enabling it to withstand political influence.

262. The ICJ submitted that the system of magistrates' courts did not meet international standards of independence and impartiality, for the three reasons set out below.

263. Firstly, the HSK – the body in charge of the appointment and dismissal of magistrates – fell short of standards pertaining to the independence of the judiciary, particularly in its structural dimension. In practice, the magistrates' courts, which sat as a single magistrate, were unable to withstand influence or pressure from outside forces. Secondly, according to reliable reports, including from international organisations, the method for selecting magistrates and the decisions they took showed that in practice there was a lack of institutional independence, leaving room for pressure from the political authorities. Thirdly, the "closed circuit" system compounded the magistrates' lack of independence.

In support of its observations, the ICJ referred mainly to the Venice Commission's opinion on the duties, competences and functioning of the criminal peace judgeships (magistrates' courts – see paragraph 108 above).

264. In the ICJ's submission, the above-mentioned factors called into question the magistrates' independence and their ability to perform a judicial review of restrictions on the right to liberty in the light of Article 5 §§ 3 and 4 of the Convention.

2. The Court's assessment

(a) Relevant principles

265. The Court reiterates that Article 5 § 4 entitles anyone who is deprived of his or her liberty to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5 § 1, of the detention (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 162, *Reports* 1998-VIII). The reviewing court must have jurisdiction to order release if the detention is unlawful (see, among other authorities, *M.M. v. Bulgaria*, no. 75832/13, § 51, 8 June 2017).

266. The Court has held that both independence and impartiality are important constituent elements of the notion of a "court" within the meaning of Article 5 § 4 of the Convention. Furthermore, a "court" must always be "established by law", failing which it would lack the legitimacy required in a democratic society to hear individual cases (see *Lavents v. Latvia*, no. 58442/00, § 81, 28 November 2002).

267. The general principles concerning the independence and impartiality of a tribunal, for the purposes of Article 6 of the Convention, were recently set out as follows in the case of *Ramos Nunes de Carvalho e Sá* (cited above, §§ 144-50):

> "144. In order to establish whether a tribunal can be considered to be 'independent' within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I, and *Tsanova-Gecheva*, cited above, § 106, 15 September 2015). The Court observes that the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV). However, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 193, ECHR 2003-VI).
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> 145. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII, and *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009).
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> 146. In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see *Micallef*, cited above, § 95, and *Morice v. France* [GC], no. 29369/10, § 75, 23 April 2015). However, there is no watertight division between

subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports* 1996-III).

147. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96, and *Morice*, cited above, § 76).

148. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings (see *Micallef*, cited above, § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

149. In this connection even appearances may be of a certain importance or, in other words, 'justice must not only be done, it must also be seen to be done' (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain,* 28 October 1998, § 45, *Reports* 1998-VIII, and *Micallef*, cited above, § 98).

150. The concepts of independence and objective impartiality are closely linked and, depending on the circumstances, may require joint examination (see *Sacilor Lormines v. France*, no. 65411/01, § 62, ECHR 2006-XIII)."

The Court considers that these principles, developed in the context of Article 6 § 1 of the Convention, apply equally to Article 5 § 4.

268. Lastly, the Court points out that in deciding whether there is a legitimate reason to fear that a court lacks independence or impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether such fears can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports* 1996-III, and *Incal v. Turkey*, 9 June 1998, § 71, *Reports* 1998-IV).

(b) Application of these principles in the present case

269. The Court observes that the question of the independence and impartiality of magistrates has been examined on several occasions by the Constitutional Court, both in the context of a challenge to constitutionality and in individual applications. Referring to the constitutional safeguards afforded to magistrates, like other judges, the Constitutional Court has held that allegations of a lack of independence and impartiality were unfounded (see paragraphs 75-80 above).

270. First of all, the Court notes that the magistrates' courts have been established by law, in accordance with Article 142 of the Constitution (see paragraph 54 above). Their functions and powers are defined in Law no. 5235 on the organisation of the courts, and proceedings before them are governed by the CCP. Section 10 of Law no. 5235 provides that the magistrates' courts have jurisdiction at the investigation stage to take all decisions on preventive measures, such as pre-trial detention. The magistrate's court is therefore the rightful judicial authority for matters relating to detention. The Court thus considers that there can be no doubt as to the lawfulness of conferring jurisdiction on the magistrates' courts in relation to detention.

271. In addition, the explanatory memorandum on Law no. 6545, which amended section 10 of Law no. 5235 on the organisation of the courts, indicates that the establishment of the magistrates' courts was designed, firstly, to end the dual system of first-instance courts in criminal matters (criminal courts of first instance and criminal courts) and, secondly, to allow specialisation regarding preventive measures. The purpose of the legislation was, by promoting specialisation among judges, to harmonise the implementation of preventive measures and achieve a standard (see paragraphs 73-74 above). The Court observes in this connection that the amendments resulting from Law no. 6545 also address, to a certain extent, the concerns which it has itself expressed in a number of Turkish cases as regards the insufficient reasons given for decisions on detention (see, in particular, *Cahit Demirel v. Turkey*, no. 18623/03, §§ 44-48, 7 July 2009, in which the Court found that there was a systemic problem in this regard).

272. The Court further notes that there is no indication that the magistrates ruling on the applicant's detention harboured any prejudice or bias against him personally. The Court will therefore focus on the objective impartiality test. In this connection, it reiterates that since the concepts of independence and objective impartiality are closely linked, it will consider both issues together (see *Grieves v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII (extracts)).

273. The Court notes that magistrates enjoy constitutional safeguards in the performance of their duties, including security of tenure. The Constitution specifies that they are independent and that no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties. These fundamental constitutional principles as to independence are reproduced in legislation, in particular in the Law on judges and prosecutors (for a detailed summary of the constitutional safeguards for judges and public prosecutors, see paragraphs 52-54 above).

274. Furthermore, there is no indication that the Minister of Justice, a member of the HSK, was able to issue instructions to judges in the performance of their judicial functions, or that there was any relationship of

subordination in terms of duties and organisational structure (see, on this issue, *İmrek v. Turkey* (dec.), no. 57175/00, 28 January 2003, and *Erol Gültekin and Others v. Turkey* (dec.), no. 52941/99, 13 May 2004). As regards the applicant's allegation that Law no. 6524 of 15 February 2014 had allowed the Minister of Justice to occupy a dominant position within the HSK, the Court notes that the provisions of the new law transferring certain powers to the Minister of Justice did not in any way authorise him to issue instructions to judges in the performance of their judicial functions, and did not create a relationship of subordination in terms of duties and organisational structure. It observes, moreover, that the provisions in question were declared void by the Constitutional Court on 10 April 2014, several months after the entry into force of the Law in question (see paragraph 69 above).

275. In so far as the applicant alleged that the executive controlled the judiciary in general – either because judges gave decisions along similar lines to statements by the executive, or because sanctions were imposed on them (transfers or reassignments) for adopting particular decisions or for supporting the YARSAV trade union for judges and prosecutors – the Court notes that this amounts to criticism of the judiciary in general, and not of the magistrates' courts specifically. It should be emphasised in this connection that in the context of the present case, the Court's task is to examine whether the magistrates who ordered the applicant's initial and continued detention and those who examined his applications for release and his objections were independent and impartial.

276. In any event, the Court is unable to establish, on the basis of the material in its possession, any correlation between the statements by the executive and the decisions by the magistrates' courts, or indeed between the transfer of judges and those decisions. The Court observes in this connection that the decisions relating to the transfers in question were taken by the HSK, the body authorised by law to take such decisions. The applicant did not maintain that the magistrates who had decided on his detention had been transferred or assigned different duties before the expiry of their terms of office.

277. With regard to the opinions and reports on which the applicant relied, the Court observes that these documents suggest a lack of independence and impartiality on the part of the Turkish judicial system in general, in relation to the structure of the HSK and the mass dismissal of judges and public prosecutors following the coup attempt. It takes note of the concerns about the national judicial system as expressed by regional and international authorities in those reports and opinions. While emphasising that it is not called upon in the present case to make general findings about the Turkish judicial system, it observes that the complaints relating to the HSK's structure are focused on the constitutional amendments adopted by the National Assembly on 21 January 2017 and put to a national referendum

on 16 April 2017. The Court would reaffirm in this connection that it is not its task to make a general assessment of the structure of the HSK, but to determine to what extent the independence and impartiality of the magistrates deciding on the applicant's pre-trial detention might have been affected. However, as the Government observed, the establishment of the magistrates' courts dates back to 18 June 2014, well before the constitutional reform that altered the structure of the HSK. Furthermore, nearly all of the decisions by the magistrates' courts on the applicant's detention were taken before the entry into force of the constitutional amendment. As regards the dismissals following the coup attempt, the Court notes that the HSK explained its decision on the matter by indicating that the presence within the judicial system of judges and prosecutors who had sworn allegiance to an illegal organisation, and who were acting in accordance with the organisation's instructions, was incompatible with the principles of independence and impartiality and undermined the reputation and authority of the judicial system. When examining the dismissals in question in the case of *Çatal v. Turkey*, the Court observed that the judges against whom such measures had been taken had the opportunity to apply directly to the Supreme Administrative Court, which had jurisdiction to examine the merits of their applications as a first-instance court (see *Çatal v. Turkey* (dec.), no. 2873/17, 7 March 2017).

278. With regard to the report produced by the ICJ and the opinion by the Venice Commission on the duties, competences and functioning of the criminal peace judgeships (magistrates' courts – see paragraph 108 above), which deal more specifically with these particular judges, the Court considers that the findings and conclusions set out in those documents, particularly in relation to the specialisation and caseload of the magistrates' courts, cannot in themselves be taken to justify any concerns as to the magistrates' independence and impartiality in each individual case. The Court considers that, having regard to the constitutional and legal safeguards afforded to the magistrates' courts, and in the absence of any relevant arguments giving cause to doubt their independence and impartiality in the applicant's case, the complaint alleging a lack of independence and impartiality on the magistrates' part should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

279. As to the fact that objections against decisions by magistrates' courts are examined by other magistrates' courts ("horizontal review"), and not by a higher court ("vertical review"), the Court takes note of the criticisms expressed by the Venice Commission, in particular its view that this prevents the harmonisation of case-law and creates a closed system and that the decisions of the magistrates' courts do not contain sufficient reasons.

280. The Court nevertheless observes that Article 5 § 4 of the Convention does not contain a requirement for an appeal against detention to be examined by a higher court. It further notes that the review performed following an objection provides an opportunity, as required by Article 5 § 4 of the Convention, to examine the lawfulness of detention (compare *R.T. v. Greece*, no. 5124/11, § 98, 11 February 2016) and to secure the detainee's release where appropriate (see, *mutatis mutandis*, *M.M. v. Bulgaria*, cited above, § 58, and contrast *Suso Musa v. Malta*, no. 42337/12, § 59, 23 July 2013). The Court can see no reason to doubt that the scope of the objection lodged with the magistrate's court was sufficient for it to constitute "proceedings" for the purposes of Article 5 § 4 of the Convention (compare *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 60, 6 November 2008). The magistrate's court dealing with the objection is empowered by law to order release in the absence of reasons justifying the detention, having regard to whether the measure is "well founded" or not. The Court would emphasise that there is no hierarchical or structural link between the magistrate examining the objection and the magistrate whose decision is being challenged. In that connection, as long as it has not been established that the magistrates in question have developed a personal friendship going beyond the strictly professional sphere, the existence of professional contact between them cannot in itself justify concerns as to the independence and impartiality of the magistrates examining the objection (see, *mutatis mutandis*, *Hajdučeková v. Slovakia* (dec.), no. 47806/99, 8 October 2002). Lastly, in so far as the applicant alleged that the "closed circuit" operation of the magistrates' courts rendered any objection ineffective, the Court would refer to the data provided by the Government (see paragraphs 106-107 above) concerning the number of objections that have been upheld.

281. Having regard to the foregoing, and to the extent that its examination has related to whether the magistrates' courts that ordered the applicant's detention were independent and impartial, the Court considers that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. The Court points out, however, that this conclusion in no way prejudices any subsequent review of the question of the independence and impartiality of the magistrates' courts.

E. Alleged failure to examine material adduced by the applicant

282. The applicant complained that specific facts and arguments he had put forward in his applications for release and his objections had not been taken into consideration by the magistrates' courts.

283. Having regard to its finding in relation to Article 5 § 4 of the Convention (see paragraph 231 above) and the considerations it took into

account in that context (see paragraph 228 above), the Court considers that it is not necessary to examine this complaint).

V. OTHER ALLEGED VIOLATIONS

284. In his observations on the admissibility and merits of the case, the applicant submitted that during the period between September 2016 and February 2017, the automatic review of his detention had been performed beyond the statutory time-limit of thirty days, and contended that his detention during the relevant period had been unlawful. He also complained that the decisions on his detention had not been sent to him or that he had only been notified of them belatedly, and that some of his applications for release had not been examined. He alleged a violation of Article 5 § 4 of the Convention on that account.

285. As is apparent from the application form lodged by the applicant with the Constitutional Court, he did not raise these complaints in the context of his individual application; moreover, he did not argue before the Court that the Constitutional Court had failed to examine such complaints in dealing with his individual application. Furthermore, some of the decisions in question were given after the applicant had lodged his application with the Constitutional Court. It follows that these complaints must be rejected for failure to exhaust domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

286. 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

287. 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. He claimed 4,461 euros (EUR) on that account. In addition, he sought an award of EUR 250,000 in respect of non-pecuniary damage. Lastly, he claimed EUR 15,368 in respect of costs and expenses incurred before the Court. By way of supporting documents, he provided an hourly breakdown and a fee agreement for an amount of EUR 6,000.

288. The Government contested those claims.

289. 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.

290. As regards non-pecuniary damage, the Court observes that it has found a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion that the applicant had committed a criminal offence and a violation of Article 5 § 4 of the Convention on account of the length of the period during which the applicant did not appear in person before a judge. That being so, it considers that the applicant 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 6,000 in respect of non-pecuniary damage.

291. As regards the claim in respect of costs and expenses, the Court reiterates that, in accordance with its case-law, 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. In the present case, regard being had to the documents in its possession and its case-law, the Court considers it reasonable to award the applicant the sum of EUR 4,000, covering costs under all heads.

B. Default interest

292. 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 application admissible as regards 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 fact that he did not appear in person before the courts examining his detention;

2. *Declares*, unanimously, inadmissible the complaints concerning the non-disclosure of the public prosecutor's opinion, the alleged lack of independence and impartiality of the magistrates' courts and the new complaints raised by the applicant in his observations on the admissibility and merits of the case;

3. *Holds*, by six votes to one, that there has been a violation of Article 5 § 1 of the Convention as regards the complaint concerning the alleged unlawfulness of the applicant's initial pre-trial detention;

4. *Holds*, unanimously, 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;

5. *Holds*, unanimously, that there has been a violation of Article 5 § 4 of the Convention on account of the length of the period during which the applicant did not appear in person before a judge;

6. *Holds*, unanimously, that it is unnecessary to examine either the admissibility or the merits of the complaint under Article 5 §§ 1 (c) and 3 of the Convention as regards the alleged failure to provide reasons for the applicant's initial pre-trial detention and the complaints under Article 5 § 4 of the Convention as regards the restriction of access to the investigation file and the alleged failure to examine the material adduced by the applicant;

7. *Holds*, unanimously,
   (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 following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (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;

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

Done in English and French, and notified in writing on 3 March 2020, 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 following separate opinions are annexed to this judgment:

(a) partly concurring opinion of Judge Bårdsen;
(b) partly dissenting opinion of Judge Yüksel.

R.S.
S.H.N.

PARTLY CONCURRING OPINION OF JUDGE BÅRDSEN

1. I agree with the majority on all accounts. The arrest and pre-trial detention of judges will always trigger serious concerns as to the independence of the judiciary, the separation of powers and the rule of law. This is even more so in the present case, which cannot be seen in isolation from the fact that in the days and weeks after the attempted coup in the night between 15 and 16 July 2016, a remarkably high number of judges were suspended from their duties, arrested and detained.

2. The majority, when finding a violation of Article 5 § 1 of the Convention because the applicant's initial pre-trial detention was unlawful, emphasise that the extensive interpretation of the concept of discovery *in flagrante delicto* in section 94 of Law no. 2802 is not only problematic in terms of legal certainty, but also appears manifestly unreasonable (see paragraph 156 of the judgment). Moreover, the majority cannot accept the Government's argument that the offence of which the applicant was accused was a "personal" offence governed by section 93 of Law no. 2802 and not an "official" offence under section 82-92, and that the application of section 94 in his case therefore did not have the effect of depriving him of procedural safeguards, but simply meant that the decision to detain him was taken by a magistrate's court lacking territorial jurisdiction. In the majority's view, which I share, the magistrate's application of the concept of discovery *in flagrante delicto* was decisive for depriving the applicant of the safeguards afforded to all judges by Law no. 2802, and the mere application of that concept and the reference to section 94 of Law no. 2802 in the magistrate's detention order did not, in the circumstances of the present case, fulfil the requirements of Article 5 § 1 of the Convention (see paragraph 158 of the judgment).

3. I write this concurring opinion to reinforce the message that the problem under Article 5 § 1 of the Convention is not, however, limited to the finding that Turkish law has stretched the concept of discovery *in flagrante delicto* beyond reason and that, in the present case, the magistrate referred to section 94 without taking a position as to whether the applicant was charged with having committed an "official" or a "personal" offence. The case reveals an additional systemic lack of legal clarity and foreseeability when it comes to the arrest and pre-trial detention of judges in Turkey at the material time, through the combined effect of the aforementioned overly broad interpretation of the concept of discovery *in flagrante delicto*, with the following three elements:

4. Firstly, it seems to be established that the protection against arrest provided for in section 88 of Law no. 2802 applies only if the offence is

"official", and not a "personal" one. However, the criteria for drawing the line between the two are not prescribed in Law no. 2802 itself, apart from what can be inferred from section 89, which uses the expression "offences in connection with or in the course of their official duties", as opposed to "personal offences" as mentioned in section 93. To the extent that these two concepts have been elaborated upon in the case-law of the Court of Cassation, the scope of what is considered to be an "official" offence appears to be surprisingly narrow, possibly not encompassing a judge's alleged membership of an illegal organisation accused of having infiltrated the judiciary (see paragraph 90 of the judgment). However, on the other hand, in the present case it was the Council of Judges and Prosecutors (HSK) which instigated the investigation in respect of the applicant (see paragraph 15-22 of the judgment), seemingly on the assumption that the offence was actually linked to the applicant's profession as a judge.

5. Secondly, when a judge accused of having committed an "official" offence has not been discovered *in flagrante delicto*, the very nature of the protection under Law no. 2802 is – based on the material that has been presented before the Court – not clear. There are indications that the Law, including section 88, is understood to provide only a certain safeguard against arrest in a narrow and technical sense, but not against pre-trial detention. However, there are contrary suggestions that the Law is also meant to cover the latter, a reading of the Law that was apparently supported by the Government in their submissions before the Court.

6. Thirdly, the uncertain state of the law is heightened by the Government's submissions (see paragraph 141 of the judgment) to the effect that Law no. 2802 did not apply at all in the applicant's case, even if the offence of which he was accused had been considered to have been committed in connection with or in the course of his duties as a judge – that is, as an "official" offence. According to the Government's argument – in contrast to how the case was actually handled by the magistrate – the special procedure for investigation of the offence of membership of a terrorist organisation as set out in Article 161 § 8 of the Code of Criminal Procedure, which contains no provision on the protection of judges from being arrested and detained, prevails over Law no. 2802.

7. I cannot but conclude that the lack of legal clarity that I have portrayed briefly above as to when, under Turkish law, a judge can be arrested and detained is not compatible with the requirement under Article 5 § 1 of the Convention that any arrest or detention must be "lawful", in the sense in which this concept has been interpreted and developed in the Court's case-law (see *Mooren v. Germany* [GC], no. 11364/03, §§ 72-79, 9 July 2009, cited in paragraph 143 of the judgment).

PARTLY DISSENTING OPINION OF JUDGE YÜKSEL

I agree with the majority in finding 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 the offence of which he was accused. However, I do not agree with the majority's conclusion that the applicant's detention was unlawful.

I consider that the question relating to the interpretation of the concept of *in flagrante delicto* could be examined from two angles. Firstly, a principled approach must be taken based on the concept of legal certainty. In this regard, I respect the Court's approach adopted in the *Alparslan Altan v. Turkey* case (no. 12778/17, §§ 104-15, 16 April 2019), in so far as the extensive interpretation of the concept of *in flagrante delicto* was found not only to be problematic with regard to the principle of legal certainty, but also to negate the procedural safeguards which members of the judiciary – in particular members of the Constitutional Court – were afforded in order to protect them from any interference by the executive. Furthermore, it is important to note that this interpretation has legal consequences that go far beyond the legal framework of a state of emergency. Secondly, I still believe that our case-law requires an analysis of the national courts' interpretation and of any potential errors in order to determine whether the detention suffered from a gross and obvious irregularity, for the following reasons (see, *mutatis mutandis*, *Mooren v. Germany* [GC], no. 11364/03, § 84, 9 July 2009; *Hammerton v. the United Kingdom*, no. 6287/10, §§ 107-17, 17 March 2016; *Čalovskis v. Latvia*, no. 22205/13, §§ 155-63, 24 July 2014; *Marturana v. Italy*, no. 63154/00, §§ 78-82, 4 March 2008; and *Riccardi v. Romania*, no. 3048/04, § 54, 3 April 2012).

First, in order to assess whether the applicant's detention suffered from a gross and obvious irregularity, the particular circumstances of the case should be addressed, namely whether the courts' interpretation of the concept of *in flagrante delicto*, the absence of emphasis on whether the applicant's alleged offence was a personal offence or an offence related to his official duties, and the application of section 94 of Law no. 2802 in the circumstances of the case had the consequence of depriving the applicant of the applicable procedural guarantees.

Second, it should be recalled that in the case of *Alparslan Altan* (cited above, § 112), the application of domestic law by the domestic courts was found to have negated the procedural safeguards that had been afforded to the applicant, who was a judge serving in the Constitutional Court and was hence entitled to protection under Law no. 6216 on the establishment and rules of procedure of the Constitutional Court. However, in the present case the applicant's situation was different and he was covered by the provisions of Law no. 2802 on judges and prosecutors. The provisions of Law no. 2802

are different from those of Law no. 6216. Indeed, while Law no. 2802 makes a distinction between personal offences (section 93) and offences that are committed in connection with or in the course of official duties (sections 82-92), and affords procedural safeguards in respect of offences related to official duties, Law no. 6216 provides for judicial immunity in respect of both types of offences, namely personal offences and offences related to official duties. Moreover, section 94 of Law no. 2802 governs, in principle, both types of offences and provides that the rules of ordinary law apply in the case of discovery *in flagrante delicto*.

In particular, Law no. 2802 does not contain any provision similar to section 17 of Law no. 6216, which applies to judges of the Constitutional Court (see *Alparslan Altan*, cited above, § 49). Without entering into an interpretation of the guarantees granted to judges by Law no. 2802, I consider that the present case is clearly distinguishable from the case of *Alparslan Altan*, in which a former Constitutional Court judge enjoyed greater procedural safeguards.

Third, in the present case, the applicant was placed in pre-trial detention on suspicion of being a member of an armed terrorist organisation and the magistrate's court did not take a position as to whether the applicant's alleged membership of a terrorist organisation constituted a personal offence or an offence committed in the course of his official duties. It is to be noted that in cases arising out of different facts and in relation to different types of offences, the Court of Cassation and the Constitutional Court have already reached different conclusions and in those cases the offences were classified as function-related when they were linked to the judicial activity of the person concerned. In those cases, sections 82-92 of Law no. 2802 were found to be applicable (see paragraphs 101-03 of the judgment for reference to the cases of *Süleyman Bağrıyanık and Others* and *Mustafa Başer and Metin Özçelik*).

Having said that, as can be seen from the decisions delivered by the national courts (namely the Constitutional Court and the Court of Cassation) under Turkish law, the offence of which the applicant was accused, namely being a member of a terrorist organisation, has been systematically treated as a personal offence, thus falling under section 93 of Law no. 2802 (see *Alparslan Altan*, cited above, § 42; see also paragraph 90 of the present judgment for the relevant Court of Cassation judgments). Moreover, in the present case, although at the initial stage the domestic authorities ordered the applicant's detention pursuant to section 94 of Law no. 2802, the ensuing proceedings were conducted in accordance with section 93, as the offence was a personal one.

Fourth, as transpires from the case file, under Turkish law, in the case of a personal offence, the difference between the application of section 93 and of section 94 of Law no. 2802 would not have related to the possibility or impossibility of detention but rather to the question of jurisdiction *ratione*

loci, more precisely as to which Chief Public Prosecutor's office would be in charge of conducting the investigation and which magistrate's court would decide on detention. Furthermore, despite the lack of territorial jurisdiction in the present case, the decisions on detention taken by the magistrate in question remained entirely valid under domestic law (see, to similar effect, *Fernandes Pedroso v. Portugal*, no. 59133/11, § 93, 12 June 2018).

In conclusion, an examination of the case file and of the national judgments submitted by the parties reveals two errors by the national courts in this case. Firstly, the magistrate's court which ordered the applicant's initial pre-trial detention did not make a clear distinction as to whether the offence with which the applicant was charged related to his official duties or whether it was a personal offence. Secondly, after accepting that the interpretation of *in flagrante delicto* was extensive in relation to the personal offence at issue in the present case, as can be understood from the parties' submissions, I consider that section 93 of Law no. 2802 should have been applied rather than section 94, and that the applicant's case should have been dealt with by a court with different territorial jurisdiction. In view of the particular circumstances of the present case and the procedural safeguards that I have tried to outline above, I believe that the shortcomings in the instant case cannot be said to amount to such a "gross or obvious irregularity" as to render the detention unlawful (see *Mooren*, cited above, § 84). I therefore consider that the applicant's detention was lawful and that he was deprived of his liberty in accordance with a procedure prescribed by law within the meaning of Article 5 § 1 of the Convention.