



The pre-trial detention of Mr Baş, a judge, following the attempted coup of 15 July 2016 breached the Convention

In today's **Chamber** judgment¹ in the case of [Baş v. Turkey](#) (application no. 66448/17) the European Court of Human Rights held:

by 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 as regards the alleged unlawfulness of the applicant's initial pre-trial detention;

unanimously, that there had been a **violation of Article 5 § 1** of the Convention on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence, and

unanimously, that there had been a **violation of Article 5 § 4** (right to speedy review of the lawfulness of detention) on account of the length of the period during which the applicant had not appeared in person before a judge.

The case concerned the pre-trial detention of Mr Baş, a judge at the time, following the attempted coup of 15 July 2016.

The Court found that according to the case-law of the Court of Cassation, a suspicion of membership of a criminal organisation could be sufficient to characterise the element of *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act. Accordingly, the Court concluded that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law, namely section 94 of Law no. 2802, were not only problematic in terms of legal certainty, but also appeared manifestly unreasonable.

The Court found that the mere reference by the Kocaeli magistrate's court to the decision taken by the Council of Judges and Prosecutors on 16 July 2016 to suspend 2,735 judges and prosecutors was insufficient to support the conclusion that there had been a reasonable suspicion justifying the pre-trial detention of this particular judge. The evidence before the Court did not warrant the conclusion that there had been a reasonable suspicion against the applicant at the time of his initial detention.

Thus, while accepting the Constitutional Court's conclusion in a separate case that the measures implemented in the aftermath of the coup attempt could be said to have been strictly required for the protection of public safety, the Court observed that in the present case Mr Baş had not appeared before a court for approximately one year and two months, a much longer period than the one previously assessed by the Constitutional Court.

Principal facts

The applicant, Hakan Baş, is a Turkish national who was born in 1978 and lives in Kocaeli (Turkey).

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.

During the night of 15 to 16 July 2016 a group of members of the Turkish armed forces attempted to carry out a military coup aimed at overthrowing the National Assembly, the government and the President of Turkey. The day after the attempted military coup, the authorities blamed the network linked to Fetullah Gülen, a Turkish citizen living in the United States and considered to be the leader of an organisation referred to as “FETÖ/PDY” (“Gülenist Terror Organisation/Parallel State Structure”).

On 20 July 2016 the government declared a state of emergency for a period of three months, which was subsequently extended. 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.

During the state of emergency, the Council of Ministers passed several legislative decrees. Article 3 of Legislative Decree no. 667 provided that the Council of Judges and Prosecutors (“the HSK”) was authorised to dismiss any judges or prosecutors who were considered to belong or be affiliated or linked to terrorist organisations or organisations, structures or groups found by the National Security Council to have engaged in activities harmful to national security. The state of emergency was lifted on 18 July 2018.

On 16 July 2016 the HSK suspended 2,735 judges and prosecutors – including the applicant – from their duties for a period of three months, pursuant to sections 77(1) and 81(1) of Law no. 2802 on judges and prosecutors, on the grounds that there was a strong suspicion that they were members of the terrorist organisation that had instigated the attempted coup and that keeping them in their posts would hinder the progress of the investigation and undermine the authority and reputation of the judiciary.

Also on 16 July 2016, the Kocaeli public prosecutor initiated a criminal investigation in respect of the judges serving in Kocaeli suspected of being members of FETÖ/PDY, including the applicant. On 18 July 2016 the applicant was placed under police supervision. On 19 July 2016 he gave evidence to the Kocaeli public prosecutor, who informed him that he had been suspended from his duties as a result of the HSK’s decision of 16 July 2016, on the grounds of his suspected membership of FETÖ/PDY. The applicant denied being a member of or having any links with that organisation. Later that day, he was brought before the Kocaeli 1st Magistrate’s Court. On 20 July 2016 the magistrate decided to place him in pre-trial detention on suspicion of membership of a terrorist organisation. An objection by the applicant against the order for his detention was dismissed.

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

On 27 December 2017 the Constitutional Court declared an individual application by the applicant inadmissible, finding that his complaints were manifestly ill-founded.

On 19 March 2018 the 29th Assize Court found Mr Baş guilty of the offence of membership of an armed terrorist organisation, sentenced him to seven years and six months’ imprisonment and, taking into account the period already spent in detention, ordered his release. Mr Baş’s conviction was upheld on appeal. The case is currently pending before the Court of Cassation.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1, 3 and 4 (right to liberty and security/right to be brought promptly before a judge/right to speedy review of the lawfulness of detention), the applicant complained about being placed in pre-trial detention. He disputed that there had been a case of *in flagrante delicto*. He argued that there had been no specific evidence giving rise to a reasonable suspicion that he had committed the alleged offence and thus necessitating his pre-trial detention. He submitted that the domestic courts had given insufficient reasons for the decisions on his detention. The applicant also

complained that no hearing had been held during the reviews of his detention, that he had not been provided with a copy of the public prosecutor's opinion and that access to the investigation file had been restricted. Lastly, he alleged a lack of independence and impartiality on the part of the magistrates who had decided on his pre-trial detention.

The application was lodged with the European Court of Human Rights on 30 January 2017.

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

Robert Spano (Iceland), *President*,
Marko Bošnjak (Slovenia),
Valeriu Grițco (Republic of Moldova),
Egidijus Kūris (Lithuania),
Ivana Jelić (Montenegro),
Arnfinn Bårdsen (Norway),
Saadet Yüksel (Turkey),

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

Article 5 §§ 1 and 3

Lawfulness of the applicant's initial pre-trial detention

Mr Başı's pre-trial detention had been ordered on the basis of the ordinary rules governing detention, that is, Articles 100 et seq. of the Code of Criminal Procedure (CCP).

The Court pointed out that in circumstances similar to those of the present case, it had held that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law appeared manifestly unreasonable and were problematic in terms of the principle of legal certainty (*Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019). The Court could see no reason to reach a different conclusion as regards the courts' interpretation of the concept of *in flagrante delicto* and the application of section 94 of Law no. 2802 in the circumstances of the present case.

The Court observed that it had not been alleged that the applicant had been arrested and placed in pre-trial detention while in the process of committing an offence linked to the attempted coup, although the Ankara public prosecutor's office had initially mentioned the offence of attempting to overthrow the constitutional order. That offence had not been taken into consideration by the Kocaeli magistrate's court in ordering the applicant's pre-trial detention. The applicant had been deprived of his liberty on suspicion of membership of FETÖ/PDY. In the view of the Kocaeli magistrate's court, there had been a case of discovery *in flagrante delicto* within the meaning of section 94 of Law no. 2802, but the magistrate had provided no legal basis for that finding.

The Court noted that in its leading judgment adopted on 26 September 2017, the Court of Cassation had held that at the time of the arrest of judges suspected of the offence of membership of an armed organisation, there was a situation of discovery *in flagrante delicto*. The leading judgment indicated that in cases involving the offence of membership of a criminal organisation, it was sufficient that the conditions laid down in Article 100 of the CCP were satisfied in order for a suspect who was a member of the judiciary to be placed in pre-trial detention on the grounds that there was a case of discovery *in flagrante delicto*.

The Court emphasised that the principle of legal certainty could be compromised if courts introduced exceptions in their case-law which ran counter to the applicable statutory provisions. Article 2 of the CCP provided a conventional definition of the concept of *in flagrante delicto*, relating

to the discovery of an offence during or immediately after its commission. However, according to the case-law of the Court of Cassation, a suspicion of membership of a criminal organisation could be sufficient to characterise the element of *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act. In the Court's view, this amounted to an extensive interpretation of the concept of *in flagrante delicto*, expanding the scope of that concept so that judges suspected of belonging to a criminal association could be deprived of the judicial protection afforded by Turkish law to members of the judiciary. Furthermore, the Court could not see how the Court of Cassation's settled case-law concerning the concept of a continuing offence could have justified extending the scope of the concept of *in flagrante delicto*, which related to the existence of a current criminal act, as provided in Article 2 of the CCP.

The Court found that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law, namely section 94 of Law no. 2802, in the present case were not only problematic in terms of legal certainty, but also appeared manifestly unreasonable.

It considered that the mere application of the concept of *in flagrante delicto* and the reference to section 94 of Law no. 2802 in the order of 20 July 2016 for the applicant's detention had not fulfilled the requirements of Article 5 § 1 of the Convention.

In the Court's view, an extensive interpretation of the concept of *in flagrante delicto* could clearly not be regarded as an appropriate response to the state of emergency. Such an interpretation, which, moreover, had not been adopted in response to the exigencies of the state of emergency, was not only problematic in terms of the principle of legal certainty, but also negated the procedural safeguards which members of the judiciary were afforded in order to protect them from interference by the executive. It had legal consequences reaching far beyond the legal framework of the state of emergency. It was in no way justified by the special circumstances of the state of emergency. The Court concluded that the decision to place the applicant in pre-trial detention, which had not been taken "in accordance with a procedure prescribed by law", could not be said to have been strictly required by the exigencies of the situation.

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

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

The Court observed that the Constitutional Court had referred to Mr Baş's use of the ByLock messaging application. It had to be noted that the relevant evidence had not been adduced until long after the applicant's initial detention. The Constitutional Court had not explained how evidence obtained several months after Mr Baş's initial pre-trial detention could have formed a basis for a reasonable suspicion that he had committed the offence of which he had been accused.

In the present case, the Court observed that it appeared from the order for the applicant's pre-trial detention that the Kocaeli magistrate's court had based its finding of a reasonable suspicion that the applicant had committed the alleged offence on the decision taken by the HSK on 16 July 2016 and on the request by the Ankara public prosecutor's office to initiate an investigation in respect of him. In its decision, the HSK had suspended 2,735 judges and public prosecutors, including the applicant, on the basis of strong suspicion that they were members of the terrorist organisation that had instigated the attempted coup. The HSK had referred to a number of disciplinary and criminal investigations that had been initiated in respect of a number of judges and prosecutors prior to the coup attempt. However, its decision did not contain any facts or information relating to the applicant personally. He did not feature among the individuals mentioned as being the subject of disciplinary and criminal investigations. Accordingly, the disciplinary and criminal investigations mentioned in the HSK's decision could not have formed the basis for the suspicion giving rise to the order for the applicant's detention. The Court further noted that in its decision, the HSK had made a

general reference to information from the intelligence services, without providing any clarification of its contents or explaining how it related to the applicant and his situation.

The Court took the view that the Government had not provided a sufficient factual basis for the HSK's decision in the present case. It found that the mere reference by the Kocaeli magistrate's court to the HSK's decision was insufficient to support the conclusion that there had been a reasonable suspicion justifying the applicant's pre-trial detention. The magistrate's court had sought to justify its decision by referring to Article 100 of the CCP and to the evidence in the file, but it had simply cited the wording of the Article in question. The vague and general references to the wording of Article 100 of the CCP and to the evidence in the file could not be regarded as sufficient to justify the "reasonableness" of the suspicion on which the applicant's detention was supposed to have been based, in the absence either of a specific assessment of the individual items of evidence in the file, or of any information that could have justified the suspicion against the applicant, or of any other kinds of verifiable material or facts.

The Court also observed that the applicant had not been suspected of having been involved in the events of 15 July 2016. Admittedly, on 16 July 2016, the Ankara public prosecutor's office had issued instructions describing the applicant as a member of FETÖ/PDY and calling for his pre-trial detention. However, the Government had not produced any facts or information capable of serving as a factual basis for those instructions by the Ankara public prosecutor's office. The fact that, before being placed in pre-trial detention, the applicant had been questioned by the Kocaeli 1st Magistrate's Court on 19 and 20 July 2016 in connection with an offence of membership of an illegal organisation revealed, at most, that the authorities had suspected him of having committed that offence. That fact alone would not satisfy an objective observer that the applicant could have committed the offence in question.

The Court found that the evidence before it did not warrant the conclusion that there had been a reasonable suspicion against the applicant at the time of his initial detention. It considered that the requirements of Article 5 § 1 (c) of the Convention regarding the reasonableness of a suspicion justifying detention had not been satisfied.

The Court concluded that there had been a violation of Article 5 § 1 of the Convention on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence.

Article 5 § 4

Mr Baş had been placed in pre-trial detention on 20 July 2016 after being heard by the Kocaeli magistrate's court and had next appeared before a court at the first hearing on 19 September 2017, after his trial had begun. Throughout this period of approximately one year and two months, he had not appeared before any of the courts deciding on his detention. His applications for release and his objections had all been examined without his having been heard by the courts. The last objection lodged by the applicant had been dismissed by the Assize Court on 15 August 2017, without a hearing. The Government argued that the situation complained of by the applicant was covered by the notice of derogation under Article 15 which the Turkish authorities had submitted to the Secretary General of the Council of Europe on 21 July 2016.

The Court reiterated that the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016 were a contextual factor which had to be fully taken into account in interpreting and applying Article 15 ([Alparslan Altan v. Turkey](#), no. 12778/17, 16 April 2019). It accepted the conclusion reached by the Constitutional Court in the case of *Aydın Yavuz and Others* to the effect that the measures implemented in the aftermath of the coup attempt and the fact for a period of eight months and eighteen days the applicants had not appeared before the judges deciding on their detention could be said to have been strictly required for the protection of public safety. The Court observed, however, that in the present case Mr Baş had not appeared before a

judge for approximately one year and two months, a much longer period than the one assessed by the Constitutional Court in its *Aydın Yavuz and Others* judgment.

The Court therefore concluded that there had been a violation of Article 5 § 4 on account of the length of time during which the applicant had not appeared in person before a judge.

Moreover, as regards the complaint of a restriction of access to the investigation file, the Court considered it unnecessary to examine the matter any further. Regarding the non-disclosure of the public prosecutor's opinion, it held that this complaint was manifestly ill-founded and rejected it. Lastly, the Court considered that, having regard to the constitutional and legal safeguards afforded to the magistrates' courts, and in the absence of any relevant arguments giving cause to doubt their independence and impartiality in the applicant's case, the complaint alleging a lack of independence and impartiality on the magistrates' part should be rejected as being manifestly ill-founded.

Just satisfaction (Article 41)

The Court held that Turkey was to pay the applicant 6,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,000 in respect of costs and expenses.

Separate opinions

Judge Bårdsen expressed a concurring opinion and Judge Yüksel expressed a partly dissenting opinion. The 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.