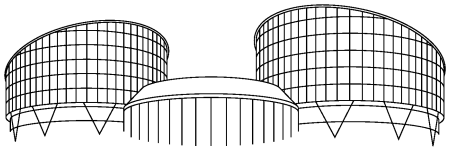

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ŞAHİN ALPAY v. TURKEY

(Application no. 16538/17)

JUDGMENT

STRASBOURG

20 March 2018

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 Şahin Alpay v. Turkey,

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

Robert Spano, *President*,
Paul Lemmens,
Ledi Bianku,
Nebojša Vučinić,
Valeriu Grițco,
Jon Fridrik Kjølbro, *judges*,
Ergin Ergül, ad hoc *judge*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 20 February 2018,

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

PROCEDURE

1. The case originated in an application (no. 16538/17) 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 Şahin Alpay ("the applicant"), on 28 February 2017.

2. The applicant was represented by Mr F. Çağıl, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that his pre-trial detention had breached Articles 5, 10 and 18 of the Convention.

4. On 3 March 2017 the Court decided to give priority to the application (Rule 41 of the Rules of Court).

5. On 13 June 2017 the Government were given notice of the complaints concerning Article 5 §§ 1, 3, 4 and 5 and Articles 10 and 18 of the Convention and the remainder of the application was declared inadmissible.

6. The applicant and the Government each filed observations on the admissibility and merits of the case.

7. The Council of Europe Commissioner for Human Rights ("the Commissioner for Human Rights") exercised his right to intervene in the proceedings and submitted written comments (Article 36 § 3 of the Convention and Rule 44 § 2).

8. In addition, written comments were submitted to the Court by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression ("the Special Rapporteur"), and also by the following non-governmental organisations acting jointly: ARTICLE 19, the Association of European Journalists, the Committee to

Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute, PEN International and Reporters Without Borders ("the intervening non-governmental organisations"). The Section President had granted leave to the Special Rapporteur and the organisations in question to intervene under Article 36 § 2 of the Convention and Rule 44 § 3.

9. The Government and the applicant each replied to the intervening parties' comments.

10. In correspondence of 18 January 2018 the applicant informed the Court that the Constitutional Court had delivered a judgment on his individual application and that the Istanbul Assize Court had rejected his request for release despite the Constitutional Court's finding of a violation. In a letter dated 19 January 2018 the Court invited the Government to submit comments on the matter. On 29 January 2018 the Government sent their further comments.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1944. He is currently detained in Istanbul.

A. The applicant's professional career

12. The applicant is a journalist who had been working since 2002 for the daily newspaper *Zaman*, which was viewed as the principal publication medium of the "Gülenist" network and was closed down following the adoption of Legislative Decree no. 668, issued on 27 July 2016 in connection with the state of emergency (see paragraphs 14-18 below). From 2001 onwards, he also lectured on comparative politics and Turkish political history at a private university in Istanbul.

13. In the years leading up to the attempted military coup of 15 July 2016 the applicant had been known for his critical views on the serving government's policies.

B. The attempted coup of 15 July 2016 and the declaration of a state of emergency

14. 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 elected parliament, government and President of Turkey.

15. During the attempted coup, soldiers under the instigators' control bombarded several strategic State buildings, including the parliament building and the presidential compound, attacked the hotel where the President was staying, held the Chief of General Staff hostage, attacked television channels and fired shots at demonstrators. During the night of violence, more than 300 people were killed and more than 2,500 were injured.

16. 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 a terrorist organisation known as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure"). Several criminal investigations were subsequently initiated by the appropriate prosecuting authorities in relation to suspected members of that organisation.

17. On 20 July 2016 the government declared a state of emergency for a period of three months as from 21 July 2016; the state of emergency was subsequently extended for further periods of three months by the Council of Ministers, chaired by the President, most recently with effect from 19 January 2018.

18. 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.

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

19. On 27 July 2016, in the course of one of the criminal investigations initiated in respect of suspected members of FETÖ/PDY, the applicant was arrested at his home in Istanbul and taken into police custody.

20. On 30 July 2016 the applicant, assisted by his lawyer, was questioned at the Istanbul Security Directorate. During the questioning the applicant denied that he belonged to an illegal organisation. Later that day, the Istanbul public prosecutor sought a judicial order for the applicant's pre-trial detention on suspicion of belonging to an illegal organisation.

21. On the same day, several editors and columnists of the daily newspaper *Zaman*, including the applicant, were brought before the Istanbul 4th Magistrate's Court. The magistrate questioned the applicant about his alleged acts and the accusations against him. The applicant stated that he had joined *Zaman* in order to be able to express his opinions; that he was in favour of a democratic system corresponding to European standards; that he was a secular person; that he had not been aware of the threat posed by Fetullah Gülen's movement until after the attempted military coup of 15 July 2016; and that he was opposed to any attack on democracy.

22. At the end of the hearing, the magistrate, taking into account the contents of the articles written by the applicant – and finding that they had promoted the terrorist organisation in question, even after 17 December 2013 – ordered his pre-trial detention. He noted in that connection that although criminal proceedings had been instituted against E.D. (the editor-in-chief of *Zaman*) before the attempted military coup, the applicant had continued to work for the newspaper and within the organisation's media structure. In the reasons given for ordering the applicant's pre-trial detention, the magistrate took the following factors into consideration: the strong suspicions against him; the nature of the alleged offence and the fact that it was among the offences listed in Article 100 § 3 of the Code of Criminal Procedure ("the CCP") – the so-called "catalogue offences", for which a suspect's pre-trial detention was deemed justified in the event of strong suspicion; the risk of absconding; the state of the evidence and the risk of its deterioration; and the risk that alternative measures to detention might be insufficient to ensure the applicant's participation in the criminal proceedings.

23. On 5 August 2016 the applicant lodged an objection against the order for his pre-trial detention. He argued that there was no justification for detaining him. He also contended that his state of health was incompatible with the conditions in the prison where he was being held. In a decision of 8 August 2016 the Istanbul 5th Magistrate's Court dismissed the applicant's objection.

24. On 17 October 2016 the applicant lodged a fresh application for his release. In a decision of 19 October 2016 the Istanbul 10th Magistrate's Court rejected the application. In his decision, the magistrate stated in particular that it was an established fact that in order to prepare the ground for a military coup, the instigators needed to create the perception that the leaders of the country concerned were dictators. In his view, the applicant's articles accusing the President of Turkey of being a dictator and calling for him to leave office had contributed to propaganda of that kind.

25. On 10 April 2017 the Istanbul public prosecutor filed a bill of indictment with the Istanbul Assize Court in respect of several individuals, including the applicant, who were suspected of being part of the FETÖ/PDY media network, in particular accusing them, under Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the Criminal Code ("the CC"), of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence, and of committing offences on behalf of a terrorist organisation without being members of it. The public prosecutor sought the imposition of three aggravated life sentences and a sentence of up to fifteen years' imprisonment on the suspects, including the applicant. As evidence, he produced six articles written by the applicant in 2013 and 2014.

26. The public prosecutor submitted that the articles by the applicants and other individuals being charged in the same criminal proceedings against leading members of FETÖ/PDY's media wing could not be regarded as an expression of the authors' opposition to or criticism of the government. In the applicant's case, the public prosecutor contended that the expressions he had used had gone beyond the limits of freedom of the press in that they had undermined the rights of the official authorities and endangered social peace and public order. The public prosecutor found that the applicant had not hesitated to call for a possible military coup in his articles and, in short, had discharged functions serving the interests of the terrorist organisation in question.

27. During the criminal proceedings, the applicant denied having committed any criminal offence.

28. The criminal proceedings are currently pending before the Istanbul 13th Assize Court.

D. Individual application to the Constitutional Court

29. On 8 September 2016 the applicant lodged an individual application with the Constitutional Court. He complained that he had been placed in pre-trial detention on account of his articles and alleged that this infringed his right to liberty and security and his right to freedom of expression and of the press. He also contended that his state of health was incompatible with the conditions of his continued detention since he was suffering from benign prostate hyperplasia, hyperlipidaemia, hyperuricemia, a multinodular goitre and sleep apnoea. On that account he asked the Constitutional Court to indicate an interim alternative measure to detention, thus allowing him to be released pending trial.

30. In a decision of 26 October 2016 the Constitutional Court refused to apply an interim measure of that kind. In reaching that decision, it noted firstly that the applicant's health had been regularly monitored from the start of his pre-trial detention, and that there was a State hospital inside the prison where he was being held. In that connection, it noted that on 4 October 2016, following a request he had made to that effect the previous day, the applicant had been examined in prison by a general practitioner and had then been transferred to the urology department of the State hospital, where he had undergone a medical examination on 20 October 2016, and that his next appointment had been scheduled for 22 March 2017. In those circumstances, the Constitutional Court found that keeping the applicant in pre-trial detention did not currently constitute a danger to his life or health. It added that should there be a change in his health or the conditions of his detention, he would be entitled to make a further application for an interim measure to secure his release.

31. On 11 January 2018 the Constitutional Court gave a judgment (no. 2016/16092) in which it held, by eleven votes to six, that there had been a violation of the right to liberty and security and the right to freedom of expression and of the press.

32. With regard to the applicant's complaint concerning the lawfulness of his pre-trial detention, the Constitutional Court noted firstly that the evidence forming the basis for his detention had included: (i) an article entitled "As if it were a religious war" ("*Din Savaşıymış*"), published on 21 December 2013; (ii) an article entitled "The President must not remain a spectator" ("*Cumhurbaşkanı Seyirci Kalamaz*"), published on 24 December 2013; (iii) an article entitled "Between Erdogan and the West" ("*Erdoğan ile Batı Arasında*"), published on 28 December 2013; (iv) an article entitled "Yes, both the crime and the punishment are individual" ("*Evet Suç da Ceza da Şahsidir*"), published on 8 February 2014; (v) an article entitled "This nation is not empty-headed" ("*Bu Millet Bidon Kafalı Değildir*"), published on 1 March 2014; and (vi) an article entitled "The solution is a government without Erdoğan" ("*Çıkar Yol Erdoğan'sız Hükûmet*"), published on 29 March 2014. After examining the substance of these articles, the Constitutional Court found that they mainly dealt with matters relating to the "17-25 December [2013]" criminal investigations. In them the applicant had set out his opinion that the government members implicated in the criminal investigation in question should be brought to justice and that it was the responsibility of the President and the ruling party's leaders to take action to that end. He had contended that the government's reaction to the investigation had been unjust. The Constitutional Court also observed that the applicant had written that if the investigation in question had been carried out on the orders of suspected members of FETÖ/PDY, they too should be the subject of a criminal investigation. However, he had maintained that it was unfair to accuse all members of the Gülenist movement. The Constitutional Court further noted that in the articles in question, the applicant had not argued that the government should be overthrown by force. On the contrary, he had asserted that the ruling party would lose in the next elections. The Constitutional Court also found that the article published one day before the attempted military coup suggested that the applicant was opposed to *coups d'état*. It held that he had been expressing opinions on a topical issue that were similar to those of the opposition leaders. In the Constitutional Court's view, the investigating authorities had been unable to demonstrate any factual basis that might indicate that the applicant had been acting in accordance with the aims of FETÖ/PDY. It added that the fact that he had expressed his views in *Zaman* could not in itself be deemed sufficient to infer that the applicant was aware of that organisation's goals. Accordingly, it concluded that "strong evidence that an offence had been committed" had not been sufficiently established in the applicant's case. 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 (providing for the suspension of the exercise of fundamental rights and freedoms in the event of war, general mobilisation, a state of siege or a state of emergency). 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 that his right to liberty and security, as safeguarded by Article 19 § 3 of the Constitution, had been breached.

33. Next, with regard to the complaint concerning freedom of expression and of the press, the Constitutional Court observed that the applicant's initial and continued pre-trial detention on account of his articles amounted to interference with the exercise of that right. Taking into account his arguments regarding the lawfulness of his pre-trial detention, the Constitutional Court held that such a measure, which had serious consequences since it resulted in deprivation of liberty, could not be regarded as a necessary and proportionate interference in a democratic society. It further noted that it could not be clearly established from the reasons given for ordering and extending the applicant's pre-trial detention whether the measure met a pressing social need or why it was necessary. Lastly, it found that it was clear that the applicant's pre-trial detention could have a chilling effect on freedom of expression and of the press, in so far as it had not been based on any concrete evidence other than his articles (see paragraph 140 of the Constitutional Court's judgment). Regarding the application of Article 15 of the Constitution, it referred to its findings concerning the lawfulness of his pre-trial detention (as set out in paragraphs 108-10 of the Constitutional Court's judgment – see paragraph 32 above) and held that there had also been a violation of freedom of expression and freedom of the press as enshrined in Articles 26 and 28 of the Constitution.

34. With regard to the applicant's complaint that the conditions of his detention were incompatible with respect for human dignity, the Constitutional Court noted that he had access to the treatment required for his condition within the prison where he was being held, and declared this complaint inadmissible as being manifestly ill-founded.

35. The applicant did not submit a claim for compensation in respect of non-pecuniary damage. Accordingly, the Constitutional Court made no award under that head. The applicant claimed an unspecified sum in respect of the pecuniary damage he had allegedly sustained. The Constitutional Court found no causal link between the violation established and the damage alleged on that account and dismissed the claim. However, it held

that the applicant was to be awarded 2,219.50 Turkish liras (TRY – approximately 500 euros (EUR)) in respect of costs and expenses.

36. As the applicant was still in pre-trial detention on the date of delivery of its judgment, the Constitutional Court decided to transmit the judgment to the Istanbul 13th Assize Court so that it could take "the necessary action".

E. Reaction of the Istanbul assize courts to the Constitutional Court's judgment

37. On 11 January 2018 the applicant's lawyer applied to the Istanbul 13th Assize Court for his client's release.

38. On the same day, the Istanbul 13th Assize Court rejected the application, on the grounds that it had not yet received official notification of the Constitutional Court's judgment.

39. On 12 January 2018 the Istanbul 13th Assize Court, having observed that the Constitutional Court's judgment had been published on its website, examined of its own motion the question of the applicant's pre-trial detention. Noting firstly that the examination of the merits of an individual application to the Constitutional Court against a judicial decision entailed determining whether there had been a violation of fundamental rights and what measures would be appropriate to put an end to the violation, and secondly that grounds of appeal on points of law could not be examined by the Constitutional Court in the context of an individual application, it found that the Constitutional Court did not have jurisdiction to assess the evidence in the case file. On that account, the Constitutional Court's judgment no. 2016/16092 was not in compliance with the law and amounted to usurpation of power (*görev gasbı*). Regarding the effects of the Constitutional Court's judgments, the Assize Court added that only judgments that were in accordance with the Constitution and the law should be deemed to be final and binding. It noted, moreover, that more extensive reasoning could be given to justify keeping the applicant in pre-trial detention and that the file contained sufficient evidence against him in that regard. However, this would create the risk of prejudging the case (*ihsas-ı rey*), seeing that a detailed explanation of the reasons justifying continued detention could be seen as an expression of the judges' opinions before they had determined the merits of the case. Accordingly, the Assize Court held that it was impossible to accept the Constitutional Court's judgment. Lastly, reiterating that the judgment in question amounted to usurpation of power, it held, by two votes to one, that there was no need for it to give a decision on the applicant's pre-trial detention.

40. The judge in the minority observed in his dissenting opinion that he agreed with the majority's conclusion that the Constitutional Court's judgment was not in compliance with the law. However, noting that the

Constitutional Court's judgments were final and binding on the Assize Court, he expressed the view that the applicant's release should be ordered.

41. On 12 January 2018 the applicant lodged an objection with a view to securing his release.

42. In a decision of 15 January 2018 the Istanbul 14th Assize Court unanimously dismissed the applicant's objection, essentially on the same grounds as the 13th Assize Court had done.

43. On 1 February 2018 the applicant lodged a further individual application with the Constitutional Court. Relying on Articles 5, 6 and 18 of the Convention, he complained mainly that he had been kept in pre-trial detention despite the Constitutional Court's judgment of 11 January 2018.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Constitution

44. Article 11 of the Constitution provides:

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

45. Article 15 of the Constitution reads as follows:

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

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

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

47. The first two paragraphs of Article 26 of the Constitution provide:

"Everyone has the right to express, individually or collectively, his or her thoughts and opinions and to disseminate them orally, in writing, through image or by any other means. This right also includes the freedom to receive or impart ideas or information without interference by the official authorities. This paragraph shall not preclude the imposition of rules concerning the licensing of radio, television, cinema or other similar enterprises.

The exercise of these freedoms may be restricted to preserve national security, public order, public safety, the fundamental characteristics of the Republic and the indivisible integrity of the State in terms of its territory and nation, to prevent crime, to punish offenders, to prevent the disclosure of information covered by State secrecy, to protect the honour, rights and private and family life of others, as well as professional secrecy as provided for by law, and to ensure the fulfilment of the judicial function in accordance with its purpose."

48. The relevant parts of Article 28 of the Constitution read as follows:

"The press is free and shall not be censored. ...

The State shall take the necessary measures to ensure freedom of the press and of information. The provisions of Articles 26 and 27 of the Constitution shall apply with regard to the restriction of freedom of the press.

..."

49. Article 90 § 5 of the Constitution provides:

"International treaties that are duly in force are legally binding. Their constitutionality cannot be challenged in the Constitutional Court. In the event of conflict between duly applicable international treaties on fundamental rights and freedoms and domestic statutes, the relevant provisions of the international treaties shall prevail."

50. Article 153 §§ 1 and 6 of the Constitution reads as follows:

"The decisions of the Constitutional Court are final. Decisions entailing annulment shall not be made public until a statement of reasons has been drafted.

...

Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive and judicial organs, the administrative authorities and natural and legal persons."

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

51. Section 45(1) and (2) of Law no. 6216 provides:

"(1) Anyone claiming that a public authority has violated one of his or her fundamental rights and freedoms as protected by the Constitution and secured under the European Convention on Human Rights and the Protocols thereto that have been ratified by Turkey may apply to the Constitutional Court.

(2) An individual application may be lodged only after the exhaustion of all the administrative and judicial remedies provided for by law in relation to the measure, act or negligence complained of."

52. Section 50(1) and (2) of Law no. 6216 reads as follows:

"(1) Following the examination on the merits, a decision shall be given as to whether or not there has been a violation of the applicant's right. If a violation is established, the measures to be taken to put an end to the violation and redress its effects shall be specified in the operative provisions of the decision. No review of the appropriateness of an administrative act may be carried out, and no decision amounting to such an act may be given.

(2) Where a violation is established on account of a judicial decision, the file shall be sent to the relevant court for reopening of the proceedings with a view to putting an end to the violation and redressing its effects. Where there is no legal interest in reopening the proceedings, the applicant may be awarded compensation or be invited to institute proceedings in the appropriate courts. The court before which the proceedings are reopened shall deliver a decision, if possible on the basis of the case file, with a view to putting an end to the violation found by the Constitutional Court in its decision and redressing the effects of the violation."

C. Relevant provisions of the Criminal Code ("the CC")

53. Article 309 § 1 of the CC is worded as follows:

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

54. Article 311 § 1 of the CC reads as follows:

"Anyone who attempts to overthrow the Turkish Grand National Assembly by force or violence or to prevent it, whether fully or in part, from discharging its duties shall be sentenced to aggravated life imprisonment."

55. Article 312 § 1 of the CC provides:

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

56. In addition, Article 220 § 6 of the CC, on punishment of offences committed on behalf of an illegal organisation, reads as follows:

"Anyone who commits an offence on behalf of an [illegal] organisation shall also be sentenced for belonging to that organisation, even if he or she is not a member of it."

57. Article 314 §§ 1 and 2 of the CC, which provides for the offence of belonging to an illegal organisation, reads as follows:

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

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

D. Relevant provisions of the Code of Criminal Procedure ("the CCP")

58. Pre-trial detention is governed by Articles 100 et seq. of the CCP. In accordance with Article 100, a person may be placed in pre-trial detention where there is factual evidence giving rise to strong suspicion that the person has committed an offence and where the detention is justified on one of the grounds laid down in the Article in question, namely: if the suspect has absconded or there is a risk that he or she will do so, and if there is a risk that the suspect will conceal or tamper with evidence or influence witnesses. For certain offences, in particular offences against State security and the constitutional order, the existence of strong suspicion is sufficient to justify pre-trial detention.

59. Article 101 of the CCP provides that pre-trial detention is ordered at the investigation stage by a magistrate at the request of the public prosecutor and at the trial stage by the competent court, whether of its own motion or at the prosecutor's request. An objection may be lodged with another magistrate or another court against decisions ordering or extending pre-trial detention. Such decisions must include legal and factual reasons.

60. Pursuant to Article 108 of the CCP, during the investigation stage, a magistrate must review a suspect's pre-trial detention at regular intervals not exceeding thirty days. Within the same period, the detainee may also lodge an application for release. During the trial stage, the question of the accused's detention is reviewed by the competent court at the end of each hearing, and in any event at intervals of no more than thirty days.

61. Article 141 § 1 (a) and (d) of the CCP provides:

"Compensation for damage ... may be claimed from the State by anyone ...:

(a) who has been arrested or taken into or kept in detention under conditions or in circumstances not complying with the law;

...

(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;

..."

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

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

63. According to the case-law of the Court of Cassation, it is not necessary to wait for a final decision on the merits of the case before ruling

on a compensation claim lodged under Article 141 of the CCP on account of the excessive length of pre-trial detention (decisions of 16 June 2015, E. 2014/21585 – K. 2015/10868 and E. 2014/6167 – K. 2015/10867).

E. Case-law of the Constitutional Court

64. In its decision of 4 August 2016 (no. 2016/12) concerning the dismissal of two members of the Constitutional Court and its decision of 20 June 2017 (*Aydın Yavuz and Others*, no. 2016/22169) concerning a person's pre-trial detention, the Constitutional Court provided information and assessments on matters including the attempted military coup and its consequences. It carried out a detailed examination, from a constitutional perspective, of the facts leading to the declaration of the state of emergency. As a result of this examination, it found that the attempted military coup had been a clear and serious attack both on the constitutional principles that sovereignty was unconditionally and unreservedly vested in the people, who exercised it through authorised organs, and that no individual or body could exercise any State authority not emanating from the Constitution, and also on the principles of democracy, the rule of law and human rights. According to the Constitutional Court, the attempted military coup had been a practical illustration of the severity of the threats posed to the democratic constitutional order and human rights. After summarising the attacks carried out during the night of 15 to 16 July 2016, it emphasised that in order to assess the severity of the threat posed by a military coup, it was also necessary to consider the risks that might have arisen had the coup attempt not been thwarted. It found that the fact that the attempted coup had taken place at a time when Turkey had been under violent attack from numerous terrorist organisations had made the country even more vulnerable and considerably increased the severity of the threat to the life and existence of the nation. The Constitutional Court noted that in some cases, it might not be possible for a State to eliminate threats to its democratic constitutional order, fundamental rights and national security through ordinary administrative procedures. It might therefore be necessary to impose extraordinary administrative procedures, such as a state of emergency, until such threats were eliminated. Bearing in mind the threats resulting from the attempted military coup of 15 July 2016, the Constitutional Court accepted the power of the Council of Ministers, chaired by the President, to issue legislative decrees on matters necessitating the state of emergency. In that context, it also emphasised that the state of emergency was a temporary legal regime, in which any interference with fundamental rights had to be foreseeable and the aim was to restore the normal regime in order to safeguard fundamental rights.

III. NOTICE OF DEROGATION BY TURKEY

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

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

THE LAW

I. PRELIMINARY QUESTION CONCERNING THE DEROGATION BY TURKEY

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

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

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

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

A. The parties' submissions

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

68. The applicant submitted that the notice of derogation could not be interpreted in such a way as to limit his rights and freedoms on account of articles he had written long before the attempted military coup.

69. The Commissioner for Human Rights did not make any comments about the notice of derogation from the Convention in his intervention.

70. The Special Rapporteur stated that if the circumstances justifying the declaration of a state of emergency ceased to exist, individuals' rights could no longer be restricted in connection with the aforementioned derogation.

71. The intervening non-governmental organisations submitted that the Government had not shown that there was currently a public emergency threatening the life of the nation. They contended in addition that the applicant's initial and continued pre-trial detention could not be regarded as strictly required by the exigencies of the situation.

B. The Court's assessment

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

73. In this connection, the Court notes firstly that the notice of derogation by Turkey, indicating that a state of emergency has been declared in order to tackle the threat posed to the life of the nation by the severe dangers resulting from the attempted military coup and other terrorist acts, does not explicitly mention which Articles of the Convention are to form the subject of a derogation. Instead, it simply announces that "measures taken may involve derogation from the obligations under the Convention". Nevertheless, the Court observes that none of the parties have

disputed that the notice of derogation by Turkey satisfied the formal requirement laid down in Article 15 § 3 of the Convention, namely to keep the Secretary General of the Council of Europe fully informed of the measures taken by way of derogation from the Convention and the reasons for them. Accordingly, it is prepared to accept that this formal requirement has been satisfied.

74. The Court further notes that under Article 15 of the Convention, any High Contracting Party has the right, in time of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention, other than those listed in paragraph 2 of that Article, provided that such measures are strictly proportionate to the exigencies of the situation and that they do not conflict with other obligations under international law (see *Lawless v. Ireland (no. 3)*, 1 July 1961, § 22, p. 55, Series A no. 3).

75. The Court reiterates that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 173, ECHR 2009). By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nevertheless, the Court would emphasise that States do not enjoy an unlimited discretion in this respect. The domestic margin of appreciation is accompanied by European supervision (see *Brannigan and McBride v. the United Kingdom*, 26 May 1993, § 43, Series A no. 258-B).

76. In the present case, the Court takes note of the Government's position that the attempted military coup and its aftermath have posed severe dangers to the democratic constitutional order and human rights, amounting to a threat to the life of the nation within the meaning of Article 15 of the Convention; it also notes that the applicant has not disputed this assessment.

77. The Court observes that the Constitutional Court, having examined from a constitutional perspective the facts leading to the declaration of a state of emergency, concluded that the attempted military coup had posed a severe threat to the life and existence of the nation (see paragraph 64 above). In the light of the Constitutional Court's findings and all the other material available to it, the Court likewise considers that the attempted military coup disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention.

78. 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

79. The Government raised two objections of failure to exhaust domestic remedies.

A. Objection of failure to bring a compensation claim

80. Regarding the applicant's complaints concerning his pre-trial detention, the Government stated that a compensation claim had been available to him under Article 141 § 1 (a) and (d) of the CCP. They contended that he could and should have brought a compensation claim on the basis of those provisions.

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

82. The Court reiterates that for a remedy in respect of the lawfulness of an ongoing deprivation of liberty to be effective, it must offer a prospect of release (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 40, 6 November 2008, and *Mustafa Avci v. Turkey*, no. 39322/12, § 60, 23 May 2017). It notes, however, that the remedy provided for in Article 141 of the CCP is not capable of terminating the applicant's deprivation of liberty.

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

B. Objection of failure to lodge an individual application with the Constitutional Court

84. The Government, relying mainly on the Court's findings in *Uzun v. Turkey* ((dec.), no. 10755/13, 30 April 2013) and *Mercan v. Turkey* ((dec.), no. 56511/16, 8 November 2016), contended that the applicant had failed to use the remedy of an individual application before the Constitutional Court.

85. The applicant rejected the Government's argument.

86. The Court reiterates that the applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). Nevertheless, the Court accepts that the last stage of a particular remedy may be reached after the application has been lodged but before its admissibility has been determined (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, ECHR 2011 (extracts); *Stanka Mirković and Others*

v. Montenegro, nos. 33781/15 and 3 others, § 48, 7 March 2017; and *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, § 105, 26 October 2017).

87. The Court observes that on 8 September 2016 the applicant lodged an individual application with the Constitutional Court, which gave its judgment on the merits on 11 January 2018 (see paragraphs 29 and 31 above).

88. Accordingly, the Court also dismisses this objection raised by the Government.

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

89. The applicant complained that his initial pre-trial detention and its continuation were arbitrary. He argued that there had been no evidence grounding a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. Furthermore, he complained that he had been kept in pre-trial detention despite the Constitutional Court's finding of a violation of his right to liberty and security in its judgment of 11 January 2018. He also contended that the duration of his pre-trial detention was excessive and that insufficient reasons had been given for the judicial decisions ordering and extending the detention. He complained that in those respects there had been a violation of 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."

90. The Government contested that argument.

A. The parties' submissions

1. The Government

91. The Government, referring to the principles established in the Court's case-law in this area (citing *Klass and Others v. Germany*, 6 September 1978, Series A no. 28; *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A; and *İpek and Others v. Turkey*, nos. 17019/02 and 30070/02, 3 February 2009), stated firstly that the applicant had been arrested and placed in pre-trial detention in the course of a criminal investigation initiated with a view to combating a terrorist organisation whose members had infiltrated State institutions and the media.

92. The Government submitted that from the contents of the above-mentioned articles written by the applicant, it was objectively possible to conclude that there had been a reasonable suspicion that he had committed the offences of which he was accused. On the strength of the physical evidence obtained during the investigation, criminal proceedings had been instituted against several individuals, including the applicant; the proceedings were currently ongoing before the Istanbul Assize Court.

93. Lastly, the Government submitted that the applicant's complaints should be assessed in the light of the notice of derogation given on 21 July 2016 under Article 15 of the Convention.

2. The applicant

94. The applicant argued that there were no facts or information that could satisfy an objective observer that he had committed the offences of which he was accused. The articles submitted by the public prosecutor and the Government to justify his pre-trial detention were covered by his freedom of expression.

95. In addition, the applicant stated that notwithstanding the final and binding judgment in which the Constitutional Court had found a violation of his right to liberty and security and to freedom of expression and of the press, the Istanbul Assize Court had kept him in pre-trial detention. Accordingly, he also complained in correspondence of 18 January 2018 that his application to the Constitutional Court had not led to his release.

3. The third parties

(a) The Commissioner for Human Rights

96. The Commissioner for Human Rights pointed out that excessive recourse to detention was a long-standing problem in Turkey. In that connection he noted that 210 journalists had been placed in pre-trial detention during the state of emergency, not including those who had been arrested and released after being questioned. One of the underlying reasons

for the high numbers of journalists being detained was the practice of judges, who often tended to disregard the exceptional nature of detention as a measure of last resort that should only be applied when all other options were deemed insufficient. In the majority of cases where journalists had been placed in pre-trial detention, they had been charged with terrorism-related offences without any evidence corroborating their involvement in terrorist activities. The Commissioner for Human Rights was struck by the weakness of the accusations and the political nature of the decisions ordering and extending pre-trial detention in such cases.

(b) The Special Rapporteur

97. The Special Rapporteur noted that since the declaration of a state of emergency, a large number of journalists had been placed in pre-trial detention on the basis of vaguely worded charges without sufficient evidence.

(c) The intervening non-governmental organisations

98. The intervening non-governmental organisations stated that since the attempted military coup, more than 150 journalists had been placed in pre-trial detention. Emphasising the crucial role played by the media in a democratic society, they criticised the use of measures depriving journalists of their liberty.

B. The Court's assessment

1. Admissibility

99. The Court observes that it has examined and dismissed the Government's objections that the applicant has not exhausted domestic remedies (see paragraphs 82-83 and 88 above).

100. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible on any other grounds. It therefore declares them admissible.

2. Merits

101. The Court reiterates firstly that Article 5 of the Convention guarantees a right of primary importance in a "democratic society" within the meaning of the Convention, namely the fundamental right to liberty and security (see *Assanidze v. Georgia* [GC], no. 71503/01, § 169, ECHR 2004-II).

102. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114), save in

accordance with the conditions specified in paragraph 1 of Article 5 of the Convention. The list of exceptions set out in Article 5 § 1 is an exhaustive one (see *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV), and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see *Assanidze*, cited above, § 170; *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 99, ECHR 2011; and *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 84, ECHR 2016 (extracts)).

103. The Court further 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; *Włoch v. Poland*, no. 27785/95, § 108, ECHR 2000-XI; and *Poyraz v. Turkey* (dec.), no. 21235/11, § 53, 17 February 2015). The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c). Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will, however, depend upon all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; *Korkmaz and Others v. Turkey*, no. 35979/97, § 24, 21 March 2006; *Süleyman Erdem v. Turkey*, no. 49574/99, § 37, 19 September 2006; and *Çiçek v. Turkey* (dec.), no. 72774/10, § 62, 3 March 2015).

104. The Court has also held 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*, cited above, § 55; *Metin v. Turkey* (dec.), no. 77479/11, § 57, 3 March 2015; and *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, § 52, 31 May 2016).

105. 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 *Ersöz v. Turkey* (dec.), no. 45746/11,

§ 50, 17 February 2015, and *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016).

106. In the present case the Court observes that the applicant was taken into police custody on 27 July 2016 on suspicion of belonging to a terrorist organisation and was placed in pre-trial detention on 30 July 2016. It further notes that in a bill of indictment filed on 10 April 2017 the Istanbul public prosecutor sought the applicant's conviction for attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence and for committing offences on behalf of a terrorist organisation, and that the criminal proceedings are still ongoing before the Istanbul 13th Assize Court. The Court also observes that during the criminal investigation and the trial, all of the applicant's applications for release have been rejected and that he remains in prison.

107. The Court further notes that after the applicant lodged an individual application with the Constitutional Court, that court held, in a judgment of 11 January 2018 which was published in the Official Gazette on 19 January 2018, that the investigating authorities had been unable to demonstrate any factual basis that might indicate that the applicant had been acting in accordance with the aims of FETÖ/PDY. On the basis of the evidence presented by the prosecution, the Constitutional Court held that there were no strong indications that the applicant had committed the offences with which he was charged. With regard to the application of Article 15 of the Constitution (providing for the suspension of the exercise of fundamental rights and freedoms in the event of war, general mobilisation, a state of siege or a state of emergency), it concluded that 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 a criminal offence. In the Constitutional Court's view, the applicant's deprivation of liberty was therefore disproportionate to the strict exigencies of the situation.

108. The Court observes that it has been established by the Constitutional Court that the applicant was placed and kept in pre-trial detention in breach of Article 19 § 3 of the Constitution (see paragraph 103 of the Constitutional Court's judgment). It considers that this conclusion amounts in substance to an acknowledgment that his deprivation of liberty contravened Article 5 § 1 of the Convention. In the particular circumstances of the present case, the Court endorses the findings which the Constitutional Court reached following a thorough examination.

109. The Court's scrutiny will therefore be limited to determining whether the national authorities afforded appropriate and sufficient redress for the violation found and whether they complied with their obligations under Article 5 of the Convention. In this connection the Court observes that although the Constitutional Court found a violation of Article 19 § 3 of the Constitution, the Istanbul 13th and 14th Assize Courts refused to release

the applicant when ruling at final instance on his applications for release, the 13th Assize Court finding in particular that the Constitutional Court's judgment was not in compliance with the law and amounted to usurpation of power.

110. The Court notes that the Constitution and Law no. 6216 confer jurisdiction on the Constitutional Court to examine applications lodged, following the exhaustion of ordinary remedies, by individuals claiming that their fundamental rights and freedoms as protected by the Constitution and the Convention and Protocols thereto have been violated.

111. The Court observes that it has already examined the remedy of an individual application to the Constitutional Court under Article 5 of the Convention, in particular in the case of *Koçintar v. Turkey* ((dec.), no. 77429/12, 1 July 2014). In that case, after examining the remedy in question, it found that none of the material in its possession suggested that an individual application to the Constitutional Court was not capable of affording appropriate redress for the applicant's complaint under Article 5 of the Convention, or that it did not offer reasonable prospects of success. In reaching that finding, it noted in particular that the Constitutional Court had jurisdiction to find violations of Convention provisions and was vested with appropriate powers to secure redress for violations, by granting compensation and/or indicating the means of redress; on that account the Constitutional Court could and should be able, if necessary, to prohibit the authority concerned from continuing to breach the right in question and to order it to restore, as far as possible, the *status quo ante* (see *Koçintar*, cited above, § 41). The Court observed that where the Constitutional Court found a violation of the right to liberty as guaranteed by Article 19 of the Constitution and the applicant remained in detention, it decided to transmit its judgment containing that finding to the appropriate court so that it could take "the necessary action". Taking into account the binding nature of the Constitutional Court's decisions in accordance with Article 153 § 6 of the Constitution (by which such decisions are binding on all State authorities and on all natural and legal persons), the Court found that the question of compliance in practice with that court's decisions on individual applications should not in principle arise in Turkey and that there was no cause to doubt that the judgments in which the Constitutional Court found a violation would be effectively implemented (ibid., § 43).

112. As indicated above (see paragraphs 37-42), following the publication of the Constitutional Court's judgment on its website (see paragraphs 39-40 above), the Istanbul 13th Assize Court, by a majority, rejected the applicant's request for release, mainly because it considered that the Constitutional Court did not have jurisdiction to assess the evidence in the case file. Accordingly, it held the Constitutional Court's judgment was not in compliance with the law and amounted to usurpation of power. In the Assize Court's view, judgments of the Constitutional Court that did

not comply with the law should not be deemed to be binding. It added that there was sufficient evidence against the applicant to justify keeping him in pre-trial detention but that such evidence could not be explained in detail in decisions on his continued detention, since this would prompt the risk of prejudging the case. In conclusion, seeing that the Constitutional Court's judgment amounted to usurpation of power, it held that there was no need to give a decision on the applicant's pre-trial detention.

113. In the light of the foregoing, it appears from developments in the domestic proceedings that, notwithstanding the Constitutional Court's finding that the applicant's pre-trial detention had infringed his right to liberty and security and his freedom of journalistic expression as safeguarded by the Turkish Constitution and the Convention, the assize courts refused to release him. The Court is therefore called upon to examine the extent to which this state of affairs at domestic level has a bearing on its own assessment of the applicant's complaint under Article 5 § 1 of the Convention.

114. The Court observes that under Turkish law, the measure of pre-trial detention is chiefly governed by Article 19 of the Constitution and Article 100 of the CCP. In this connection, it notes that the Constitutional Court's review is essentially performed from the standpoint of Article 19 of the Constitution, whereas the criminal courts consider the matter of an individual's detention primarily in relation to Article 100 of the CCP. It thus observes that the reasons given in the Constitutional Court's judgment and in the decision delivered by the 13th Assize Court suggest that the criteria applied by the two courts coexist, particularly as regards the discretion to assess the evidence in the case file. In this context, the Court cannot accept the 13th Assize Court's argument that the Constitutional Court should not have assessed the evidence in the case file. To hold otherwise would amount to maintaining that the Constitutional Court could have examined the applicant's complaint concerning the lawfulness of his initial and continued pre-trial detention without considering the substance of the evidence produced against him.

115. Next, the Court observes that in the present case, prior to the Constitutional Court's judgment of 11 January 2018, the Government had explicitly urged the Court to reject the applicant's application for failure to exhaust domestic remedies, on the grounds that his individual application to the Constitutional Court was still pending (see paragraph 84 above). This argument reinforced the Government's view that an individual application to the Constitutional Court was an effective remedy for the purposes of Article 5 of the Convention. Such a position is, moreover, consistent with the Court's findings in the case of *Koçintar* (cited above). To put it briefly, the Court considers that this argument by the Government can only be interpreted as meaning that under Turkish law, if the Constitutional Court has ruled that the applicant's pre-trial detention is in breach of the

Constitution, the response by the courts with jurisdiction to rule on the issue of pre-trial detention must necessarily entail releasing him, unless new grounds and evidence justifying his continued detention are put forward. However, in the event, the 13th Assize Court rejected the application for the applicant's release following the Constitutional Court's judgment of 11 January 2018 by interpreting and applying domestic law in a manner departing from the approach indicated by the Government before the Court.

116. As the Court has regularly confirmed, although it is primarily 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 the domestic law has been complied with (see *Mooren v. Germany* [GC], no. 11364/03, § 73, 9 July 2009). 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 emphasises that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty should be satisfied (ibid., § 76). 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. Lastly and above all, 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. In the context of sub-paragraph (c) of Article 5 § 1, the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention should be regarded as arbitrary (ibid., § 77 and 79).

117. The Court observes that it has already found in the *Uzun* decision (cited above) that the Turkish legislature has demonstrated its intention to entrust the Constitutional Court with jurisdiction to find violations of Convention provisions and with appropriate powers to provide redress for such violations (see *Uzun*, cited above, §§ 62-64). Furthermore, with regard to complaints under Article 5 of the Convention, in *Koçintar* (cited above) the Court considered the nature and effects of decisions delivered by the Constitutional Court in accordance with the Turkish Constitution. Article 153 § 1 of the Constitution provides that the Constitutional Court's judgments are "final". Moreover, as the Court noted in *Koçintar*, Article 153 § 6 provides that decisions of the Constitutional Court are binding on the legislative, executive and judicial organs (see, to similar effect, *Uzun*, cited above, § 66). In the Court's view, therefore, it is clear that the Constitutional Court forms an integral part of the judiciary within

the constitutional structure of Turkey and that – as the Court has previously noted in *Koçintar*, and as the Government explicitly submitted before the Court in the present case – it plays an important role in protecting the right to liberty and security under Article 19 of the Constitution and Article 5 of the Convention by offering an effective remedy to individuals detained during criminal proceedings (see also *Mercan*, cited above, §§ 17-30).

118. On that basis, and having regard in particular to the Government's arguments before it as to the effectiveness of an individual application to the Constitutional Court for the purposes of Article 5 of the Convention, the Court observes that the reasons given by the Istanbul 13th Assize Court in rejecting the application for the applicant's release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, cannot be regarded as satisfying the requirements of Article 5 § 1 of the Convention. For another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications runs counter to the fundamental principles of the rule of law and legal certainty. The Court reiterates that these principles, inherent in the protection afforded by Article 5 of the Convention, are the cornerstones of the guarantees against arbitrariness (see paragraph 116 above). Although the Constitutional Court transmitted its judgment to the Assize Court so that it could take "the necessary action", the Assize Court resisted the Constitutional Court by refusing to release the applicant, with the result that the violation found by the Constitutional Court was not redressed. The Court has already stated (see paragraph 108 above) that it endorses the findings reached by the Constitutional Court in its judgment of 11 January 2018 regarding the period of pre-trial detention up to the date of that judgment. It observes that the case file discloses no new grounds or evidence showing that the basis for the detention has changed following the Constitutional Court's judgment. In that connection, it notes in particular that the Government have not demonstrated that the evidence purportedly available to the 13th Istanbul Assize Court justifying the strong suspicion against the applicant was in fact any different from the evidence examined by the Constitutional Court. That being so, the Court considers that the applicant's continued pre-trial detention, after the Constitutional Court had given its clear and unambiguous judgment finding a violation of Article 19 § 3 of the Constitution, cannot be regarded as "lawful" and "in accordance with a procedure prescribed by law" as required by the right to liberty and security.

119. Turning to the derogation by Turkey, the Court observes that the Constitutional Court expressed its position on the applicability of Article 15 of the Turkish Constitution, holding that the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence (see paragraph 109 of the Constitutional Court's

judgment). Accordingly, it found that the applicant's deprivation of liberty was disproportionate to the strict exigencies of the situation. This conclusion is also valid for the Court's examination. Having regard to Article 15 of the Convention and the derogation by Turkey, the Court considers, as the Constitutional Court did in its judgment, that a measure of pre-trial detention that is not "lawful" and has not been effected "in accordance with a procedure prescribed by law" on account of the lack of reasonable suspicion cannot be said to have been strictly required by the exigencies of the situation (see, *mutatis mutandis*, *A. and Others*, cited above, §§ 182-90). In that context, the Court notes in addition that the Government have not provided it with any evidence that could persuade it to depart from the conclusion reached by the Constitutional Court.

120. In the light of the foregoing, there has been a violation of Article 5 § 1 of the Convention in the present case.

121. The Court would emphasise that the applicant's continued pre-trial detention, even after the Constitutional Court's judgment, as a result of the decisions delivered by the Istanbul 13th Assize Court, raises serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention. However, as matters stand, the Court will not depart from its previous finding that the right to lodge an individual application with the Constitutional Court constitutes an effective remedy in respect of complaints by persons deprived of their liberty under Article 19 of the Constitution (see *Koçintar*, cited above, § 44). Nevertheless, it reserves the right to examine the effectiveness of the system of individual applications to the Constitutional Court in relation to applications under Article 5 of the Convention, especially in view of any subsequent developments in the case-law of the first-instance courts, in particular the assize courts, regarding the authority of the Constitutional Court's judgments. In that regard, it will be for the Government to prove that this remedy is effective, both in theory and in practice (see *Uzun*, cited above, § 71).

122. In view of its finding under Article 5 § 1 of the Convention concerning the applicant's complaint of a lack of reasonable suspicion that he had committed a criminal offence, the Court considers that it is not necessary to examine whether the authorities have kept him in detention for reasons that could be regarded as "relevant" and "sufficient" to justify his initial and continued pre-trial detention under Article 5 § 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF THE LACK OF A SPEEDY JUDICIAL REVIEW BY THE CONSTITUTIONAL COURT

123. The applicant submitted that the proceedings he had brought before the Constitutional Court with a view to challenging the lawfulness of his pre-trial detention had not complied with the requirements of the Convention in that the Constitutional Court had failed to observe the requirement of "speediness". On that account he relied on Article 5 § 4 of the Convention, which provides:

> "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."

124. The Government contested the applicant's argument.

A. The parties' submissions

1. The Government

125. First of all, the Government submitted that Turkish law contained sufficient legal safeguards enabling detainees to effectively challenge their deprivation of liberty. They noted that detainees could apply for release at any stage of the investigation or the trial and that an objection could be lodged against any decisions rejecting such applications. The question of a suspect's continued detention was automatically reviewed at regular intervals of no more than thirty days. In that context, the Government emphasised that the Constitutional Court was not to be regarded as a court of appeal for the purposes of Article 5 § 4 of the Convention.

126. Next, referring to statistics on the Constitutional Court's caseload, the Government stated that in 2012 1,342 applications had been lodged with that court; in 2013 that number had risen to 9,897, and in 2014 and 2015 respectively there had been 20,578 and 20,376 applications. Since the attempted military coup, there had been a dramatic increase in the number of applications to the Constitutional Court: a total of 103,496 applications had been lodged with it between 15 July 2016 and 9 October 2017. Bearing in mind this exceptional caseload for the Constitutional Court and the notice of derogation of 21 July 2016, the Government submitted that it could not be concluded that that court had failed to comply with the requirement of "speediness".

2. The applicant

127. The applicant reiterated his assertion that the Constitutional Court had not given a speedy decision as required by Article 5 § 4 of the Convention.

3. The third parties

(a) The Commissioner for Human Rights

128. The Commissioner for Human Rights observed that, in relation to Article 5 of the Convention, the Constitutional Court had developed an approach in line with the principles established by the Court in its own case-law. While acknowledging the size of the Constitutional Court's caseload since the attempted military coup, he emphasised that it was essential for the proper functioning of the judicial system that that court should give its decisions speedily.

(b) The Special Rapporteur

129. The Special Rapporteur likewise noted that since the declaration of the state of emergency, the Constitutional Court had been faced with an unprecedented caseload.

(c) The intervening non-governmental organisations

130. The intervening non-governmental organisations did not make submissions on this complaint.

B. The Court's assessment

1. Admissibility

131. The Court reiterates that it has found Article 5 § 4 of the Convention to be applicable to proceedings before domestic constitutional courts (see *Smatana v. the Czech Republic*, no. 18642/04, §§ 119-24, 27 September 2007, and *Žúbor v. Slovakia*, no. 7711/06, §§ 71-77, 6 December 2011). Accordingly, having regard to the jurisdiction of the Turkish Constitutional Court (see, for example, *Koçintar*, cited above, §§ 30-46), the Court concludes that Article 5 § 4 is also applicable to proceedings before that court.

132. The Court further 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.

2. Merits

133. The Court reiterates that Article 5 § 4, in guaranteeing detainees a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see *Mooren*,

cited above, § 106, and *Idalov v. Russia* [GC], no. 5826/03, § 154, 22 May 2012).

134. The question whether the right to a speedy decision has been respected must – as is the case for the "reasonable time" stipulation in Article 5 § 3 and Article 6 § 1 of the Convention – be determined in the light of the circumstances of each case, including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter (see *Mooren*, cited above, § 106, with further references; *S.T.S. v. the Netherlands*, no. 277/05, § 43, ECHR 2011; and *Shcherbina v. Russia*, no. 41970/11, § 62, 26 June 2014).

135. In order to determine whether the requirement that a decision be given "speedily" has been complied with, it is necessary to effect an overall assessment where the proceedings were conducted at more than one level of jurisdiction (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B, and *Mooren*, cited above, § 106). Where the original detention order or subsequent decisions on continued detention were given by a court (that is to say, by an independent and impartial judicial body) in a procedure offering appropriate guarantees of due process, and where the domestic law provides for a system of appeal, the Court is prepared to tolerate longer periods of review in proceedings before a second-instance court (see *Lebedev v. Russia*, no. 4493/04, § 96, 25 October 2007, and *Shcherbina*, cited above, § 65). These considerations apply *a fortiori* to complaints under Article 5 § 4 concerning proceedings before constitutional courts which were separate from proceedings before ordinary courts (see *Žúbor*, cited above, § 89). In this context, the Court notes that the proceedings before constitutional courts such as the Turkish Constitutional Court are of a specific nature. Admittedly, the Constitutional Court does review the lawfulness of an applicant's initial and continued pre-trial detention. However, in doing so it does not act as a "fourth-instance" body but determines solely whether the decisions ordering the initial and continued detention complied with the Constitution.

136. In the present case the Court observes that the applicant lodged an individual application with the Constitutional Court on 8 September 2016. On 26 October 2016 the Constitutional Court rejected the applicant's application for an interim measure ordering his release; it gave its final judgment on 11 January 2018. The period to be taken into consideration thus amounted to sixteen months and three days.

137. The Court observes that in the Turkish legal system, anyone in pre-trial detention may apply for release at any stage of the proceedings and may lodge an objection if the application is rejected. It notes that in the present case the applicant made several such applications for release, which were examined in conformity with the "speediness" requirement (see paragraphs 23-24 above). The Court observes in addition that the question of a suspect's detention is automatically reviewed at regular intervals of no

more than thirty days (see paragraph 60 above). In a system of that kind, the Court can tolerate longer periods of review by the Constitutional Court. Where an initial or further detention order was imposed by a court in a procedure offering appropriate guarantees of due process, the subsequent proceedings are less concerned with arbitrariness, but provide additional guarantees based primarily on an evaluation of the appropriateness of continued detention. Nevertheless, the Court considers that even in the light of those principles, in normal circumstances a period of sixteen months and three days cannot be regarded as "speedy" (see *G.B. v. Switzerland*, no. 27426/95, §§ 28-39, 30 November 2000; *Khudobin v. Russia*, no. 59696/00, §§ 115-24, ECHR 2006-XII (extracts); and *Shcherbina*, cited above, §§ 62-71). However, in the present case the Court observes that the applicant's application to the Constitutional Court was a complex one, being one of the first of a series of cases raising new and complicated issues concerning the right to liberty and security and freedom of expression under the state of emergency following the attempted military coup. Moreover, bearing in mind the Constitutional Court's caseload following the declaration of a state of emergency, the Court notes that this is an exceptional situation.

138. That conclusion does not mean, however, that the Constitutional Court has carte blanche when dealing with any similar complaints raised under Article 5 § 4 of the Convention. In accordance with Article 19 of the Convention, the Court retains its ultimate supervisory jurisdiction for complaints submitted by other applicants alleging that, after lodging an individual application with the Constitutional Court, they have not had a speedy judicial decision concerning the lawfulness of their detention.

139. In the light of the foregoing, although the duration of sixteen months and three days before the Constitutional Court could not be described as "speedy" in an ordinary context, in the specific circumstances of the case there has been no violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

140. The applicant also complained that he had not had access to an effective remedy by which he could have obtained compensation for the damage sustained on account of his pre-trial detention. He alleged a violation of Article 5 § 5 of the Convention, which provides:

> "5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

141. The Government contested the applicant's argument. They stated that two remedies had been available to the applicant, namely a claim for compensation from the State under Article 141 § 1 of the CCP and an individual application to the Constitutional Court. In their submission, these

remedies were capable of affording redress in respect of the complaint concerning the applicant's pre-trial detention.

142. The applicant submitted that the remedies suggested by the Government were not effective.

143. The intervening parties made no submissions on this complaint.

144. The Court reiterates that the right to compensation set forth in Article 5 § 5 of the Convention presupposes that a violation of one of the other paragraphs of that Article has been established, either by a domestic authority or by the Convention institutions (see *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X). In the present case, it remains to be determined whether the applicant had the opportunity to claim compensation for the damage sustained.

145. In so far as this complaint concerns Article 5 § 4 of the Convention, the Court considers that in view of the absence of a finding of a violation of that provision in its conclusions set out in paragraphs 133-39 above, the complaint is incompatible *ratione materiae* with the provisions of the Convention for the purposes of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

146. The Court observes that it has already found a violation of Article 5 § 1. Regarding the possibility of claiming compensation for that violation, the Court notes that Article 141 of the CCP does not specifically provide for a compensation claim for damage sustained by a person as a result of the lack of reasonable suspicion that he or she has committed a criminal offence. In that connection, the Government have failed to produce any judicial decision concerning the award of compensation, on the basis of this provision of the CCP, to anyone in a similar position to the applicant.

147. The Court considers, however, that the same cannot be said of the possibility of claiming compensation before the Constitutional Court. It reiterates that the Constitutional Court has jurisdiction to order redress in the form of an award of compensation (see paragraph 111 above). The Court further observes that in a judgment delivered on the same day as the one in the present case, likewise concerning a journalist in pre-trial detention, the Constitutional Court awarded compensation to the applicant in respect of the violations it had found (application no. 2016/23672).

148. The Court therefore considers that the applicant had a remedy by which he could have obtained compensation in respect of his complaint under Article 5 § 1 of the Convention. 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.

VI. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

149. The applicant also complained of interference with his freedom of expression, in breach of Article 10 of the Convention, on account of his initial and continued pre-trial detention. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

150. The Government contested the applicant's argument.

A. The parties' submissions

1. The Government

151. The Government argued firstly that the applicant's complaint under Article 10 should be declared inadmissible for failure to exhaust domestic remedies, given that the criminal proceedings brought against him were still ongoing.

152. Next, the Government submitted that the order for the applicant's pre-trial detention did not constitute interference within the meaning of Article 10 of the Convention, since the subject matter of the proceedings instituted against him did not relate to his activities as a journalist. In that connection, they emphasised that the applicant had been placed and kept in pre-trial detention on suspicion of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government through force and violence, and committing offences on behalf of an armed terrorist organisation without being a member of it.

153. The Government submitted that, should the Court nevertheless conclude that there had been an interference, it should in any event find that the interference had been "prescribed by law", had pursued a legitimate aim and had been "necessary in a democratic society" in order to achieve that aim, and therefore justified.

154. To that end, they noted that the criminal proceedings against the applicant had been provided for in Article 309 § 1, Article 311 § 1 and Article 314 §§ 1 and 2 of the CC. Furthermore, the impugned interference had pursued several aims for the purposes of the second paragraph of

Article 10 of the Convention, namely protection of national security or public safety, and prevention of disorder and crime.

155. As to whether the interference had been necessary in a democratic society, the Government submitted that by making use of the opportunities available in democratic systems, terrorist organisations were able to form numerous ostensibly legal structures in order to achieve their aims. In the Government's view, the criminal investigations into individuals operating within such structures could not be said to concern their professional activities. In that regard, FETÖ/PDY was a complex, *sui generis* terrorist organisation carrying out activities under the guise of lawfulness. Against this background, the FETÖ/PDY media wing was primarily concerned with legitimising the organisation's activities by manipulating public opinion. The Government emphasised that the applicant had been placed in pre-trial detention in the context of an investigation of that nature.

156. The Government further contended that rights and freedoms could not be used to destroy other rights and freedoms. In that context, emphasising that the offending articles by the applicant had promoted an armed terrorist organisation and had constituted incitement to violence, the Government maintained that the use of the media as a tool for destroying fundamental freedoms could not be tolerated. Accordingly, they submitted that the interference complained of had been proportionate and necessary in a democratic society.

2. The applicant

157. The applicant submitted that his pre-trial detention, without any concrete evidence that he had committed the alleged offences, amounted to unjustified interference with his freedom of expression.

3. The third parties

(a) The Commissioner for Human Rights

158. Relying mainly on the findings made during his visits to Turkey in April and September 2016, the Commissioner for Human Rights noted firstly that he had repeatedly highlighted the widespread violations of freedom of expression and media freedom in Turkey. He expressed the view that Turkish prosecutors and courts interpreted anti-terrorism legislation in a very broad manner. Many journalists expressing dissent or criticism against the government authorities had been placed in pre-trial detention purely on account of their journalistic activities, without any concrete evidence. The Commissioner for Human Rights thus rejected the Government's assertion that the criminal proceedings instituted against journalists were unconnected to their professional activities, finding that it lacked credibility in that often the only evidence included in investigation files concerning journalists related to their journalistic activities.

159. In addition, the Commissioner for Human Rights submitted that neither the attempted coup nor the dangers represented by terrorist organisations could justify measures entailing severe interference with media freedom, such as the measures he had criticised.

(b) The Special Rapporteur

160. The Special Rapporteur submitted that anti-terrorism legislation had long been used in Turkey against journalists expressing critical opinions about government policies. Nevertheless, since the declaration of the state of emergency, the right to freedom of expression had been weakened even further. Since 15 July 2016, 231 journalists had been arrested and more than 150 remained in prison.

161. The Special Rapporteur stated that any interference would contravene Article 10 of the Convention unless it was "prescribed by law". It was not sufficient for a measure to have a basis in domestic law; regard should also be had to the quality of the law. Accordingly, the persons concerned had to be able to foresee the consequences of the law in their case, and domestic law had to provide certain safeguards against arbitrary interference with freedom of expression.

162. In the Special Rapporteur's submission, the combination of facts surrounding the prosecution of journalists suggested that, under the pretext of combating terrorism, the national authorities were widely and arbitrarily suppressing freedom of expression through prosecutions and detention.

(c) The intervening non-governmental organisations

163. The intervening non-governmental organisations submitted that restrictions on media freedom had become significantly more pronounced and prevalent since the attempted military coup. Stressing the important role played by the media in a democratic society, they stated that journalists were often detained for dealing with matters of public interest. They complained on that account of arbitrary recourse to measures involving the detention of journalists. In their submission, detaining a journalist for expressing opinions that did not entail incitement to terrorist violence amounted to an unjustified interference with the journalist's exercise of the right to freedom of expression.

B. The Court's assessment

1. Admissibility

164. With regard to the Government's objection that the applicant had not exhausted domestic remedies as the criminal proceedings against him were still ongoing in the domestic courts, the Court considers that the objection raises issues that are closely linked to the examination of whether

there has been an interference with the applicant's exercise of his right to freedom to of expression, and hence to the examination of the merits of his complaint under Article 10 of the Convention. The Court will therefore analyse this question in the context of its examination on the merits.

165. In the present case, the Court observes that the Constitutional Court found violations of Articles 26 and 28 of the Turkish Constitution on account of the applicant's initial and continued pre-trial detention and awarded him compensation by way of redress for those violations. However, despite the Constitutional Court's judgment, the competent assize courts rejected the applicant's application for release. Accordingly, the Court considers that the judgment did not afford appropriate and sufficient redress to the applicant and did not deprive him of his "victim" status.

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

2. Merits

(a) Whether there was an interference

167. The Court refers first of all to its case-law to the effect that certain circumstances with a chilling effect on freedom of expression will confer on applicants who have yet to be convicted in a final judgment the status of victims of an interference with the freedom in question (see *Dink v. Turkey*, nos. 2668/07 and 4 others, § 105, 14 September 2010; *Altuğ Taner Akçam v. Turkey*, no. 27520/07, §§ 70-75, 25 October 2011; and *Nedim Şener v. Turkey*, no. 38270/11, § 94, 8 July 2014).

168. In the present case, the Court observes that criminal proceedings were instituted against the applicant on suspicion of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence, and of committing offences on behalf of an armed terrorist organisation without being a member of it. The criminal proceedings brought against the applicant on that account are still ongoing, and he has remained in pre-trial detention for more than one year and six months.

169. The Court also notes that in its judgment of 11 January 2018, the Constitutional Court held that the applicant's detention on account of his articles amounted to interference with the exercise of his right to freedom of expression and of the press. The Court endorses this particular finding by the Constitutional Court.

170. The Court considers, in the light of the Constitutional Court's judgment, that the applicant's pre-trial detention accordingly constitutes an "interference" with his right to freedom of expression within the meaning of Article 10 of the Convention (see *Şık v. Turkey*, no. 53413/11, § 85, 8 July 2014).

171. For the same reasons, the Court dismisses the Government's objection of failure to exhaust domestic remedies in respect of the complaints under Article 10 of the Convention.

(b) Whether the interference was justified

172. The Court reiterates that an interference will breach Article 10 of the Convention unless it satisfies the requirements of the second paragraph of that Article. It therefore remains to be determined whether the interference observed in the present case was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" in order to achieve them.

173. In this connection, the Court reiterates that the expression "prescribed by law", within the meaning of Article 10 § 2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences, and that it should be compatible with the rule of law (see *Müller and Others v. Switzerland*, 24 May 1988, § 29, Series A no. 133).

174. In the present case, none of the parties disputed that the applicant's pre-trial detention had had a legal basis, namely the relevant provisions of the CC and the CCP.

175. The question then arising is whether the interpretation and application of the provisions of the CC may reduce their accessibility and foreseeability. In the present case, given that the public prosecutor, in bringing the charges against the applicant, and the judges, in deciding to keep him in pre-trial detention, interpreted those provisions as covering the articles written by him, the Court considers that serious doubts may arise as to whether he could have foreseen his initial and continued pre-trial detention on the basis of Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the CC. However, in view of its findings below concerning the necessity of the interference, the Court considers that it does not have to settle this question.

176. As regards the "legitimate aim" pursued by the interference, the Court is prepared to accept that it was intended to prevent disorder and crime. It thus remains to be determined whether the interference was "necessary" to achieve those aims.

177. In the present case the Court observes that the Constitutional Court concluded that the applicant's initial and continued pre-trial detention, following his expression of his opinions, constituted a severe measure that could not be regarded as a necessary and proportionate interference in a democratic society for the purposes of Articles 26 and 28 of the Constitution. Finding that the judges concerned had not shown that depriving the applicant of his liberty met a pressing social need, the Constitutional Court held that in so far as his detention was not based on

any concrete evidence other than his articles, it could have had a chilling effect on freedom of expression and of the press (see paragraph 33 above).

178. In the circumstances of the case, the Court can see no reason to reach a different conclusion from that of the Constitutional Court. In this connection, it also refers to its own conclusions under Article 5 § 1 of the Convention (see paragraphs 106-20 above).

179. Against this background, the Court notes that the intervening parties highlighted the existence of a general problem in Turkey concerning the interpretation of anti-terrorism legislation by prosecutors and the competent courts. They submitted that journalists were often subjected to severe measures such as detention for dealing with matters of public interest. The Court notes in this connection that it has consistently held that where the views expressed do not constitute incitement to violence – in other words, unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist acts in pursuit of their supporters' goals and can be interpreted as likely to encourage violence by instilling deep-seated and irrational hatred towards specified individuals – the Contracting States cannot restrict the right of the public to be informed of them, even with reference to the aims set out in Article 10 § 2, namely the protection of territorial integrity or national security or the prevention of disorder or crime (see *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 60, 8 July 1999, and *Şık*, cited above, § 85).

180. The Court is prepared to take into account the circumstances surrounding the cases brought before it, in particular the difficulties facing Turkey in the aftermath of the attempted military coup. The coup attempt and other terrorist acts have clearly posed a major threat to democracy in Turkey. In this connection, the Court attaches considerable weight to the conclusions of the Constitutional Court, which noted, among other things, that the fact that the attempt had taken place at a time when Turkey had been under violent attack from numerous terrorist organisations had made the country even more vulnerable (see paragraph 64 above). However, the Court considers that one of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate. It has emphasised on many occasions that democracy thrives on freedom of expression (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 57, *Reports of Judgments and Decisions* 1998-I; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 129, ECHR 2012; and *Party for a Democratic Society (DTP) and Others v. Turkey*, nos. 3840/10 and 6 others, § 74, 12 January 2016). In this context, the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society. In the Court's view, even in a state of emergency – which is, as the Constitutional Court noted, a legal regime whose aim is to restore the

normal regime by guaranteeing fundamental rights (see paragraph 64 above) – the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.

181. In this context, the Court considers that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings. Should this not be the case, the national courts' interpretation cannot be regarded as acceptable.

182. The Court further notes that the pre-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices (see, to similar effect, paragraph 140 of the Constitutional Court's judgment). The Court further notes that a chilling effect of this kind may be produced even when the detainee is subsequently acquitted (see *Şık*, cited above, § 83).

183. Lastly, with regard to the derogation by Turkey, the Court refers to its findings in paragraph 119 of this judgment. In the absence of any strong reasons to depart from its assessment concerning the application of Article 15 in relation to Article 5 § 1 of the Convention, the Court considers that these conclusions are also valid in the context of its examination under Article 10.

184. In the light of the foregoing, the Court concludes that there has been a violation of Article 10 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

185. On the basis of the same facts and relying on Article 18 of the Convention, the applicant complained that he had been detained for expressing critical opinions about the government authorities.

Article 18 of the Convention reads as follows:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

186. Having regard to the conclusions reached above under Article 5 § 1 and Article 10 of the Convention, the Court does not consider it necessary to examine this complaint separately.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

187. 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

188. In respect of non-pecuniary damage, the applicant claimed 1,000 euros (EUR) for each day he had spent in detention.

189. The Government submitted that this claim was unfounded and that the amount claimed was excessive.

190. The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Assanidze*, cited above, § 198; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII; and *Fatullayev v. Azerbaijan*, no. 40984/07, § 172, 22 April 2010).

191. Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately

redressed (see *Maestri*, cited above, § 47, and *Assanidze*, cited above, § 199).

192. In the present case, as regards non-pecuniary damage, the Court considers that the violation of the Convention has indisputably caused the applicant substantial harm. Accordingly, making its assessment on an equitable basis, the Court finds it appropriate to award the applicant EUR 21,500 in respect of non-pecuniary damage.

193. Concerning the measures to be adopted by the respondent State (see paragraph 189 above), subject to supervision by the Committee of Ministers, to put an end to the violations found, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (see, among other authorities, *Fatullayev*, cited above, § 173, and the case-law cited therein).

194. Nevertheless, where the nature of the violation found is such as to leave no real choice as to the measures required to remedy it, the Court may decide to indicate only one individual measure, as it did in the cases of *Assanidze* (cited above, §§ 202-03); *Ilaşcu and Others* (cited above, § 490); *Aleksanyan v. Russia* (no. 46468/06, §§ 239-40, 22 December 2008); *Fatullayev* (cited above, §§ 176-77); and *Del Río Prada v. Spain* ([GC], no. 42750/09, §§ 138-39, ECHR 2013). In the light of its approach in those cases, it considers that any continuation of the applicant's pre-trial detention in the present case will entail a prolongation of the violation of Article 5 § 1 and a breach of the obligations on respondent States to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention.

195. Accordingly, having regard to the particular circumstances of the case, the reasons for its finding of a violation and the urgent need to put an end to the violation of Article 5 § 1 of the Convention, the Court considers that the respondent State must ensure the termination of the applicant's pre-trial detention at the earliest possible date.

B. Costs and expenses

196. The applicant did not seek reimbursement of any costs and expenses incurred before the Convention institutions and/or the domestic courts. That being so, the Court considers that no sum is to be awarded on that account to the applicant.

C. Default interest

197. 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. *Joins to the merits*, by a majority, the preliminary objection of failure to exhaust domestic remedies in respect of the complaint under Article 10 of the Convention and dismisses it;

2. *Declares*, by a majority, the application admissible as regards the complaints under Article 5 §§ 1, 3 and 4 and Article 10 of the Convention;

3. *Declares* inadmissible, unanimously, the complaint under Article 5 § 5 of the Convention;

4. *Holds*, by six votes to one, that there has been a violation of Article 5 § 1 of the Convention;

5. *Holds*, unanimously, that there is no need to examine separately the complaint under Article 5 § 3 of the Convention;

6. *Holds*, unanimously, that there has been no violation of Article 5 § 4 of the Convention;

7. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;

8. *Holds*, unanimously, that there is no need to examine separately the complaint under Article 18 of the Convention;

9. *Holds*, by six votes to one,
   (a) that the respondent State is to take all necessary measures to put an end to the applicant's pre-trial detention;
   (b) 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, EUR 21,500 (twenty-one thousand five hundred euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(c) 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;

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

Done in French, and notified in writing on 20 March 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Robert Spano
Registrar	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) Concurring opinion of Judge Spano joined by Judges Bianku, Vučinić, Lemmens and Grițco;

(b) Partly dissenting opinion of Judge Ergül.

R.S.
S.H.N.

CONCURRING OPINION OF JUDGE SPANO JOINED BY JUDGES BIANKU, VUČINIĆ, LEMMENS AND GRIȚCO

1. Today the Court delivers important judgments on the merits in cases brought by two prominent journalists detained in Turkey after the attempted *coup d'état* of 15 July 2016. I agree with every word in the Court's forceful reasoning. However, I write separately to comment on the arguments made by the *ad hoc* national judge in his dissenting opinion, which I respectfully disagree with, in particular his views on the principle of subsidiarity (see in particular paragraphs 2, 21, 23 and 24 of his opinion).

2. The principle of subsidiarity encapsulates a norm of power distribution between the Court and the member States, with the ultimate aim of securing to every person who finds himself or herself within the jurisdiction of a State the rights and freedoms provided by the Convention. Importantly, it is not the Strasbourg Court that is entrusted with the day-to-day responsibility of securing Convention rights; it is the member States. In other words, in accordance with Article 1 of the Convention, it is the national authorities which are the primary guarantors of human rights, subject to the supervision of the Court. When the member States fulfil their Convention role by applying in good faith the general principles deriving from the Court's case-law, the principle of subsidiarity implies that the Court may defer to their findings in a particular case. Its aim is thus to incentivise national authorities to fulfil their obligations to secure Convention rights, thus raising the overall level of human rights protection in the European legal space.

3. The Court's powers and jurisdictional competence are entrenched in Articles 19 and 32 of the Convention. It is the Court that is the final arbiter of the scope and content of the Convention. Member States demonstrate with their actions, in particular the reasoning provided by national courts, whether deference is due under the principle of subsidiarity. It follows that the operationalisation of the principle towards a more process-based review of domestic decision-making, within the conceptual framework of the margin of appreciation doctrine, does not in any way limit the Court's competence to ultimately review substantive findings at national level at the stage of the application of Convention principles embedded in the domestic legal systems. In short and to be clear, the robust and coherent application of the principle of subsidiarity by the Court has nothing to do with taking power away from the Court.

4. Moreover, as flows directly from the language of Article 15 of the Convention, these principles apply equally where a State is confronted with a public emergency threatening the life of the nation. Such a situation does not give States carte blanche. In other words, a state of emergency is not an open invitation to member States to erode the foundations of a democratic society based on the rule of law and the protection of human rights. Only

measures which are strictly required by the exigencies of the situation can be justified under the Convention, and it is ultimately for the Court to pass judgment at the European level on whether such justification has been adequately demonstrated on the facts.

5. Finally, the member States are under an international-law obligation, finding its expression in Article 46 of the Convention, to execute judgments rendered by the Court. When a State has decided to secure to everyone within its jurisdiction the rights and freedoms guaranteed by the Convention and at the same time has decided to come within the jurisdiction of the Court, this obligation to execute the Court's judgments becomes mandatory and without exception. It follows that it is now for the competent Turkish authorities to faithfully and expeditiously execute today's judgments under the supervision of the Committee of Ministers in a manner consistent with Turkey's obligations under the Convention.

PARTLY DISSENTING OPINION OF JUDGE ERGÜL

(Translation)

I

1. I fully agree with my colleagues' conclusion that the complaints alleging a violation of Article 5 §§ 3, 4 and 5 and Article 18 of the Convention should be rejected as inadmissible, or as disclosing no violation, or for any of the other reasons given in the judgment. However, I regret that I am unable to join the majority of the Court in finding that Article 5 § 1 and Article 10 of the Convention are both admissible and have been violated. I therefore disagree with the majority's findings of a violation for two reasons, one relating to admissibility and the other to the merits.

2. Regarding admissibility, I would first like to reiterate the well-established principles and settled case-law in this area. Article 35 of the European Convention on Human Rights provides: "The Court may only deal with the matter after all domestic remedies have been exhausted ..." It follows that in the Convention system, the domestic courts are the ordinary courts in relation to Convention law. They are entrusted with primary responsibility for enforcing the rights safeguarded by the Convention. This equates to the principle of subsidiarity, which underpins the Convention system (Frédéric Sudre, *Droit européen et international des droits de l'homme*, 9th edition, PUF, Paris 2008, p. 204). The Court has repeatedly stated that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights" (see *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24; *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-70, 25 March 2014; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). The Convention leaves it first and foremost to the national authorities – and more specifically, the courts with jurisdiction in matters relating to the Convention – to secure the enjoyment of the rights and freedoms it enshrines. The Convention is therefore of a secondary nature in relation to national legislation, and its fundamental rules are in no way intended to replace the rules of domestic law. This rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Vučković and Others*, cited above, §§ 69-70, and *Brusco*, cited above).

3. According to the Court's case-law, in a legal system designed to protect fundamental rights and freedoms, it is incumbent on the aggrieved individual to test the extent of such protection (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006, and *Independent News and*

Media and Independent Newspapers Ireland Limited v. Ireland (dec.), no. 55120/00, 19 June 2003). Furthermore, the applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). Nevertheless, in certain exceptional cases "the Court accepts that the last stage of such remedies may be reached shortly after the lodging of the application but before it determines the issue of admissibility" (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, ECHR 2011 (extracts)). Moreover, according to the Court's case-law, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Vučković and Others*, cited above, § 74). In my view, the last-mentioned principle should apply *mutatis mutandis* to a situation where the applicant has applied to the Court while his case was pending before a domestic court offering an effective remedy.

4. With regard to an individual application to the Constitutional Court, the Court has already held that it "can see no reason to doubt the legislature's intention – as manifested in the explanatory report on the constitutional amendments ... – to ensure identical protection to that provided by the Convention machinery: Law no. 6216 expressly states that the [Turkish Constitutional Court's] jurisdiction *ratione materiae* covers the fundamental rights and freedoms safeguarded by the European Convention on Human Rights and the Protocols thereto, such rights and freedoms also featuring in the Turkish Constitution itself" (see *Uzun v. Turkey* (dec.), no. 10755/13, § 62, 30 April 2013).

5. In the present case, the applicant lodged an individual application with the Constitutional Court on 8 September 2016. He also applied to the European Court on 28 February 2017, under Article 34 of the Convention, while his application was still pending before the Constitutional Court. On 11 January 2018 the Constitutional Court gave a judgment in which it held, by eleven votes to six, that there had been a violation of the right to liberty and security and the right to freedom of expression and of the press. Therefore, the applicant did not await the outcome of his individual application to the Constitutional Court.

II

6. An examination of this case in the light of the above principles reveals, firstly, that the applicant has not satisfied the requirement of exhaustion of domestic remedies. Furthermore, in my opinion, the approach taken in *Karoussiotis v. Portugal* and other cases cited in the judgment cannot be applied to the present case. The case involves a specific legal system for the protection of fundamental rights and freedoms, and individual applications to the Turkish Constitutional Court are regarded as

effective remedies that must be used before an application can be lodged with the Court, as the Court has consistently held (see *Uzun*, cited above, and *Mercan v. Turkey* (dec.), no. 56511/16, 8 November 2016).

7. In addition, the European Court's examination the present case cannot lead to a finding that the Constitutional Court has given judgment and that domestic remedies have therefore been exhausted. Instead, since the Constitutional Court's judgment was in the applicant's favour, he could no longer claim to be a "victim" within the meaning of Article 34 of the Convention in this case. As the Court has consistently held, "where the national authorities have found a violation and their decision constitutes appropriate and sufficient redress, the party concerned can no longer claim to be a victim within the meaning of Article 34 of the Convention" and "[w]hen those two conditions are satisfied, the subsidiary nature of the protective mechanism of the Convention precludes an examination by the Court" (see *Eckle v. Germany*, 15 July 1982, §§ 64-70, Series A no. 51; *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I; *Hay v. the United Kingdom* (dec.), no. 41894/98, ECHR 2000-XI; *Cataldo v. Italy* (dec.), no. 45656/99, ECHR 2004-VI, *Göktepe v. Turkey* (dec.), no. 64731/01, 26 April 2005; and *Yüksel v. Turkey* (dec.), no. 51902/08, § 46, 9 April 2013).

8. Regarding the assize courts' decisions refusing to release the applicant following the Constitutional Court's judgment, he will certainly be entitled to apply to the Court anew once the Constitutional Court has given its judgment on the assize courts' refusal. Indeed, on 30 January 2018 the applicant lodged a fresh individual application with the Constitutional Court, relying on Articles 5, 6 and 18 of the Convention and complaining mainly about his continued pre-trial detention despite the Constitutional Court's judgment of 11 January 2018. The Constitutional Court has decided to treat the applicant's application as a priority.

9. Hence, the reasons given by the majority to justify their position in the present case were unable to persuade me that the settled case-law and well-established principles outlined above should be disregarded. I can therefore see no reason to depart from the above-mentioned case-law and general principles in the present case.

10. According to the Preamble to the Constitution of the Republic of Turkey: "Having regard to the absolute supremacy of the will of the nation, sovereignty is vested fully and unconditionally in the Turkish nation and no individual or body authorised to exercise such sovereignty in the name of the nation may interfere with the liberal democracy enshrined in the Constitution or the legal order instituted in accordance with its requirements". The above principles from the Preamble correspond to the principles of democracy, the rule of law and the protection of human rights referred to in the Preamble to the Statute of the Council of Europe, of which Turkey is one of the founding members. Unfortunately, on 15 July 2016 an

attempted coup in Turkey flouted those principles and sought to suppress fundamental rights and freedoms and to disregard the will of the nation.

III

11. As to the merits, I would like first of all to stress the scale and the severity of the threat to Turkey during the night of 15 July 2016. It involved a bloody attempted military coup by members of a *sui generis* terrorist organisation that had infiltrated all areas of society and the State apparatus. There has never been such a serious threat to the life of the nation, democracy and fundamental rights in any of the States Parties to the European Convention on Human Rights.

12. During the night of 15 to 16 July 2016 a faction of the Turkish armed forces linked to a terrorist organisation known as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure") attempted to carry out a military coup aimed at overthrowing the democratically elected government and President of Turkey and ending democracy. The organisation had already been declared a terrorist organisation in a court judgment and in an advisory decision by the National Security Council. The coup instigators issued a statement on behalf of the "Peace at Home Council", announcing that martial law and a curfew had been declared throughout national territory. They also stated that the Turkish Grand National Assembly had been overthrown, that all political parties' activities had been terminated and that all the police had been placed under the control of the martial-law commanders.

13. Using helicopters and fighter planes, the coup instigators attacked and bombarded a large number of locations, including the Turkish Grand National Assembly building, the presidential compound, the Security Directorate headquarters, the Special Operations Command of the national police and the National Intelligence Organisation headquarters in the capital city, Ankara. They also attacked the hotel where the President was staying. Several senior military officers, including the Chief of General Staff and the commanders of the armed forces, were held hostage. In addition, the bridges over the Bosphorus linking Europe and Asia were sealed off, as were Istanbul's airports, by tanks and armoured vehicles. Many public institutions in locations across the country were occupied, or attempts were made to occupy them. During the coup attempt, various institutions and organisations, such as the Türksat satellite communications and cable television operations company, were attacked with the aim of interrupting television broadcasts and Internet access throughout the country. The premises of certain private television broadcasters were occupied and attempt were made to interrupt their broadcasts.

14. The coup attempt was rejected by representatives of all constitutional authorities, first and foremost the President and also the Prime Minister and the Constitutional Court. At the President's urging, the people

gathered in the streets and public squares to act against the coup leaders. The security forces, acting under the orders and instructions of the legitimate authorities, took steps to counter the attempted coup. All political parties represented in the Turkish Grand National Assembly, together with civil-society organisations, condemned the despicable coup attempt and declared that they would not accept any undemocratic government. The civilians who gathered in public squares and the streets resisted the coup participants alongside the security forces, despite the attacks from fighter planes, helicopters, tanks, other armoured vehicles and weapons deployed by the coup leaders. As the judgment points out, hundreds of civilians lost their lives in these attacks and thousands of people were injured, most of them civilians.

15. The prosecuting authorities acted promptly in initiating investigations in respect of those taking part in the attempted coup; this is worth highlighting, since the coup had not yet been foiled. As a result, the attempted coup was entirely averted on 16 July thanks to the efforts of the legitimate constitutional institutions and national solidarity. Moreover, millions of citizens organised overnight democracy vigils in city squares for about a month in protest against the attempted coup.

IV

16. It should be borne in mind that the Statute of the Council of Europe affirms, in its Preamble, the member States' conviction "that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human society and civilisation". Ibn Khaldun (1332-1406), a great thinker, legal scholar, historical philosopher and sociologist and the founder of the science of civilisation (*umran*), explains in his masterpiece *Muqaddimah* that "one cannot imagine a [State] without civilisation, while a civilisation without [a State or] authority is impossible" (Ibn Khaldun, *Muqaddimah: an Introduction to History*, IV, 19, translated by Franz Rosenthal, Princeton University Classics, 1967) and that human rights violations (or injustices) ruin civilisation, and the ruin of civilisation leads to the complete destruction of the State (ibid., III, 41). Despite the difference in eras, some striking similarities can be noted between the two perspectives. These words and principles assume full significance during a state of emergency following an attempted military coup. In order to assess the severity of the threat posed by an attempted military coup, consideration should also be given to the risks that might have arisen had the coup attempt not been foiled. Practice has shown that the most serious violations of fundamental rights tend to occur during such periods. Moreover, the alarming conditions in a number of States dominated by regimes installed as a result of a military coup and the tragic situation in such societies, at the present time and throughout the world, corroborate the aforementioned great thinker's observations and the Council of Europe's founding principles. By

preventing this serious public emergency threatening the life of the nation, the Turkish people have demonstrated how a people can preserve democracy, the rule of law and civilisation and take control of its own destiny.

17. Consideration should be given to the fact that Turkey gave notice of a derogation from the Convention under Article 15 on 21 July 2016 following the declaration of the state of emergency. I share the majority's opinion that the first formal requirement is easily satisfied, and also that, in view of the wide margin of appreciation left to the national authorities in this sphere, the attempted military coup undoubtedly gave rise to a "public emergency threatening the life of the nation" within the meaning of Article 15 of the Convention. Furthermore, the applicant's complaints do not concern rights from which no derogation is permitted. As regards the proportionality of the measures taken in the context of the derogation, I differ from the majority, since in my view this point warrants a careful examination in the light of the threat to the life of the nation and to the rule of law, democracy, the constitutional order and human rights in Turkey.

18. In a judgment delivered before the attempted coup, the Turkish courts found that FETÖ/PDY was an armed terrorist organisation (Erzincan Assize Court, judgment of 16 June 2016,). Furthermore, judgments delivered after 15 July 2016 have established a link between this terrorist organisation and the attempted coup. The conclusions reached on this point by the Criminal Division of the Plenary Court of Cassation are fairly instructive: "From the first years of the organisation's existence ... it appears from statements by individuals who were formerly active in the organisation that their goal was to take control of all constitutional institutions (legislature, executive, judiciary) of the Republic of Turkey, and at the same time to become a major political/economic power with an international impact by taking advantage of pupils who were trained in accordance with their principles and aims in educational establishments set up abroad and in Turkey through funds collected by way of 'favour' (*himmet*), and by making use of the economic and political power thus acquired to promote the organisation's interests and their ideology." The Criminal Division went on to observe: "It is understood that FETÖ/PDY uses public powers that should be under State control to further its own organisational interests. After going through various stages, members of the organisation embarking on a career – while remaining FETÖ/PDY soldiers and maintaining very strong links to that organisation – within the Turkish armed forces, the police and the National Intelligence Organisation are required to undergo ideological training so that they are ready to exploit their own authorisation to use weapons and force in following the orders of this illegal organisational hierarchy. A person in this position is [described] as a servant by the head of the organisation: 'persons linked to the service must be determined, persistent, obedient, responsible for everything, must not falter when

attacked, must prioritise their rank within the service over their own rank when they have attained a high rank, must be aware that the duties to be accomplished can be difficult in the service, and must be ready to sacrifice their entire existence, life and love for the service [that is, the terrorist organisation] ...” According to the judicial authorities’ findings, the following three principles have been established as FETÖ’s working principles: confidentiality, intra-organisational solidarity and strict hierarchical relations. FETÖ’s complex organisation is based on the principle of confidentiality, which it has faithfully observed since its creation, from the lowest cell to the highest branches.

19. On 20 July 2016 a state of emergency was declared for a period of three months as from 21 July 2016 to safeguard democracy, human rights and the rule of law, to remove elements that had infiltrated the State authorities and to eliminate any potential threats in future. The state of emergency has subsequently been extended several times by the Council of Ministers, chaired by the President, most recently with effect from 19 January 2018. On each occasion a notice of derogation from the Convention under Article 15 has been transmitted to the Secretary General of the Council of Europe.

20. In practice, the investigations and judicial proceedings and court judgments have shown that FETÖ/PDY is a complex, *sui generis* terrorist organisation carrying out its activities under a cloak of legality. In this context, the FETÖ/PDY media wing has played a significant role in legitimising the actions that gave rise to this organisation’s despicable attempted military coup by manipulating public opinion. The applicant was placed in pre-trial detention in the context of an investigation into the organisation’s media wing.

V

21. The attempted military coup and its aftermath, together with other terrorist acts, have posed severe dangers to the democratic constitutional order, human rights and public security and order, amounting to a threat to the life of the nation within the meaning of Article 15 of the Convention. The applicant’s complaints should therefore be assessed with due regard to the notice of derogation issued on 21 July 2016 (and subsequently reiterated) under Article 15 of the Convention. The Court has found that the attempted military coup created a “public emergency threatening the life of the nation” within the meaning of the Convention. However, it reached a different conclusion concerning the proportionality of the measures, without giving detailed reasons. In the assessment of proportionality, two dimensions must be taken into account. Firstly, it must be borne in mind that the applicant’s complaints relate only to rights from which a derogation is permitted. That being so, the State should have had a greater margin of

appreciation and the Court should have had regard to the risks and the difficulties with which the State was confronted.

22. Next, the Court's assessment should not give rise to a legal hierarchy between rights from which a derogation is permitted. As was emphasised in the Vienna Declaration and Programme of Action, adopted by consensus at the World Conference on Human Rights by the representatives of 171 States on 25 June 1993, a legal hierarchy between human rights should not in principle be accepted: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." However, Article 15 of the Convention does provide for a kind of hierarchy between right by classifying rights as derogable and non-derogable. Despite the clarity of the text of Article 15, a conclusion that creates a legal hierarchy between rights from which a derogation is permitted will run counter to the concern for practicality expressed by the drafters of the Convention. The derogation mechanism seeks to promote the balance which States must ensure between respect for human rights and preservation of the life of their nation.

23. In addition, it should be determined whether there is a sufficient basis to conclude that the measure of pre-trial detention linked to a right that remains within the scope of the derogation is strictly required by the exigencies of the situation of a public emergency threatening the life of the nation. In that regard, several factors are known to the Court, such as the severity of the threat to the life of the nation, the fact that the complaint concerns a judicial measure against which an objection may be lodged, the extreme complexity of the case concerning the media wing of the terrorist organisation behind the severe threat, the significant role of the FETÖ/PDY media wing in concealing the organisation's illegal activities and in legitimising the actions that gave rise to the despicable attempted military coup, the declaration of a state of emergency on account of the coup attempt and its extension since 21 July 2016, on each occasion with the approval of the Turkish Grand National Assembly. On account of those factors, and as the case is strictly linked to the incidents that gave rise to the state of emergency and the derogation, it has to be concluded that the measures taken were strictly required by the exigencies of the situation. For that reason, the derogation relating to an exceptionally severe threat should have prevailed in the assessment of the merits of the case.

24. In conclusion, I consider that in the circumstances of the case, even though it concerned Articles 5 and 10 of the Convention, the subsidiarity principle should have prevailed in the context of admissibility. In addition, the derogation relating to an exceptionally severe threat should have prevailed in the assessment of the merits of the case. Having regard to all the foregoing considerations, and contrary to the majority, I conclude that there has been no violation of the provisions of the Convention.