



Judgment concerning the application by the journalist Şahin Alpay, 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 **Şahin Alpay v. Turkey** (application no. 16538/17), the European Court of Human Rights held in today's **Chamber judgment**¹:

- 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)**.

Under Article 5 § 1, the Court found in particular that Mr Alpay'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 13th Assize Court in rejecting the application for Mr Alpay'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 the fact that Mr Alpay had been kept in pre-trial detention, even **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*², § 44) 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 46 (binding force and execution of judgments) of the Convention, the Court held that it was incumbent on the respondent State to ensure the termination of Mr Alpay's pre-trial detention at the earliest possible date.

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.

Under Article 10, the Court held that there was no reason to reach a different conclusion from that of the Constitutional Court, which had found that Mr Alpay'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. In that regard, the Court pointed out 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 (16 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 under Article 5 § 5 (right to compensation for unlawful detention), finding that Mr Alpay had had a remedy by which he could have obtained compensation in respect of his complaint under Article 5 § 1 of the Convention, since the Constitutional Court had jurisdiction to order redress in the form of an award of compensation.

Principal facts

The applicant, Şahin Alpay, is a Turkish national who was born in 1944. He is currently in detention in Istanbul (Turkey).

Mr Alpay 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. He also lectured on comparative politics and Turkish political history at a private university in Istanbul.

On 27 July 2016 Mr Alpay was arrested at his home and taken into police custody on suspicion of being a member of the terrorist organisation FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure"). On 30 July 2016 he was brought before the Istanbul 4th Magistrate's Court and placed in pre-trial detention on the grounds that articles by him had promoted the terrorist organisation in question. Applications for Mr Alpay's release were rejected. On 8 September 2016 Mr Alpay lodged an individual application with the Constitutional Court.

On 10 April 2017 the Istanbul public prosecutor filed an indictment with the Istanbul Assize Court in respect of several individuals suspected of being part of the FETÖ/PDY media wing, including Mr Alpay, 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 Alpay's subsequent application for release.

Criminal proceedings against Mr Alpay are currently pending before the Istanbul 13th Assize Court.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 3 (right to liberty and security), Mr Alpay complained that his initial pre-trial detention and its continuation were arbitrary and that there had been no evidence grounding a suspicion that he had committed a criminal offence. He also objected that he had been kept in pre-

trial detention despite the Constitutional Court's finding of a violation (in its judgment of 11 January 2018). In addition, he complained about the length of his pre-trial detention and contended that insufficient reasons had been given for the judicial decisions ordering and extending it.

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

Under Article 5 § 5 (right to compensation for unlawful detention), Mr Alpay 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.

Relying on Article 10 (freedom of expression), Mr Alpay complained of a breach of his right to freedom of expression.

Under Article 18 (limitation on use of restriction of rights), Mr Alpay alleged that he had been detained for expressing critical opinions about the government authorities.

The application was lodged with the European Court of Human Rights on 28 February 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

In its judgment of 11 January 2018 the Constitutional Court had established that Mr Alpay had been placed and kept in pre-trial detention in breach of Article 19 § 3 of the Constitution,⁴ holding 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. On the basis of the evidence presented by the prosecution, the Constitutional Court had held that there were no strong indications that Mr Alpay had committed the offences with which he was charged. In the Constitutional Court's view, Mr Alpay's deprivation of liberty was therefore disproportionate to the strict exigencies of the situation.

Finding that the Constitutional Court's conclusion amounted in substance to an acknowledgment that Mr Alpay's deprivation of liberty had contravened Article 5 § 1 of the Convention, the Court endorsed the Constitutional Court's findings.

³ Constitutional Court judgment of 11 January 2018, published in the Official Gazette on 19 January 2018.

⁴ See § 103 of the Constitutional Court's judgment.

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

Although the Constitutional Court had found a violation of Article 19 § 3 of the Constitution, the Istanbul 13th and 14th Assize Courts had refused to release Mr Alpay. In particular, the 13th Assize Court had held that the Constitutional Court had not had jurisdiction to assess the evidence in the case file, and that its judgment had not been in compliance with the law and had amounted to usurpation of power.

The Court could not 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 Mr Alpay's complaint concerning the lawfulness of his initial and continued pre-trial detention without considering the substance of the evidence produced against him.

Furthermore, prior to the Constitutional Court's judgment, the Government had explicitly urged the Court to reject Mr Alpay's application for failure to exhaust domestic remedies, on the grounds that his individual application to the Constitutional Court was still pending. 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*.⁵ The Court accordingly found that this argument by the Government could only be interpreted as meaning that under Turkish law, if the Constitutional Court 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 13th Assize Court had rejected the application for Mr Alpay'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 observed, moreover, that the reasons given by the Istanbul 13th Assize Court in rejecting the application for Mr Alpay'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 Alpay, with the result that the violation found by the Constitutional Court had not been redressed. The Court observed, moreover, 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. In that connection it noted in particular that the Government had not demonstrated that the evidence purportedly available to the 13th Istanbul Assize Court justifying the strong suspicion against Mr Alpay had in fact been any different from the evidence examined by the Constitutional Court.

Accordingly, the Court found that Mr Alpay'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.

⁵ *Koçintar v. Turkey* (dec.), no. 77429/12, 1 July 2014.

3. The derogation by Turkey

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 Alpay'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, 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 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. In that regard, it would be for the Government to prove that this remedy was effective, both in theory and in practice.

Article 5 § 3 (Mr Alpay's complaint that insufficient reasons were given for the judicial decisions ordering and extending his pre-trial detention)

In view of its finding under Article 5 § 1 of the Convention, the Court held that it was unnecessary to examine this complaint.

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

The Court considered that although the duration of 16 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 had been no violation of Article 5 § 4 of the Convention**. Firstly, the Court observed that the case had been a complex one, being one of the first to raise 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. Secondly, bearing in mind the Constitutional Court's caseload following the declaration of a state of emergency, the Court found

that this was an exceptional situation. It pointed out, however, that that conclusion did not mean that the Constitutional Court had carte blanche when dealing with similar complaints. 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 5 § 5 (right to compensation for unlawful detention)

Mr Alpay complained that he had not had an effective remedy by which he could have obtained compensation for the damage sustained on account of his pre-trial detention.

The Court unanimously declared this complaint inadmissible, finding that it was manifestly ill-founded in so far as it concerned Article 5 § 1 of the Convention, and incompatible *ratione materiae* with the provisions of the Convention in so far as it concerned Article 5 § 4.

The Court considered that Mr Alpay had had a remedy by which he could have obtained compensation in respect of his complaint under Article 5 § 1 of the Convention, since the Constitutional Court had jurisdiction to order redress in the form of an award of compensation. Indeed, the Constitutional Court had given a judgment on the same day as the one in Mr Alpay's case, in which it had awarded compensation for the violation it had found in respect of another journalist held in pre-trial detention (application no. 2016/23672).

Article 10 (freedom of expression)

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

Next, the Court could see no reason to reach a different conclusion from the Constitutional Court, which had found that Mr Alpay'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 Alpay 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, 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, 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)

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

Article 46 (binding force and execution of judgments)

The Court found that any continuation of Mr Alpay's pre-trial detention would 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. 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 held that it was incumbent on the respondent State to ensure the termination of Mr Alpay's pre-trial detention at the earliest possible date.

Just satisfaction (Article 41)

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

Separate opinions

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