



Judgment concerning the application by the journalist Mehmet Hasan Altan, who was arrested and detained following the attempted military coup

Following deliberations held on 20 February 2018 on the admissibility and merits of the case of [Mehmet Hasan Altan v. Turkey](#) (application no. 13237/17), the European Court of Human Rights held in today's Chamber judgment¹:

- by a majority (six votes to one), that there had been a **violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights;
- by a majority (six votes to one), that there had been a **violation of Article 10 (freedom of expression)**; and
- unanimously, that there had been **no violation of Article 5 § 4 (right to a speedy review of the lawfulness of detention)** on account of the alleged lack of a speedy judicial review by the Constitutional Court.

Under Article 5 § 1, the Court found in particular that Mr Altan's continued pre-trial detention, after the Constitutional Court's clear and unambiguous judgment of 11 January 2018 finding a violation of Article 19 § 3 of the Constitution, could not be regarded as "lawful" and "in accordance with a procedure prescribed by law" as required by the right to liberty and security. In that connection the Court observed, in particular, that the reasons given by the Istanbul 26th Assize Court in rejecting the application for Mr Altan's release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, could not be regarded as satisfying the requirements of Article 5 § 1 of the Convention. The Court held that for another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness.

The Court emphasised that Mr Altan's continued pre-trial detention, after the Constitutional Court's judgment, raised 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 stood, the Court did not intend to depart from its previous finding (*Koçintar*, § 44²) that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty. Nevertheless, it reserved the right to examine the effectiveness of the system of individual applications to the Constitutional Court in cases brought 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.

Under Article 10, the Court held in particular that there was no reason to reach a different conclusion from that of the Constitutional Court, which had found that Mr Altan's initial and continued pre-trial detention, following his expression of his opinions, constituted a severe measure

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

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution.

Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

2 *Koçintar v. Turkey* ((dec.), no. 77429/12, 1 July 2014).

that could not be regarded as a necessary and proportionate interference in a democratic society. In that regard, the Court pointed out in particular 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.

Regarding the complaint under Article 5 § 4 concerning the length of proceedings in the Constitutional Court (14 months and three days), the Court found that the situation in the present case was exceptional, especially on account of the complexity of the case and the Constitutional Court's current caseload.

Lastly, the Court unanimously rejected the complaint concerning the lawfulness of the applicant's detention in police custody (Article 5 § 3) for failure to exhaust domestic remedies, and also the complaints concerning his lack of access to the investigation file (Article 5 § 4) and the right to compensation for unlawful detention (Article 5 § 5) as being manifestly ill-founded.

Principal facts

The applicant, Mehmet Hasan Altan, is a Turkish national who was born in 1953. He is currently in detention in Istanbul (Turkey).

Mr Altan is an economics professor and a journalist. Prior to the attempted military coup of 15 July 2016, he presented a political discussion programme on Can Erzincan TV, a television channel that was closed down following the adoption of Legislative Decree no. 668, issued on 27 July 2016.

In the course of a criminal investigation relating to suspected members of FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure"), Mr Altan was arrested on 10 September 2016 and taken into police custody on suspicion of having links to the organisation's media wing. On 22 September 2016 he appeared before the Istanbul 10th Magistrate's Court and was placed in pre-trial detention. On various dates Mr Altan applied without success to be released pending trial. On 8 November 2016 Mr Altan lodged an individual application with the Constitutional Court.

On 14 April 2017 the Istanbul public prosecutor filed an indictment with the Istanbul Assize Court in respect of several individuals including Mr Altan, in particular accusing them, under Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the Criminal Code, 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.

On 11 January 2018 the Constitutional Court gave judgment, holding that there had been a violation of the right to liberty and security and the right to freedom of expression and of the press. Despite the Constitutional Court's judgment, the Istanbul Assize Court rejected Mr Altan's subsequent application for release.

On 16 February 2018 the Istanbul 26th Assize Court sentenced Mr Altan to aggravated life imprisonment for attempting to overthrow the constitutional order.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), Mr Altan complained that his initial pre-trial detention and its continuation were arbitrary and that there was no evidence grounding a suspicion that he had committed a criminal offence. He also complained that insufficient reasons had been given for the judicial decisions ordering and extending his detention.

Relying on Article 5 § 4 (right to a speedy review of the lawfulness of detention), Mr Altan submitted that the proceedings in the Constitutional Court had failed to observe the requirement of “speediness”.

Under Articles 10 (freedom of expression) and 17 (prohibition of abuse of rights), Mr Altan complained of a breach of his right to freedom of expression on account of his initial and continued pre-trial detention. The Court decided to examine this part of the application under Article 10 alone.

Mr Altan also relied on Article 5 §§ 3 (lawfulness of detention in police custody), 4 (lack of access to the investigation file) and 5 (right to compensation for unlawful detention), and Article 18 (limitation on use of restriction of rights) in conjunction with Articles 5 and 10 of the Convention.

The application was lodged with the European Court of Human Rights on 12 January 2017.

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

Robert Spano (Iceland), *President*,
Paul Lemmens (Belgium),
Ledi Bianku (Albania),
Nebojša Vučinić (Montenegro),
Valeriu Grițco (the Republic of Moldova),
Jon Fridrik Kjølbro (Denmark), and
Ergin Ergül (Turkey), *ad hoc judge*,

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

[Article 5 § 1 \(right to liberty and security\)](#)

The Court found that there had been a **violation of Article 5 § 1** for the following reasons.

1. The Constitutional Court’s judgment³

Mr Altan had lodged an individual application with the Constitutional Court, which had held that the investigating authorities had been unable to demonstrate any factual basis that might indicate that he had been acting in accordance with the aims of FETÖ/PDY or with the purpose of preparing the ground for a possible military coup. On the basis of the evidence presented by the prosecution, the Constitutional Court had held that there were no strong indications that Mr Altan had committed the offences with which he was charged.⁴ 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), the Constitutional Court had 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, Mr Altan’s deprivation of liberty was therefore disproportionate to the strict exigencies of the situation.

Accordingly, the Court observed that it had been established by the Constitutional Court that Mr Altan had been placed and kept in pre-trial detention in breach of Article 19 § 3 of the Constitution.⁵ In the Court’s view, that conclusion amounted in substance to an acknowledgment that Mr Altan’s deprivation of liberty had contravened Article 5 § 1 of the Convention, and the Court endorsed the Constitutional Court’s findings.

³ Delivered on 11 January 2018 and published in the Official Gazette on 19 January 2018.

⁴ See §§ 142-48 of the Constitutional Court’s judgment.

⁵ See § 150 of the Constitutional Court’s judgment.

2. Applications for release following the Constitutional Court's judgment

Following the Constitutional Court's judgment, the Istanbul 26th and 27th Assize Courts had refused to release Mr Altan, holding that the Constitutional Court had not had jurisdiction to assess the evidence in the case file and that its judgment had therefore not been in compliance with the law, and also that ordering Mr Altan's immediate release on the basis of that judgment would run counter to the general principles of law, the independence of the judiciary, the principle that no authority could give instructions to the courts, and the right to a court.

The Court could not accept the 26th 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 Mr Altan's complaint concerning the lawfulness of his initial and continued pre-trial detention without considering the substance of the evidence produced against him. The Court also pointed out that prior to the Constitutional Court's judgment, the Government had explicitly urged the Court to reject Mr Altan's application for failure to exhaust domestic remedies, on the grounds that his individual application to the Constitutional Court was still pending.⁶ That argument had backed up 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 was, moreover, consistent with the Court's findings in the case of *Koçintar v. Turkey*.⁷ To put it briefly, the Court found that this argument by the Government could only be interpreted as meaning that under Turkish law, if the Constitutional Court had ruled that an applicant's pre-trial detention was 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 were put forward. However, in the event, the 26th Assize Court had rejected the application for Mr Altan'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. The Court moreover observed that the reasons given by the Istanbul 26th Assize Court in rejecting the application for the applicant's release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, could not 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 ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness. Thus, although the Constitutional Court had transmitted its judgment to the Assize Court so that it could take the necessary action, the Assize Court had resisted the Constitutional Court by refusing to release Mr Altan, with the result that the violation found by the Constitutional Court had not been redressed. The Court also observed that the case file disclosed no new grounds or evidence showing that the basis for the detention had changed following the Constitutional Court's judgment. It noted in particular that the Government had not demonstrated that the evidence purportedly available to the 26th Istanbul Assize Court justifying the strong suspicion against the applicant had in fact been any different from the evidence examined by the Constitutional Court.

Accordingly, the Court found that Mr Altan'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, could not be regarded as "lawful" and "in accordance with a procedure prescribed by law" as required by the right to liberty and security.

3. The derogation by Turkey

⁶ See § 105 of the Court's judgment (*Mehmet Hasan Altan v. Turkey*) for further details.

⁷ *Koçintar v. Turkey* ((dec.), no. 77429/12, 1 July 2014).

The Court accepted 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. It reiterated that under Article 15 of the Convention, any High Contracting Party had 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 were strictly proportionate to the exigencies of the situation and that they did not conflict with other obligations under international law. It observed that the Constitutional Court, having examined from a constitutional perspective the facts leading to the declaration of a state of emergency, had concluded that the attempted military coup had posed a severe threat to the life and existence of the nation. In the light of the Constitutional Court's findings and all the other material available to it, the Court likewise considered that the attempted military coup had disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention.

As to whether the measures taken in the present case had been strictly required by the exigencies of the situation, the Court considered, having regard to Article 15 of the Convention and the derogation by Turkey, that, as the Constitutional Court had found, a measure entailing pre-trial detention that was not "lawful" and had not been effected "in accordance with a procedure prescribed by law" on account of the lack of reasonable suspicion could not be said to have been strictly required by the situation.

4. Effectiveness of the remedy of an individual application

The Court emphasised that Mr Altan's continued pre-trial detention, even after the Constitutional Court's judgment, as a result of the decisions delivered by the Istanbul 26th Assize Court, raised 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 stood, the Court did not intend to depart from its previous finding that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty under Article 19 of the Constitution (*Koçintar*, § 44). Nevertheless, it reserved 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 would be for the Government to prove that that remedy was effective, both in theory and in practice.

5. Mr Altan's complaint that insufficient reasons were given for the judicial decisions ordering and extending his pre-trial detention

The Court held unanimously that there was no need for a separate examination of this complaint, in view of its finding under Article 5 § 1 of the Convention.

Article 5 § 4 (lack of a speedy judicial review by the Constitutional Court)

The proceedings concerning Mr Altan's individual application to the Constitutional Court had lasted 14 months and three days. The Court considered that in normal circumstances, such a period could not be regarded as "speedy".⁸ However, it observed that Mr Altan's application to the Constitutional Court had been 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 noted

⁸ See, among other authorities, *G.B. v. Switzerland*, no. 27426/95, §§ 28-39, 30 November 2000, and *Khudobin v. Russia*, no. 59696/00, §§ 115-24, ECHR 2006-XII (extracts).

that this was an exceptional situation. Accordingly, although the duration of 14 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 **the Court found that there had been no violation of Article 5 § 4 of the Convention.**

The Court pointed out, however, that that conclusion did not mean that the Constitutional Court had 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 retained its ultimate supervisory jurisdiction for complaints submitted by other applicants alleging that, after lodging an individual application with the Constitutional Court, they had not had a speedy judicial decision concerning the lawfulness of their detention.

Article 10 (freedom of expression)

The Court found, in the light of the Constitutional Court’s judgment of 11 January 2018, that Mr Altan’s pre-trial detention had constituted an “interference” with his right to freedom of expression; that it had been prescribed by the relevant provisions of the Criminal Code and the Code of Criminal Procedure (“the CCP”); and that it had pursued the legitimate aims of preventing disorder and crime.

The Court could see no reason to reach a different conclusion from the Constitutional Court, which had found that Mr Altan’s initial and continued pre-trial detention, following his expression of his opinions, had 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 Mr Altan of his liberty had met a pressing social need, the Constitutional Court had held that in so far as his detention had not been based on any concrete evidence other than his articles and comments, it could have had a chilling effect on freedom of expression and of the press. The Court also referred to its own conclusions under Article 5 § 1 of the Convention.

While taking 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 Court observed that one of the principal characteristics of democracy was the possibility it offered of resolving problems through public debate. It had emphasised on many occasions that democracy thrived on freedom of expression. In that 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 was at the very core of the concept of a democratic society. In the Court’s view, even in a state of emergency – which, as the Constitutional Court had noted, was a legal regime whose aim was to restore the normal regime by guaranteeing fundamental rights – the Contracting States should bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness. Moreover, 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. Even where such serious charges had been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures had proved incapable of fully guaranteeing the proper conduct of proceedings. Should that not be the case, the national courts’ interpretation could not be regarded as acceptable. Lastly, the pre-trial detention of anyone expressing critical views produced 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, would inevitably have a chilling effect on freedom of expression by intimidating civil

society and silencing dissenting voices,⁹ and a chilling effect of that kind could be produced even when the detainee was subsequently acquitted.

With regard to the derogation by Turkey, 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 found that its conclusions were also valid in the context of its examination under Article 10.

The Court therefore held that there had been a violation of Article 10 of the Convention.

Article 18 (limitation on use of restriction of rights)

The Court held unanimously that there was no need for a separate examination of the complaint under Article 18 of the Convention (limitation on use of restriction of rights).

Complaints declared inadmissible

Article 5 § 3 (lawfulness of detention in police custody)

Regarding complaints about the lawfulness and duration of detention in police custody, the Turkish legal system provided two remedies: an objection with a view to securing release from custody (Article 91 § 5 of the CCP) and a compensation claim against the State (Article 141 § 1 (a) of the CCP). Mr Altan had lodged an objection seeking his release from police custody and had therefore availed himself of the remedy provided for in Article 91 § 5 of the CCP. However, he had not brought a compensation claim under Article 141 § 1 (a) of the CCP. In that connection the Court noted that where there were doubts as to a domestic remedy's effectiveness and prospects of success – as Mr Altan had maintained – the remedy in question had to be attempted. The Court therefore rejected the complaint concerning his detention in police custody for failure to exhaust domestic remedies (Article 35 §§ 1 and 4 of the Convention). It pointed out, however, that that conclusion in no way prejudiced any subsequent review of the question of the effectiveness of the remedy concerned, and in particular of the domestic courts' ability to develop a uniform, Convention-compliant approach to the application of Article 141 § 1 (a) of the CCP.

Article 5 § 4 (lack of access to the investigation file)

On an unspecified date, the Istanbul public prosecutor had decided, on the basis of Article 3 § 1 (I) of Legislative Decree no. 668, to restrict the suspects' and their lawyers' access to the investigation file. However, first the police, then the public prosecutor and finally the magistrate had put detailed questions about the evidence to Mr Altan, who had been assisted by counsel, and the contents of the questions had been reproduced in the records of the questioning. Although he had not had an unlimited right of access to the evidence, Mr Altan had had sufficient knowledge of the substance of the evidence forming the basis for his pre-trial detention and had thus had the opportunity to properly contest the reasons given to justify the detention. This complaint was therefore manifestly ill-founded (Article 35 §§ 3 (a) and 4 of the Convention).

Article 5 § 5 (right to compensation for unlawful detention)

Mr Altan had been awarded compensation (amounting to approximately 4,500 euros (EUR)) by the Constitutional Court for the violations it had found. The Court held that although this amount was lower than what it would itself have awarded, it could not be regarded as wholly disproportionate either. This complaint was therefore manifestly ill-founded (Article 35 §§ 3 (a) and 4 of the Convention).

Just satisfaction (Article 41)

The Court held that Turkey was to pay Mr Altan EUR 21,500 in respect of non-pecuniary damage.

⁹ See paragraph 235 of the Constitutional Court's judgment.

Separate opinion

Judge Spano, joined by Judges Bianku, Vučinić, Lemmens and Gričco, expressed a concurring opinion. Judge Ergül expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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