



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

SECOND SECTION

CASE OF BAŞER AND ÖZÇELİK v. TÜRKİYE

(Applications nos. 30694/15 and 30803/15)

JUDGMENT

Art 5 § 1 • Unlawful pre-trial detention of judges on suspicion of attempting to overthrow the Government and impair its operation, and of being members of an armed organisation • Failure to comply with a procedure prescribed by law in dispensing with domestic procedural safeguard afforded to judges of a prior authorisation for initiating a criminal investigation • Detention ordered by competent, independent and impartial, specialised domestic court
Art 5 § 1 (c) • Lack of reasonable suspicion an offence had been committed at time of applicants' initial pre-trial detention

STRASBOURG

13 September 2022

FINAL

30/01/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Başer and Özçelik v. Türkiye,

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

Jon Fridrik Kjølbro, *President*,

Carlo Ranzoni,

Marko Bošnjak,

Egidijus Kūris,

Branko Lubarda,

Pauliine Koskelo,

Saadet Yüksel, *Judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the applications (nos. 30694/15 and 30803/15) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Turkish nationals, Mr Mustafa Başer and Mr Metin Özçelik (“the applicants”), on 24 June 2015;

the decision to give notice to the Turkish Government (“the Government”) of the complaints concerning the lawfulness of the applicants’ initial pre-trial detention, the alleged lack of reasonable suspicion that they had committed an offence, and the restriction of access to the investigation files;

the parties’ observations;

Having deliberated in private on 5 July 2022;

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

INTRODUCTION

1. The present applications concern the pre-trial detention of the applicants, judges of the 29th and 32nd Istanbul Criminal Courts respectively, at the time of the events, on suspicion of attempting to overthrow the government and impair its operation, and of being members of an armed organisation.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicants were born in 1969 and 1970, respectively. They were represented by Mr E. Albayrak and Mr Ö. Durdu, lawyers practising in Istanbul. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye.

A. The background of the case

3. In 2014 the Istanbul public prosecutor's office opened seven separate investigations in connection with the Gülenist movement. As part of those investigations, sixty-three suspects (a journalist and sixty-two law-enforcement officers) were placed in pre-trial detention for attempting to overthrow the government and impair its operation, for being members of a terrorist organisation (with reference to the Gülenist movement which was classified as a terrorist organisation by the Turkish authorities and was later described by them as the "Fetullahist Terrorist Organisation/Parallel State Structure" (*Fetullahçı Terör Örgütü / Paralel Devlet Yapılanması*), hereinafter referred to as "FETÖ/PDY"), obtaining State intelligence for political and military espionage purposes, unlawful interception of communications and forgery of official documents.

4. On 20 February 2015, in the context of an application for the recusal of all the magistrates in Istanbul which had been submitted by the suspects' lawyer, the 9th Istanbul Assize Court ruled on a jurisdictional conflict between the 32nd and 48th Criminal Courts. It considered that once the 48th Criminal Court, which at that time was responsible for the referral and distribution (*tevzi nöbeti*) of applications, had forwarded the recusal application to the 32nd Criminal Court, the latter court was required to take a decision (a decision as to a lack of territorial jurisdiction, a decision as to a lack of jurisdiction as regards subject matter, a decision concluding that there was no need for a decision, a decision allowing the application, or a decision rejecting the application). On 4 March 2015 the first applicant, as the judge of the 32nd Criminal Court, dismissed the application on the grounds that the recusal of all magistrates was not authorised, and the lawyer had failed to clearly identify the magistrate whose recusal was being requested.

5. The Directorate General of Criminal Affairs of the Ministry of Justice ("the Directorate") was also consulted about applications for recusal lodged with the Istanbul criminal courts by certain suspects. In its opinion of 6 February 2015, the Directorate considered that the provisions of the Code of Criminal Procedure ("the CCP") relating to the recusal of judges were limited to the trial phase of a case, and the recusal of all judges was not

possible. The criminal courts did not have jurisdiction to rule on applications for the recusal of magistrates; the word “judge” in Article 27 § 2 of the CCP, relating to the recusal of judges, referred to the judges of criminal courts of first instance (*sulh ceza hakimi*), but did not refer to the recently created magistrates’ courts (*sulh ceza hakimliği*), and consequently this provision was implicitly null and void. Lastly, at the investigation stage of a case, the decisions to be taken by a judge could only be adopted by the magistrates’ courts, and only the magistrates’ courts could consider objections to those decisions. It was clearly contrary to the CCP for a judge or court other than a magistrate’s court to take a decision on detention.

6. On 8 April 2015 the Constitutional Court declared inadmissible applications lodged by thirty-six of the sixty-three suspects who were being investigated by the Istanbul prosecutor’s office (*Hikmet Kopar and Others*, application nos. 2014/14061). Twenty of the applicants were intelligence officers detained in the context of investigation no. 2014/69722 on suspicion of illegally intercepting communications and falsifying official documents for this purpose. Two of the officers were also suspected of constituting an organisation with the purpose of committing crimes. These officers were suspected of having intentionally dissimulated the identity of the persons affected by the interceptions in the requests addressed to the judges, and of having used the interceptions thus obtained for purposes other than the investigation. They were suspected of having carried out these interceptions in a widespread, systematic and organised manner. The other applicants (sixteen law-enforcement officers) in the case of *Hikmet Kopar and Others* were detained in the context of investigation no. 2014/41637, opened in connection with offences allegedly committed during the investigation related to an alleged terrorist organisation. The Constitutional Court noted that the communications of the Prime Minister with heads of State and Government as well as the communications of ministers, high-ranking officials and the director of the National Intelligence Agency had been intercepted. It noted that the suspected officers had falsified official documents to carry out these interceptions and had obtained State intelligence for political and military espionage purposes. The Constitutional Court found that the complaints of the individuals concerned were manifestly ill-founded; the complaints were based on the argument that there was a lack of reasonable suspicion that they had committed an offence, a lack of grounds for their detention, and a lack of independence and impartiality on the part of the magistrates’ courts.

7. On 19 April 2015 a speech by Fetullah Gülen, the alleged leader of FETÖ/PDY, entitled “The Sacred Suffering and the Heroes of Alms” (*Mukaddes Çile ve İnfak Kahramanları*) was published on the website www.herkul.org. The relevant part of this speech translates as follows:

“... Some of you suffer and some of you share what you endure, feel their suffering in your soul; [he] stands like a steed [*küheylan*] as to the acts to be carried out, [he] flies

like a dove of the woods with the permission and grace of Allah; at this moment it means that they share [their suffering]. Yes, some live as prisoners [in] *Medrese-i Yusufiye*¹, and the others sit outside and pray for them: ‘Free them as soon as possible, with ease, my God. Release them and [make] a lot of famil[ies] rejoice with them, forty thousand families, fifty thousand families, one hundred thousand families, perhaps ten million families, my God ...’”

8. On 20 April 2015 the lawyers for the sixty-three suspects detained in connection with the seven investigations carried out by the Istanbul prosecutor’s office presented applications before the judge of the 29th Istanbul Criminal Court for the recusal of all the magistrates sitting on the bench of the magistrates’ courts of Istanbul (of which there were ten in total at that time) and requested the release of the detained suspects. The lawyers indicated that the applications for recusal and applications for release which they had submitted so far had been systematically rejected by the magistrates’ courts in identical terms. They alleged that the magistrates’ courts had lost their independence and impartiality, and that the applications for recusal should therefore be considered by the 29th Istanbul Criminal Court.

9. On 21 April 2015 the second applicant, who was the judge of the 29th Istanbul Criminal Court, invited each of the ten magistrates’ courts and the prosecutors in charge of the investigations to send in their submissions.

10. In their response of 22 April 2015, the magistrates’ courts indicated that the applications for recusal had not been handed over to the judges whose recusal had been sought, as provided for in Article 26 of the CCP. They also explained that criminal courts of first instance (*sulh ceza mahkemesi*) had been abolished and that the jurisdiction to take preventive measures at the investigation stage (*soruşturma*) had been assigned to the magistrates’ courts. Moreover, they asserted that the recusal of a judge was only possible at the trial stage. The magistrates’ courts also specified that decisions made by a magistrate’s court could be challenged only by means of an appeal to another magistrate’s court, under Article 268 of the CCP. They also referred to the opinion given by the Directorate on 6 February 2015 (see paragraph 5 above).

11. The prosecutors in charge of the investigations also responded on 22 April 2015, stating that the criminal courts had no jurisdiction to rule on objections lodged against the decisions taken by the magistrates’ courts or to decide on a detainee’s release. They refused to send the relevant investigation files to the second applicant.

12. On 24 April 2015 the magistrate of the 7th Istanbul Magistrate’s Court asked the second applicant to submit to him the applications for release submitted on 20 April 2015, arguing that he was the duty magistrate.

13. In a decision issued on 24 April 2015, the second applicant allowed the applications for the recusal of all the Istanbul magistrates. He firstly

1. In reference to the imprisonment of the Prophet Joseph, it means the place of detention of persons detained for their work for faith and the Koran.

indicated that it was his court which had jurisdiction to hear applications filed on 20 April 2015, as he had been on duty. He went on to note that he had a number of documents submitted by the suspects' lawyers and he felt that there was no legal objection to him deciding on the applications for recusal without having the investigation files, since he had not been called upon to decide on the merits of the cases and, as the suspects were detained, the applications were classified as urgent.

14. The second applicant also stated that, in accordance with Article 27 § 2 of the CCP, applications for the recusal of a judge of a criminal court of first instance were considered by a criminal court. He added that Law no. 6545 relating to the establishment of magistrates' courts did not provide for a special provision on the recusal of magistrates, so there was no doubt as to the applicability of the general provisions of the CCP. He therefore found it difficult to agree with the opinion expressed by the Directorate on 6 February 2015 which indicated that Article 27 § 2 of the CCP did not concern the newly created magistrates' courts and that this provision was implicitly null and void.

15. As for the possibility of recusing a judge at the investigation stage of a case, the second applicant explained that Article 22 et seq. of the CCP, governing recusal, did not distinguish between the investigation stage and the trial stage. He stated that the applications for recusal in question had been submitted after the hearings in the cases of the persons concerned had been completed, and that they had been detained for three to nine months. He added that, according to the Court of Cassation's case-law, the right to a fair trial as guaranteed by Article 6 of the Convention also covered the investigation phase. He therefore held that there was no doubt that it was possible to challenge a judge at the investigation stage and that therefore it was difficult to agree with the opinion of the Directorate.

16. With regard to the merits of the applications for recusal, the second applicant explained that the magistrates' courts had been established by Law no. 6545, and that following the establishment of the magistrates' courts, criminal courts of first instance (*sulh ceza hakimi*) had been abolished. He also indicated that immediately after the new magistrates' courts had started operating, investigations had been opened against the law-enforcement officers held responsible for certain operations, and most of the suspects brought before magistrates had been placed in pre-trial detention. He went on to explain that the process of creating magistrates' courts had given rise to public debates. According to him, various allegations about the courts had circulated, for example, allegations that these were "project" courts, that the magistrates had been specifically appointed, and that therefore those magistrates were not independent or impartial.

17. The second applicant considered that the lawyers' allegations about the impartiality of the magistrates' courts were based on concrete reasons. Those allegations were a development of: statements by the executive power

about magistrates' courts, reported in the press before and after the creation of magistrates' courts; certain allegations reported by the press; the refusal of certain appointed judges to accept the office of magistrate; the transfer to different duties of magistrates who had not issued detention orders or who had issued orders for release; the anticipated disclosure on social media of the identity of persons who would be remanded in custody, before and during police operations, in various investigations conducted after the establishment of magistrates' courts; and the identical and formulaic nature of all decisions made by magistrates as regards the extension of detention.

18. Once he had allowed the applications for the recusal of all the Istanbul magistrates, the second applicant, under Article 27 § 4 of the CCP, appointed the 32nd Istanbul Criminal Court to rule on the pre-trial detention of the suspects, on the grounds that that court was on duty on 24 April 2015.

19. On 25 April 2015, the High Council of Judges and Prosecutors (Hakimler ve Savcılar Yüksek Kurulu – “the HSYK”) ordered the initiation of an inspection (paragraph 31 below).

20. On the same day, ruling on an application by the prosecutor's office, the 10th Istanbul Magistrate's Court declared the decision rendered the previous day by the second applicant – allowing the applications for the recusal of the magistrates and referring the files to the 32nd Criminal Court so that it could decide on the applications for release – null and void. The 10th Magistrate's Court firstly explained that the 29th Criminal Court had ignored the rules on criminal courts on duty. He then noted that the application of the provisions on recusal was limited to the trial phase and trial courts, and that the magistrates' courts were not intended to rule on cases; they had been created solely to adopt, at the investigation stage, the decisions to be made by a judge, and to examine objections against such decisions. The 10th Magistrate's Court went on to explain that Article 27 § 2 of the CCP concerned judges of criminal courts of first instance (*sulh ceza mahkemesi hakimi*) with judicial powers, and that this provision no longer applied to magistrates' courts and had implicitly become obsolete. Thus, the 10th Magistrate's Court considered that the 29th Criminal Court had decided on the recusal of the magistrates in disregard of substantive and procedural standards, and that its decision was legally ineffective. He invited the 32nd Criminal Court to forward the applications for release to the Magistrate's Court on duty.

21. Also on 25 April 2015, the first applicant, in his capacity as judge of the 32nd Criminal Court, accepted the applications for the suspects' release, and by seven separate orders he decided to release all sixty-three detained suspects. Regarding his competence to hear the applications for the release of the persons concerned, he noted that the decision of the 29th Criminal Court on the recusal of the magistrates was final. As to whether he could rule solely on the basis of the documents provided by the suspects' lawyers, he answered in the affirmative. He noted that the dispute was not about the merits of the

cases, and that the applications for the release of the suspects should be decided on the basis of the documents provided by the lawyers. The first applicant noted that the files did not contain any evidence of strong suspicions about the commission of the offences of which the suspects were accused. He added that there was no risk of information being leaked or evidence being tampered with, and he considered that the reasons given were not relevant and sufficient. In conclusion, the first applicant considered that the files did not reveal the existence of facts or evidence requiring pre-trial detention, and that there was no reason why the detainees should remain in detention, taking into account the fact that they had permanent residences, the fact that they had surrendered, and their occupation, status, character, morality, wealth and family ties. He therefore ordered the release of the suspects.

22. Also on 25 April 2015, when deciding on the application by the prosecutor's office and reiterating the reasons which it had set out in its previous decision (paragraph 20 above), the 10th Magistrate's Court considered that the release orders issued by the 32nd Criminal Court were legally ineffective and should be considered null and void. In the same decision, the 10th Magistrate's Court stated that the decisions of the Istanbul magistrates' courts regarding the continued detention of the suspects were still valid.

23. In a statement issued on 26 April 2015, the Istanbul public prosecutor considered that the decisions of the Istanbul magistrates' courts to keep the suspects in pre-trial detention were still valid; the prosecutor took into account the 10th Magistrate's Court's decision of 25 April 2015 and considered that the criminal courts had no jurisdiction to rule on pre-trial detention.

24. On the same day, the Minister of Justice, in his capacity as President of the HSYK, issued a statement. He indicated that according to the press statement made by the Istanbul public prosecutor (see previous paragraph), the 29th and 32nd Criminal Courts had ruled on the applications before them without seeing the investigation files or examining the charges against the suspects or the evidence. The Minister pointed out that consequently two judicial inspectors had begun an examination, which was in progress. He reiterated that in accordance with Article 6 of the Constitution, no one could exercise authority which did not stem from the Constitution; classifying a failure to consider both that provision and the procedural rules relating to competence as judicial activity would be tantamount to accepting impunity for persons holding judicial office. The Minister indicated that the impugned decisions, which he described as an attempt to create legal chaos through courts lacking competence, showed the appropriateness of the decision taken by the HSYK to investigate the parallel structure within the judiciary. He indicated that the use of judicial authority, in an organised and systematised manner, for the purpose of serving illegal interests and objectives and undermining legal security, would receive the appropriate response within the

framework of the law. He concluded by stating that any undertaking to undermine public order, legal security or social peace would be doomed to failure.

25. On 26 April 2015 the Istanbul prosecutor's office in charge of executing the relevant orders returned the release orders issued by the first applicant to him without executing them, on the grounds that following the issuance of those orders, the 10th Magistrate's Court had ordered the detention of the suspects on the same day (paragraph 22 above).

26. On 27 April 2015 the first applicant again referred the release orders to the Istanbul prosecutor's office in charge of executing the orders, which once again refused to implement them, on the same grounds as before.

27. On the same day, the first applicant reminded the prosecutor's office in charge of executing the orders that the release orders issued by his court were in accordance with the relevant procedure, final and not amenable to an objection, and that they should be implemented immediately.

28. On 27 April 2015 the applicants were suspended from their duties by the Second Chamber of the HSYK (paragraph 40 below).

29. On 28 April 2015 the 32nd Istanbul Criminal Court (a newly appointed judge) declared the decisions adopted by the first applicant null and void, on the grounds that the criminal courts had no jurisdiction to rule on pre-trial detention.

30. On 29 April 2015 the 29th Istanbul Criminal Court (a newly appointed judge) declared the decision of the second applicant null and void, on the grounds that the criminal courts had no jurisdiction to rule on applications for the recusal of magistrates.

B. Inspection and examination carried out by the HSYK while the applicants adopted their decisions

31. On 25 April 2015 the HSYK Inspection Board initiated a general inspection on the Istanbul Criminal Courts after the publication of the news by the press regarding several irregularities, and on the same day an examination (*inceleme*) was launched *ex officio*.

32. On 25 April 2015 the public prosecutor took the witness statements of the chief clerk and the clerk of the 29th Criminal Court. The chief clerk explained the duty system (*nöbet sistemi*); she explained that each criminal court was the duty court for correspondence (*muharebe nöbeti*) on one day, and the duty court for the referral and distribution of applications (*tevzi nöbeti*) for fifteen days. She explained that their court had been on duty for correspondence, and therefore it should not have accepted the applications in question and should have transferred them to the duty criminal court for referral. The chief clerk also explained that detention issues were dealt with by magistrates' courts, and their court did not usually receive cases concerning detention issues. She also explained that the disputed applications

for recusal and release had not been scanned and filed with the court registry in accordance with the usual procedure, and she specified that she had not been informed of the filing of the applications for recusal or the decision rendered on 24 April 2015.

33. The clerk of the 29th Criminal Court explained that their court was on duty for correspondence, and therefore he was only in charge of sending and receiving documents to and from courts in other cities. He pointed out that their court had not received an application for release before. The clerk then explained that it was customary practice for the chief clerk to receive the applications filed with the court, except for important cases. The clerk explained that on the morning of 20 April 2015 the second applicant had come to the court registry and said, “If any application comes in, I want to see it personally.” The clerk pointed out that lawyers had visited the second applicant’s office throughout the day. He also stated that on 21 April 2015, shortly after 5 p.m., the second applicant had called him into his office to hand over the disputed applications, requesting that he scan them and register them in UYAP (*Ulusal Yargı Ağı Bilişim Sistemi* – the national communication system of the judiciary). The clerk added that he had passed the decision of the second applicant to the first applicant by hand on 24 April at around 5 p.m., at the request of the second applicant.

34. On 26 April 2015, at the end of the examination (*inceleme*) carried out by him, the judicial inspector drafted a preliminary report (*ön rapor*). He considered that the applicants had acted “in unity of mind and action with the suspects” (*şüphelilerle fikir ve eylem birliği içerisinde hareket ettiği*). According to this report, the examination (*inceleme*) was authorised on 25 April 2015 in accordance with the inspection competence of the chairmanship of the Inspection Board of HSYK. The preliminary report also stated that the examination (*inceleme*) had started *ex officio* following the publication of articles in the press.

35. The judicial inspector noted that the second applicant had personally acknowledged receipt of the applications for recusal and release submitted by the lawyers for the sixty-three suspects, that the chief clerk had not been informed that those applications had been received, and that the applications had been registered in UYAP by the clerk the following day, namely on 21 April 2015, after working hours, upon the second applicant’s instructions. The inspector noted that these elements had also been emphasised in a letter from the chief clerk of the 29th Criminal Court sent on 26 April 2015. The inspector also noted that the second applicant had decided to join the seven separate applications, allowed the applications for recusal, and appointed the first applicant to decide on pre-trial detention. He further noted that the examination of the reasons set out in the applications had not mentioned concrete elements relating to situations justifying the recusal, or questioned the impartiality of the magistrates’ courts.

36. The inspector also stated that the second applicant had acted in disregard of procedural standards, namely Article 26 of the CCP, which required a recusal application to be submitted to the judge whose recusal was being requested. He alleged that the second applicant lacked knowledge of procedural and substantive standards; the judge had decided the cases without being aware, even if only from UYAP, of the material in the investigation files, and he had decided the cases only on the basis of the applications submitted by the suspects' lawyers and the incomplete information and documents provided by them.

Lastly, the inspector noted that on 6 February 2015 the 26th Istanbul Criminal Court had rejected an application by one of the suspects for the recusal of all the magistrates in Istanbul.

37. With regard to the first applicant, the inspector noted that he had decided to release a number of suspects without seeing the content of the investigation files on them, either physically or in UYAP. The inspector noted that the first applicant had decided on the applications for release only a day after they had been filed, when the application forms alone could not have been read in such a short period of time. He noted that because of a decision to restrict access, the suspects and their lawyers had not had access to the investigation files, and therefore the first applicant could not have had full knowledge of the content of the files from the applications made by the lawyers. The inspector also observed that the first applicant had ignored the decision of the 10th Magistrate's Court of 25 April 2015 considering the decision of the 29th Criminal Court of 24 April 2015 null and void, even though he had been aware of those decisions before certain orders had been drafted and before the orders had been sent to the enforcement authority.

38. The inspector added that the first applicant had ignored section 10 of the Judicial Organisation Act, which gave magistrates' courts jurisdiction to take the decisions to be taken by a judge during the investigation stage of a case.

39. According to his preliminary report, having regard to the evidence relating to the applicants and the publication of articles in the press accusing them of acting on instructions from the organisational structure of Fetullah Gülen (*örgütsel yapılanmasının*) the inspector considered that the facts imputed to the applicants, given their nature and seriousness, required the removal of the applicants (*eylemlerin niteliği itibariyle meslekten çıkarmayı gerektirir ağırlıkta bulunduğu*), and that their continued service could damage the authority and reputation of the judiciary. Accordingly, he recommended the suspension of the applicants from their duties, under section 77 of Law no. 2802 and section 40 of the HSYK Regulations.

40. On 27 April 2015, following the inspector's recommendations, the Second Chamber of the HSYK issued a disciplinary sanction against the applicants (suspension from duties for a period of three months), by five votes to two.

41. The Second Chamber of the HSYK related what the clerks of the 29th Criminal Court had said in their statements. It also noted that according to the information given by the chief clerk in his letter of 26 April 2015, the applications for recusal and release received on 20 April 2015 by the second applicant had been registered in the UYAP system on 21 April 2015 at 6.08 p.m. The Second Chamber of the HSYK then recounted how the applicants had adopted the decisions in question.

42. The Second Chamber of the HSYK then explained that with the amendment of section 10 of the Judicial Organisation Act, criminal courts of first instance (*sulh ceza mahkemeleri*) had been abolished and magistrates' courts had been set up. Thus, the power of the criminal courts of first instance to issue judgments had been referred to the criminal courts. The magistrates' courts, on the other hand, had been given the power to adopt, at the investigation stage, the decisions to be taken by a judge, and to consider any objections against such decisions. The Second Chamber also set out what the procedure was under Article 268 of the CCP for considering an objection, namely that an objection to the decision of a magistrate's court was considered by another magistrate's court.

43. The Second Chamber went on to observe that the law establishing magistrates' courts contained no specific provision on the recusal of magistrates, and that the provisions of the CCP relating to the recusal of judges had not been amended. As a result, doubts had arisen as to whether magistrates' courts acting only at the investigation stage could be challenged and, if so, which authority was responsible for hearing such applications for recusal. It noted that the Directorate had been consulted in this regard and had issued its opinion of 6 February 2015. According to the Second Chamber of the HSYK, although the opinion of the Directorate was not binding on magistrates, ignoring the relevant considerations was not consistent with the principle of good faith.

44. The Second Chamber noted that even assuming that Article 27 § 2 of the CCP had not been implicitly repealed, this did not change the procedure requiring a recusal application to be submitted under the conditions of Article 26, namely to the judge whose recusal was being requested. Similarly, the Second Chamber indicated that once an application for recusal had been accepted, the criminal court should not act arbitrarily in appointing the judge or court responsible for adjudicating on an application for release, and should do so in the light of the statutory provisions clearly giving the magistrates' courts jurisdiction. The Second Chamber reiterated that the criminal courts had not been given such jurisdiction. Assuming that all the magistrates in Istanbul could be recused and that there would no longer be a magistrate's court in Istanbul which could rule on the release of the suspects, in accordance with Article 268 § 3 (a) of the CCP, the magistrates' courts of Bakırköy would have jurisdiction to rule on an objection. In any event, the 32nd Criminal Court had had no jurisdiction to rule on the release of the suspects.

45. The Second Chamber of the HSYK further stated that the second applicant, while he had been on duty for correspondence only, had recorded the applications for the magistrates' recusal, which should have been handed over to the magistrates whose recusal had been requested, contrary to the usual procedural rules of the court; instead of transferring the applications to the judges concerned, he had allowed the unsubstantiated applications of the suspects, in disregard of the law. The Second Chamber indicated that on that occasion the second applicant had ignored the comments of the magistrates' courts. He had then unlawfully appointed the 32nd Criminal Court to rule on the applications for release, specifying the relevant judge (the first applicant) by name, thus ignoring the fact that only the magistrates' courts had had jurisdiction in that matter.

46. As for the first applicant, the Second Chamber of the HSYK noted that he had decided to release sixty-three suspects: (a) on the basis of an unlawful decision on jurisdiction issued by the 29th Criminal Court, which was not a higher court; (b) without seeing the investigation files and without reviewing the personal circumstances of each of the suspects, taking into account the offences in question and the evidence; and (c) while giving similar and very general reasons in his decisions.

47. The Second Chamber indicated that the applicants had acted in concert with the suspects, whose previous attempts to secure their release had failed. To release the suspects, the applicants had violated the clear provisions of the law in a planned and organised manner. The Second Chamber therefore decided to suspend the applicants from their office for a period of three months, in accordance with section 77(1) and section 81(1) of Law no. 2802, on the grounds that their continued service would impair the proper conduct of the investigation, as well as harm the authority and reputation of the judiciary.

48. Two members of the HSYK expressed their views in a separate dissenting opinion. They claimed that the statements of members of the executive suggested that the HSYK had acted under the influence of the executive branch of the State, and thus lacked independence and impartiality. In their view, the applicants had been sanctioned for decisions which they had taken during their judicial activity. They further asserted that the internal procedure of the HSYK had not been followed, in particular regarding obtaining authorisation to investigate the case, and that the HSYK had adopted its decision in a hurry. Lastly, they stated that newspapers had announced an extraordinary meeting of the HSYK and suggested what sanction would be imposed on the applicants, all on the same day.

49. On 28 April 2015, after considering the recommendation of the HSYK Inspection Board to move to the investigation phase (*soruşturma*), as well as the articles published in the press and on the Internet criticising the decisions taken by the applicants, the Third Chamber of the HSYK decided that, in view of the irregularities attributed to the applicants in the preliminary report

prepared on 26 April 2015, it was necessary to move on to the investigation phase under section 83 of Law no. 2802 and section 37(2) of the Inspection Board Regulations. The Third Chamber referred in its decision to some news articles (“The chaos decision of an incompetent court”, “The evil plan of the parallel organisation was foiled”, “The incompetent parallel judge seeks to make the show”, “Incompetent judge continues show”, “Decision of chaos from the Kamikaze judge”) without any other information about the date of these articles or their content. Two members of the Third Chamber expressed their views in a separate dissenting opinion. The Third Chamber sought the authorisation of the President of the HSYK in this regard, and the latter approved that decision on 11 June 2015.

50. As part of his subsequent investigation, the judicial inspector conducted a hearing in which the clerks and officers of the 32nd Criminal Court gave evidence as witnesses.

51. As it appears from their testimony, on Saturday 2 April 2015 at approximately 4 p.m. the Commission of Justice urgently summoned the chief clerk of the 32nd Criminal Court to that courthouse. As she was unavailable at that time, she asked the court clerk to go instead of her, and the court clerk went to the secretariat of the Commission of Justice at the courthouse at around 5 p.m. After waiting a while, she gave her mobile telephone number and went down to the entrance of the courthouse, after being instructed not to go to the 32nd Criminal Court’s registry. Shortly afterwards the clerk Ah. joined her, at the request of the first applicant. At about 5.20 p.m. the first applicant called the court clerk on her mobile telephone. When she indicated that she had been summoned by the Commission of Justice, the first applicant stated, “I am also coming [to the courthouse], do nothing until I arrive.” Then he called again and asked her, “What happened, has there been any development? If they ask for the key to my office, say you don’t have it.” Subsequently, the first applicant also called the clerk Ah. and asked him to summon the clerk Ab. and the court usher to the courthouse.

52. Upon arriving at the courthouse, the first applicant asked the court clerk and the clerk Ah. to join him in his office, located on the second floor. He handed them files and asked for those files to be transported to the hearing room, and he asked the court clerk to open UYAP for a draft decision. In response to a question from the clerk, he replied, “I was going to write it on Monday, but they’re not going to let me write [it], that’s why we’re going to write [it] now.”

53. In the hearing room, the first applicant and the court clerk began to write the decisions, on the basis of a note which the applicant had taken out of his pocket. The court usher and then the clerk Ab. joined them in the hearing room a little later. During the drafting, the clerks Ab. and Ah. noted the information necessary for preparing release orders. The first applicant told one of the clerks that he could not go home. During the drafting of the

decisions, the connection to UYAP was interrupted, and the first applicant asked for the drafting to continue offline. An official from the secretariat of the Commission of Justice called the court clerk on her mobile phone asking where she had gone, and told her that the chief prosecutor was expecting her. The first applicant then seized the clerk's mobile phone and had a conversation with the person who was on the line. The first applicant then asked the clerk Ah. to go to the secretariat of the Commission of Justice and tell them that they were waiting and that they were not drafting decisions. The clerk Ah. refused to go. When the court clerk indicated to the first applicant that the person who had summoned her was his supervisor and asked to go, the first applicant stated that she could not leave until he allowed her to go, and no one was permitted to leave the hearing room. While they were drafting the decisions, the applicant left the hearing room several times to speak on the phone. Three lawyers also entered the hearing room to question the first applicant about the veracity of the relevant information on the Internet.

54. When the first applicant went to his office and was absent from the hearing room, the clerks expressed their concerns about the events and questioned the behaviour which was being displayed. Upon returning to the hearing room, the applicant continued to draft the decisions, as the drafting was scheduled to end at approximately 10 p.m. The applicant also requested that the suspects' lawyers be immediately notified of the decisions; those lawyers were waiting in the corridor.

55. The chief clerk of the 32nd Criminal Court arrived at the courthouse at around 9 p.m., shortly before the drafting of the decisions was completed. She had been intrigued by the fact that the first applicant had picked up the court clerk's mobile phone and explained that she was busy. When she reached the hearing room, the court clerk and the first applicant were drafting the decisions and all the clerks of the 32nd Criminal Court were present. The chief clerk then joined the other chief clerks at the secretariat of the Commission of Justice, before being summoned by the judicial inspector, who was also in the same building. The inspector had given the chief clerk a letter for the first applicant; upon receiving this letter, the first applicant wrote a letter in response for the chief clerk to pass on to the inspector. When she realised that the applicant was ruling on the applications for release, the chief clerk expressed her doubts about the regularity of adjudicating on the applications for release and about their court's jurisdiction to do so. In response, the applicant stated, "I am the one making the decision; if anything happens to me it will happen to me, nothing will happen to you."

56. While the chief clerk was printing out the letter, the judicial inspector contacted her at her post and asked her to send the clerks to him one by one. Those clerks, worried that they would be held liable, wanted to go with the chief clerk instead and to meet the inspector in a group, to ask him if they were committing an illegal act. Upon arriving at the inspector's office, the chief clerk saw that the inspector was being targeted by the suspects' lawyers.

She gave him the letter which the first applicant had written in response, and reported the clerks' concerns. The inspector then went to meet with the clerks and reassured them that there was no need to worry and that they could return to their posts.

57. While the clerks were waiting in the corridor, an official from the secretariat of the Commission of Justice arrived and remonstrated with the court clerk, blaming her for not waiting at the secretariat. The court clerk replied that she had had to leave, at the request of the first applicant. During this conversation, the clerk became unwell and was taken to hospital.

58. After the clerk had left for the hospital, the chief clerk and the clerks went to the registry office to draft the release orders. The applicant wrote a letter to the Commission of Justice requesting that the court clerk who had been taken to hospital be replaced by the clerk of another court who was present. At the request of the judicial inspector, the chief clerk sent him (the inspector) a copy of the release decisions taken by the first applicant to which he had referred.

59. According to the witnesses, the release orders were issued at about 2 a.m. One of the clerks went to the office of duty counsel, who was not there. The first applicant then contacted the secretariat of the prosecutor's office by telephone and threatened the person with whom he spoke with prosecution when that person indicated that they were not in charge of executing orders. The first applicant and the court usher then tried to send the orders to the prison where the suspects were being held, by means of a fax from the police station, but without success. When the court usher expressed his wish to go home, the first applicant stated that he would wait until duty counsel arrived in the morning. The first applicant then retired to his office to spend the night there. The clerk Ah. left the courthouse after falling asleep for a while in the hearing room. As for the court usher and the clerk Ab., they spent the whole night in the hearing room. In the morning, the first applicant sent the clerk Ab. to the duty prosecutor's office again to file the orders. The first applicant then called the chief clerk and indicated that she could hand over the documents to the inspector in the afternoon, and then he left the courthouse at approximately 10.30 a.m. The chief clerk returned to the courthouse in the morning, and handed over to the inspector the files which he had requested.

60. On 7 July 2015, on the basis of a report prepared on 3 July 2015 by the judicial inspectors after the authorisation of the investigation initiated by the Third Chamber of the HSYK on 28 April 2015, the Second Chamber of the HSYK decided that a trial should be opened against the applicants.

C. The applicants' pre-trial detention and the dismissal of their objections

61. On 30 April 2015 the HSYK Inspection Board asked the 2nd Bakırköy Assize Court to place the applicants in pre-trial detention under Article 100

of the CCP and section 85 of Law no. 2802. The request was based on the observations made by the inspector in his report of 26 April 2015, and those contained in the decision of the Second Chamber of the HSYK of 27 April 2015.

1. The second applicant

62. On 30 April 2015 the second applicant appeared before the 2nd Bakırköy Assize Court, which ordered his pre-trial detention on suspicion of attempting to overthrow the government and impair its operation, and of being a member of an armed organisation. During his hearing, he stated that magistrates could be heard and detained only in situations where they had been caught *in flagrante delicto*, which was not the case in his situation. He also alleged that the 2nd Assize Court did not have competence to decide on his detention, as it was not the duty assize court. The applicant explained that he had taken a court decision in accordance with the law, in the performance of his duties as a judge, and that there was no evidence in connection with the charges against him.

63. Before considering the application for the applicant's detention, the 2nd Assize Court specified that it would rule in accordance with section 85 of Law no. 2802 and an HSYK decision of 12 February 2015 on the specialisation of courts.

64. The 2nd Assize Court then gave details of the following pieces of evidence, namely: a table showing the duty courts and magistrates; the letter sent on 26 April 2015 by the chief clerk of the 29th Criminal Court; the decision of the 26th Criminal Court; the decision of the 10th Magistrate's Court; the decisions of the applicants; the opinion of the Directorate of 6 February 2015; the transcript of the clerks' hearing at the 29th Criminal Court on 25 April 2015; the record of the transcript of the speech by Fetullah Gülen; and the preliminary report by the judicial inspector of 26 April 2015.

65. The 2nd Assize Court found that there was concrete evidence showing the existence of strong suspicions that the second applicant had acted in concert with the suspects (*aynı irade birliği içerisinde*), in the light of the following evidence: the nature of the investigations concerning the suspects; the witness statements indicating that the second applicant had deviated from usual practice; the information obtained from UYAP regarding the dates when the applications had arrived and had been registered; the date when the decisions had been written and validated on UYAP; and information in the file showing that the second applicant had acted contrary to procedure and usual practice.

66. The 2nd Assize Court also noted that the offences in question were listed in Article 100 § 3 of the CCP, and therefore the existence of grounds for detention was presumed. It further noted that evidence was still being collected, and it considered, in view of the second applicant's status, that there was a risk of pressure being put on witnesses and others and therefore a risk

that evidence would be tampered with. It considered that there was a risk of flight, given the second applicant's socio-economic situation and the nature of the alleged offences. It also considered detention a proportionate measure, in the light of the possible sentence. Lastly, in view of the risk of evidence being leaked and tampered with, the court considered that judicial supervision was an insufficient measure.

67. As a result, the 2nd Assize Court ordered that the applicant be placed in pre-trial detention under Article 100 of the CCP and section 85 of Law no. 2802, for attempting to overthrow the government and impair its operation, and for being a member of an armed organisation – crimes under Articles 312 and 314 of the Criminal Code respectively.

2. The first applicant

68. On 30 April 2015 the 2nd Bakırköy Assize Court issued an arrest warrant for the first applicant, at the same time as it placed the second applicant in detention on remand.

69. On 1 May 2015 the first applicant appeared before the 2nd Assize Court and which ordered his pre-trial detention on suspicion of attempting to overthrow the government and impair its operation, and of being a member of an armed organisation.

70. During his hearing, the first applicant explained that he had not been informed of the decision of the 10th Magistrate's Court until 11 p.m., when he had already rendered his decisions on the release of the suspects, and in any event, the magistrate's court could not declare his decisions null and void. As for the opinion provided by the Directorate, the applicant indicated that this could not bind a judge, and that under Article 138 of the Constitution, no one could give an instruction to a judge.

71. The first applicant then explained that on 4 March 2015, shortly before the lodging of the disputed recusal applications, he had rejected the application for recusal made by some suspects (see paragraph 4 above), and added that, if he had intended to commit the alleged offences, then he would have done so on that occasion. The applicant stated that, after the 29th Criminal Court had allowed the applications for recusal and appointed him to decide on the release applications, he had been required to take a decision. He indicated that he had taken the decision in good conscience, and said that he was convinced that he had decided in accordance with the law.

72. When giving evidence on the transcript of Fetullah Gülen's speech, the applicant indicated that he had never seen or heard this speech before. When asked about the preliminary report prepared by the judicial inspector, the applicant explained that on 24 April 2015 he had taken the file home with him and worked on the file at night. He said that the drafting of the decisions had ended on 25 April 2015 at around 10 p.m., whereas he had not read the decision of the 10th Magistrate's Court until 11 p.m. He added that he had

finished drafting the release orders at about 2.30 a.m. and had forwarded them to the prosecutor in charge of executing them the next day, at about 10 a.m.

73. The applicant maintained that the elements of the alleged offences had not been satisfied, and that there were only abstract allegations about him. He claimed that he had merely exercised his judicial functions. The applicant added that there was no risk of evidence being leaked or tampered with; he specified that he had surrendered to the courthouse when he had read the arrest warrant, and added that he had a permanent residence.

74. At the end of his hearing, the 2nd Assize Court ordered that the first applicant should be placed in pre-trial detention under Article 100 of the CCP and section 85 of Law no. 2802, for attempting to overthrow the government and impair its operation, and for being a member of an armed organisation.

75. The 2nd Assize Court considered that there were strong suspicions that the applicant had acted in concert with the suspects (*aynı irade birliği içerisinde hareket ettiğine dair*), on the basis of: the content of the investigation file; a record of 29 April 2015 relating to the transcript of Fetullah Gülen's speech; the table showing the duty courts and magistrates; the nature of the investigations concerning the suspects; the decision of the 10th Magistrate's Court; and the decisions of the 32nd Criminal Court. It considered that the grounds for detention were presumed to exist because the offences in question were "catalogue offences" listed in Article 100 § 3 of the CCP, and added that evidence was still being collected and that judicial supervision measures would not be sufficient.

3. Both applicants

76. In two separate applications, the applicants' lawyers objected to the detention of their clients and requested their release, if necessary, under judicial supervision.

77. On 8 May 2015, in two separate decisions, the 2nd Anadolu Assize Court rejected the objections raised by the applicants.

78. The 2nd Anadolu Assize Court found that there was concrete evidence for having strong suspicion that the applicants had committed the alleged offences and shown their willingness to have a consensus (*fikir birliği*) with the suspects and to cooperate with them, in view of: the decisions taken by the applicants; the statements of the clerks of the 29th Criminal Court; the preliminary report prepared by the judicial inspector on 26 April 2015; the application for the applicants' pre-trial detention submitted by the senior judicial inspector; the transcripts of the applicants' hearings; and the content of the entire case. As the offences alleged were "catalogue offences", the 2nd Anadolu Assize Court considered that the existence of grounds for detention was presumed. It also noted that evidence had not yet been gathered.

D. Applications to the Constitutional Court

79. On 12 May 2015 both applicants lodged individual appeals with the Constitutional Court. They complained that there was a lack of plausible reasons to suspect that they had committed the alleged offences, as the acts in question had been limited to judicial activities, that there had been a breach of section 88 of Law no. 2802, and that the 2nd Assize Court had not had competence to decide on their detention. Lastly, they alleged that there had been a violation of Article 10 of the Convention, on the grounds that they had been detained because of their judicial activities and their decisions. They also alleged that there had been an infringement of the principle of legal security, as their detention had not been foreseeable on the basis of the alleged facts. The applicants also claimed to have submitted supplementary pleadings to the Constitutional Court to complain of non-compliance with Article 159 of the Constitution and section 82 of Law no. 2802, and to lodge complaints concerning Article 5 § 4 and Article 7 of the Convention. The Government did not refute the applicants' claim that they had filed these supplementary pleadings.

80. On 20 January 2016, after the applicants' appeals had been joined, the Constitutional Court declared them inadmissible for the reasons set out below.

81. With respect to the alleged infringement of the right to liberty and security, the Constitutional Court considered several aspects of that complaint.

82. The Constitutional Court noted that the HSYK had designated the 2nd Bakırköy Assize Court to rule on cases relating to certain offences, under section 9 of Law no. 5235, and in order to ensure specialisation. Thus, the Constitutional Court held that it could not be accepted that the 2nd Bakırköy Assize Court had been created in violation of the "natural judge" principle, since it had been designated as a specialised court prior to the detention of the applicants. With regard to the independence of the Assize Court, the Constitutional Court found there was no reason to consider the judges sitting on the bench of the 2nd Assize Court differently from the other judges. It added that judges sitting on the bench of that court were appointed by the HSYK under the same conditions as other judges, and that they had constitutional and legislative guarantees ensuring their independence and impartiality. It therefore considered that it could not be asserted that the judges of the 2nd Assize Court lacked objective impartiality. It could not be accepted, on the basis of facts which had not been established as true, or comments made in the course of political debates, that the judges concerned had not acted independently and impartially or had been motivated by political or personal reasons, as long as the judges concerned had not shown any prejudice against the applicants.

83. The Constitutional Court went on to find that the applicants had been placed in detention by the 2nd Bakırköy Assize Court, which had been designated as a specialised court for terrorist offences by an HSYK decision of 12 February 2015. It noted that there was uncertainty in the legislation as to whether the designation of that court as a specialised court also concerned preventive measures to be adopted at the investigation stage. It firstly noted that, in accordance with Law no. 2802, the nearest assize court, namely the Bakırköy Assize Court, was authorised to commit the applicants for trial. It observed that the offences of which the applicants had been accused were offences which could be tried by the 2nd Assize Court. According to the Constitutional Court, since the 2nd Bakırköy Assize Court had jurisdiction under section 89 of Law no. 2802 to decide whether to commit for trial, it could be accepted that it was also competent to decide on pre-trial detention under section 85 of the same Law, without this being regarded as a clear error in the court's assessment or an arbitrary approach. Accordingly, the Constitutional Court found the applicants' complaints regarding non-compliance with the "natural judge" principle and the 2nd Assize Court's lack of independence, impartiality and competence to be manifestly unfounded.

84. The Constitutional Court further noted that the applicants had complained that they had been placed in detention in the absence of strong suspicions that they had committed the alleged offences and that the alleged acts did not constitute an offence. It noted that the applicants had also complained that they had been detained because of their decisions in the course of their judicial activities and that they had thus been deprived of the opportunity to freely express their beliefs as judges, something which they considered to be an infringement of their right to freedom of expression.

85. In this regard, the Constitutional Court stated that the facts attributed to the applicants were not an expression of their personal ideas and beliefs, but related to court decisions which they had adopted in the course of their judicial duties. They had been remanded in custody because they had been accused of adopting those decisions since they had been instructed to do so by the organisation of which they were members. Accordingly, the Constitutional Court held that that complaint should be considered in the context of the complaint related to the illegality of their detention.

86. The Constitutional Court then noted that the applicants had been accused of being members of FETÖ/PDY. It observed that, according to the indictment, the members of that organisation had acted following an encrypted instruction by Fetullah Gülen during a speech published on the Internet on 19 April 2015 to secure the release of the suspects. The prosecutor had accused the applicants of acting in accordance with this instruction and adopting the contentious decisions with a view to releasing the suspects, without seeing the investigation files and without having the competence to take those decisions.

87. The Constitutional Court then noted that in requesting the second applicant's detention on remand, the judicial inspector of the HSYK had found that the applicant had registered the applications for recusal and release outside of working hours, had decided to join them, and had accepted the recusal of all the magistrates in violation of the rules of procedure relating to the recusal of judges, without seeing the investigation files. As regards the first applicant, the judicial inspector had indicated that in the space of one day he had decided to release all the suspects, without reading the investigation files and without having the competence to take those decisions.

88. The Constitutional Court went on to observe that, in principle, the question of whether the elements constituting the offences had been satisfied was an issue to be decided by the judicial authority at the end of the trial. Apart from cases where there had clearly been an unconstitutional interpretation and an arbitrary assessment of the evidence, which could then lead to a violation of the right to liberty, the interpretation of statutory provisions, including those relating to detention, and their application in respect of a given situation were a matter for the courts' discretion. Moreover, during a judicial review of detention, consideration should be limited to the question of whether convincing reasons had existed indicating that the individual concerned might have committed the offence. In this context, the existence of serious evidence indicating that an offence had been committed had been sufficient for the original detention decision.

89. In the Constitutional Court's view, there had been convincing evidence to suspect that the applicants had committed an offence, considering cumulatively the investigation report, the indictment, the facts alleged against the persons concerned and the evidence relating to them, and the reasons given in the detention decisions and in the decisions relating to the rejection of the objection.

90. The Constitutional Court also found that the grounds for detention had been based on the reasons set out in the remand decisions, because the offences alleged against the applicants were offences covered by Article 100 § 3 of the CCP.

91. As for the applicants' allegation that they had been detained because of the judicial decisions they had taken as judges, the Constitutional Court found it unfounded. It reiterated that judges, given their important position and function in society, enjoyed a special status and constitutional guarantees. It added that the criminal liability of magistrates in the event of an offence had been commonly accepted in modern legal systems. In the Constitutional Court's view, it was implausible that judges could not be punished for offences which they might have committed in the course of their duties simply because of their status. It explained that the domestic legal system therefore provided for special procedures for the prosecution of criminal acts that judges might have committed in relation to their duties.

92. The Constitutional Court noted that the applicants had been accused of acting upon the instructions of the organisation of which they were allegedly members, and of illegally accessing the applications for the recusal of all the magistrates in Istanbul and the applications for release submitted by the lawyers for the sixty-three suspects detained in seven different investigations, without reviewing the records of the case. As members of the same organisation as the suspects, they had also been accused of acting as one with them, in terms of thoughts and actions (*fikir ve eylem birliği içinde hareket etmekle*).

93. The Constitutional Court found that the applicants had not been detained because of the decisions which they had made during the exercise of their judicial jurisdiction, in their capacity as judges; they had been detained because they had been suspected of committing acts with a view to freeing the suspects with whom they had acted in concert, knowingly and by abusing their office as judges, and without having the necessary jurisdiction to do so.

94. Lastly, the Constitutional Court noted that the applicants had complained that they had not been able to raise an objection in an effective manner because they had not been able to obtain copies of the files relating to the investigations into the suspects. It observed that the applicants had not been charged with an offence relating to the facts of the investigations in question or based on the material contained in those files, and that therefore the fact that they had not been familiar with that material had not been an obstacle to their effectively lodging an objection. It further noted that it had not been established that the applicants had submitted such a request to the investigating authorities. Nor had the applicants claimed not to have had access to the information, documents and evidence relating to the charges against them. It therefore found that complaint manifestly unfounded.

E. The applicants' trial

95. On 21 September 2015 the applicants were charged with attempting to overthrow the government and interfere with its operation, membership of the armed terrorist organisation FETÖ/PDY, abuse of power, and breach of the confidentiality of an investigation, on the basis of Articles 312, 314 (in connection with section 7 of Law no. 3713 on Terrorism), 257 and 285 of the Criminal Code. The indictment referred to a report dated 30 June 2015, prepared by the anti-terrorist section of the Directorate General of Security, referring to the Gülenist movement as FETÖ/PDY and describing its structure and activities.

96. On 5 October 2015 the 2nd Bakırköy Assize Court accepted the indictment and on 18 November 2015 it referred the case to the Court of Cassation, which had jurisdiction to try the applicants as they were judges of the first rank. The trial commenced before the 16th Criminal Chamber of the

Court of Cassation. During the trial, the applicants' detention was regularly reviewed and extended. Objections lodged by the applicants were rejected by the 17th Criminal Chamber of the Court of Cassation.

97. In a judgment of 24 April 2017, the 16th Criminal Chamber of the Court of Cassation found the applicants guilty of the charges of membership of an armed terrorist organisation and abuse of power, and sentenced them both to ten years' imprisonment. As regards the other charges against them – attempting to overthrow the government, and breaching the confidentiality of an investigation – it acquitted them, on the grounds that the constitutive elements of those offences had not been satisfied.

In a judgment of 26 September 2017, the Criminal General Assembly of the Court of Cassation upheld the judgment of the 16th Criminal Chamber. On that occasion, it ruled on objections raised by the applicants which related to procedure. With regard to 2nd Bakırköy Assize Court allegedly not having competence to decide on detention, the Criminal General Assembly noted that the court with competence to decide on both detention and the opening of the trial was the assize court closest to the judicial district in which the person concerned served, namely the Bakırköy Assize Court. It explained that by its decision of 12 February 2015, the HSYK had given second assize courts the power to judge terrorist offences, in order to ensure specialisation. For these reasons, it considered that the fact that the 2nd Bakırköy Assize Court – whose jurisdiction was not limited to a particular case or a specific person or group, and which ruled as a specialised court – had decided on the applicants' detention and the opening of the trial did not reveal any irregularities.

II. RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. The Constitution

98. The relevant parts of the provisions of the Constitution and Law no. 2802 relating to the principles of judicial independence are set out in *Baş v. Turkey* (no. 66448/17, §§ 52-55, 3 March 2020).

99. Article 140 of the Constitution provides, among other things, that the procedure relating to the opening of an investigation against judges and prosecutors for offences committed in or during the performance of their duties and their judging is regulated by law.

100. The relevant part of Article 159 § 9 of the Constitution reads as follows:

“The inspection of the judges' and prosecutors' compliance with the performance of their duties in accordance with the law and other regulations (administrative circulars, in the case of judges); the preliminary examination [*araştırma*], and if necessary the conduct of an examination [*inceleme*] and an investigation [*soruşturma*] in respect of them, to check whether they have committed an offence in or during the exercise of their duties and [to check whether] their attitudes and behaviour have been compatible

with their status and functions, shall be carried out by the Inspectors of the Council, on the proposal of the competent chamber and upon the authorisation of the President of the High Council of Judges and Prosecutor.”

By a Law of 21 January 2017, the HSYK (the High Council of Judges and Prosecutors) became the Council of Judges and Prosecutors.

B. The Criminal Code

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

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

102. Article 314 §§ 1 and 2 of the Criminal Code, which provides for the offence of membership of an armed 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.”

The “armed organisation” as provided for in Article 314 of the Criminal Code is a specific form of criminal organisation as provided for in Article 220 of the Criminal Code. Article 314 punishes the constitution of or membership in a criminal organisation formed with a view to committing offences against state security and the constitutional order. It is therefore mainly the purpose of the organisation that distinguishes the two crimes as well as the use of force and violence. Furthermore, according to Article 3 of the Anti-Terrorism Act (Act No. 3713), the offence under Article 314 of the Criminal Code is a terrorist offence.

C. The Code of Criminal Procedure

103. Article 26 § 1 of the CCP, relating to the procedure for an application for recusal, reads:

“(1) The application is presented through an application filed with the court to which [the judge whose recusal was requested] belongs, or by a clerk referring [the application] for the purpose of writing a record in this regard.”

104. Article 27 of the CCP, which relates to the courts that have competence to decide on an application for recusal, reads as follows in its relevant parts:

“...

(2) If the application for recusal is against a judge of a criminal court of first instance [*sulh ceza hakimi*], the [higher-level] criminal court of the same judicial district rules [on the application] ...

...

(4) If the application for recusal is accepted, another judge or court is appointed to hear the case. ...”

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

“1. If there is concrete evidence giving rise to a strong suspicion that the [alleged] offence has been committed and that there are grounds for pre-trial detention, a detention order may be made in respect of a suspect or an accused. Pre-trial detention may only be ordered in proportion to the sentence or preventive measure that could potentially be imposed, bearing in mind the significance of the case.

2. In the cases listed below, grounds for pre-trial detention shall be presumed to exist:

(a) ... if there are specific facts providing grounds for a suspicion of a flight risk;

(b) if the conduct of the suspect or accused gives rise to a strong suspicion

(1) of a risk that evidence might be destroyed, concealed or tampered with;

(2) of an attempt to put pressure on witnesses or other individuals ...”

106. For certain offences listed in Article 100 § 3 of the CCP (so-called “catalogue offences”), there is a statutory presumption that grounds for detention exist.

107. The relevant parts of Article 268 § 3 (a) of the CCP, on objections, as amended by Law no. 6545 of 18 June 2014, are worded as follows:

“If there are several magistrates’ courts in one place, objections to the decisions of a magistrate’s court are considered by the magistrate’s court whose number follows [the number of the court whose decision is the subject of the objection]. [If the decision at issue was made by] the magistrate’s court whose number is the final number [in the sequence], [the objection is examined] by magistrate’s court number 1. ... in places where there is an assize court, if there is only one magistrate’s court, [objections are considered] by the magistrate’s court in the judicial district of the nearest assize court.”

D. Law no. 5235 on the organisation of the courts

108. Magistrates’ courts in criminal matters were established by Law no. 6545 of 18 June 2014, which came into force on 28 June 2014, amending section 10 of Law no. 5235 on the organisation of the courts. Criminal courts of first instance (*sulh ceza mahkemesi*) were abolished and their powers in relation to preventive measures at the investigation stage were transferred to the criminal magistrates’ courts.

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

“Except in cases where additional powers have been conferred by law, the criminal magistrates’ courts shall be established to take decisions and measures requiring judicial intervention at the investigation stage and to examine objections against them.

Several criminal magistrates’ courts may be established in places where the caseload so requires. In that event, the magistrates’ courts shall each be assigned a number. Judges appointed to magistrates’ courts may not be transferred to other courts or assigned other duties by the justice commission for the judicial district (*adli yargı adalet komisyonlarınınca*). ...”

110. On 12 February 2015, under section 9(5) of Law no. 5235, the HSYK decided that in judicial districts with more than two assize courts, the second assize courts would specialise in dealing with terrorist offences and offences against the security of the State and the constitutional order. The HSYK clarified that these were not exceptional courts, but specialised courts, governed in all respects by the CCP.

E. Law no. 2802 on Judges and Prosecutors, Law no. 6087 on the Council of Judges and Prosecutors, Inspection Board Regulations, and relevant case-law

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

Section 82

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

Section 83

“Prior authorisation is not required for the investigation of facts that the judicial inspectors have become aware during an inspection or investigation and any delay could be prejudicial. However, the Ministry of Justice is immediately informed of the situation.”

Section 85

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

Section 88

“(1) Except for cases [where a person has been] discovered *in flagrante delicto*, which fall within the jurisdiction of the assize courts, judges and prosecutors suspected of committing an offence may not be arrested, subjected to a personal search or questioned, and their homes may not be searched. However, the Ministry of Justice shall be immediately informed of the situation.

(2) Where members and officers of the security forces act in breach of the provisions of the first subsection above, an investigation shall be conducted directly by the

competent public prosecutor in accordance with the provisions of ordinary law, and proceedings shall be instituted.”

Section 89

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

...”

112. In accordance with section 37 of the Inspection Board Regulations, the conduct of any investigations (*araştırma, inceleme, soruşturma*) against judges and prosecutors for offences committed in or during the performance of their duties is subject to the authorisation of the President of the HSYK, at the request of the Third Chamber. Prior authorisation is not necessary, however, for facts that judicial inspectors have become aware of, *ex officio* or following a complaint, during an inspection, and where any delay in the initiation of an investigation could be detrimental. Nevertheless, when moving to the investigation phase (*soruşturma*), the situation is notified to the President of the HSYK, clearly stating the convincing reasons, and attaching the relevant information and documents that served as the basis for this conviction.

113. Law no. 6087 on the HSYK was adopted on 11 December 2010, following a constitutional amendment. Section 9 of this Law states that the Second Chamber of the HSYK has the authority to decide on the opening of criminal proceedings and the temporary suspension of magistrates. The Third Chamber, on the other hand, has the competence to propose the opening of an investigation, among other things.

114. In its judgment in *Süleyman Bağrıyanık and Others*, adopted unanimously on 16 November 2016, the Constitutional Court reviewed the lawfulness of the pre-trial detention of four public prosecutors suspected of offences committed in connection with their official duties. After the authorisation procedure under section 82 of Law no. 2802 had been initiated, the accused had been placed in pre-trial detention by the 2nd Tarsus Assize Court. In response to a complaint by the accused that that court, which specialised in dealing with terrorist offences, lacked jurisdiction and that the case should have been heard by the duty assize court, the Constitutional Court noted that under section 89 of Law no. 2802, the 2nd Tarsus Assize Court had jurisdiction to institute criminal proceedings, and accordingly it had been entitled to order the accused’s detention, under section 85 of the same Law.

115. In response to a complaint by the accused under section 88 of Law no. 2802, the Constitutional Court observed that that Law did not contain any provisions prohibiting the adoption of preventive measures in respect of judges and prosecutors once the initiation of an investigation had been

authorised in accordance with the procedure laid down in Law no. 2802. It noted that by the date of the accused's initial detention, the examination and investigation procedure had been completed and permission to initiate a investigation had been given.

116. The Constitutional Court further noted that the Mersin Assize Court, which had examined an objection by the accused against the order for their detention, had found that the prohibition in section 88(1) of Law no. 2802 related only to actions that could be taken by the security forces, and did not preclude the judicial authorities from taking preventive measures. The Constitutional Court held that this interpretation and the application of domestic law had been neither unreasonable nor arbitrary, and that the accused's detention had therefore been lawful.

117. In the case of *Turan* (plenary, Appeal No. 2017/10536, 4 June 2020), the Constitutional Court reiterated that the criminal liability of magistrates in the event of an offence had been commonly accepted in modern legal systems, and that offences committed by them in or during the exercise of their functions did not go unpunished. For this reason, the Constitution and Laws nos. 2802 and 6087 provided for special investigation and prosecution procedures. Referring to the case of *Süleyman Bağrıyanık and Others*, the Constitutional Court considered that admitting that magistrates could not be arrested, searched, interviewed and therefore detained in the absence of a situation where they had been caught *in flagrante delicto* would mean that it would be impossible to resort to preventive measures as regards crimes committed by magistrates, a situation which would be incompatible with the requirements of the rule of law. It concluded that there was no legal impediment to the application of preventive measures, including detention, against judges and prosecutors, for offences related to their function, as long as the procedural provisions of the relevant law were respected, and the competent authorities authorised the investigation.

III. RELEVANT COUNCIL OF EUROPE INSTRUMENTS

118. Paragraph 68 of Recommendation CM/Rec (2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) reads as follows:

“Liability and disciplinary proceedings

...

68. The interpretation of the law, the assessment of the facts or the assessment of the evidence, which judges proceed with in the judgment of cases, should not give rise to the undertaking of their criminal liability, except in cases of malice.”

119. The Consultative Council of European Judges, at its eleventh plenary meeting (17-19 November 2010), adopted a Magna Carta of Judges (Fundamental Principles) summarising and codifying the main conclusions of opinions it had already adopted. Paragraph 20 of that document, under the heading “Ethics and responsibility”, reads as follows:

“Ethics and responsibility

...

20. Judges shall be criminally liable in ordinary law for offences committed outside their judicial office. Criminal liability shall not be imposed on judges for unintentional failings in the exercise of their functions.”

THE LAW

I. JOINDER OF THE APPLICATIONS

120. In view of the similarity of the applications, the Court considers it appropriate to consider them together and therefore decides to join them.

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

121. The applicants claimed that they had been placed in detention in breach of domestic law. They also alleged that there had been no evidence of plausible grounds to suspect that they had committed the alleged offences, and that the domestic courts had not sufficiently justified the decisions concerning their detention.

The applicants alleged that there had been a violation of Article 5 of the Convention, the relevant parts of which are worded as follows:

“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.”

122. The Government disputed the applicants’ arguments.

A. Procedure prescribed by law

1. *The parties' arguments*

(a) The applicants

123. The applicants denounced the non-compliance with the procedural rules provided for in Turkish law. They complained that an investigation had been opened without the prior authorisation of the President of the HSYK, and argued that the conditions for implementing section 83 of Law no. 2802 had not been satisfied.

124. According to the applicants, under Article 159 of the Constitution, the Third Chamber of the HSYK had not been allowed to decide to continue the investigation in their case, as it had done in its decision of 28 April 2015. They explained that under this provision, the opening of an investigation had only been possible on the proposal of the competent chamber and after the President of the HSYK had approved such a proposal. Since the President of the HSYK had not given his approval until 11 June 2015, the conditions set out in this provision had not been satisfied when they had been detained. They added that section 82 of Law no. 2802 was contrary to Article 159 of the Constitution as it mentioned only the authorisation to be given by the Minister of Justice. The applicants, on the other hand, stated that the conditions for applying section 83 of the Law no. 2802 had not been satisfied.

125. According to the applicants, assuming that an investigation had been properly authorised, section 88 of Law no. 2802 had been ignored too. In accordance with this provision, magistrates could only be arrested and questioned where they had been caught *in flagrante delicto*, and that had not happened in their case.

126. The applicants also claimed that judicial inspectors had not been competent to request their detention.

127. Furthermore, the applicants questioned the jurisdiction of the 2nd Bakırköy Assize Court to order their detention. According to them, at the investigation stage of a case, jurisdiction to decide on detention belonged to the assize court on duty. The special jurisdiction of a court concerned only the trial phase, and not the investigation phase. The applicants also believed that they had been detained by a court which had lacked competence, and argued that specialised courts had been formed to take decisions based on the wishes of political power.

128. The applicants asserted that the issue of the independence and impartiality of the 2nd Bakırköy Assize Court had not been carefully considered by the Constitutional Court, and nor had the appointment to the court of a judge who was allegedly close to power or who had taken part in investigations into FETÖ/PDY, or the transfer of a dissenting judge. According to them, the presidents and members of courts were appointed by the HSYK, which was under the control of the Executive. The applicants also

referred to statements made by the HSYK to a daily newspaper which had indicated that the necessary would be done again in the event of a repeat of the event of the “kamikaze judges”, in reference to the decisions rendered by them. The Constitutional Court had not considered the allegation that the decision of the 2nd Bakırköy Assize Court had in fact been drafted by the 4th Bakırköy Magistrate’s Court, something which had been proven by the publication of a decision written in similar terms by the Fourth Magistrate’s Court and published on Twitter a few hours before the decision of the 2nd Assize Court.

129. The applicants asserted that, after large-scale police operations of 17-25 December 2013, the Constitutional Court had not rendered a judgment finding a violation in respect of an application lodged in connection with FETÖ/PDY. The magistrates who had rendered decisions in favour of FETÖ/PDY had either been detained, dismissed or suspended from their duties, or transferred to a different jurisdiction. They argued that their case was the greatest example of this, and that there had been a desire to make an example of them and to show the fate reserved for magistrates who wanted to take decisions in accordance with the law and in full independence.

130. They explained that the two members of the Constitutional Court and the two members of the HSYK who had not voted with the majority had been dismissed from their posts and detained after the attempted *coup d’état* in July 2016. The judge who had opposed the extension of their detention on 24 July 2015 had been transferred to another judicial district. Therefore, any judges who might have decided to release or acquit them had been at risk of being dismissed or arrested.

131. According to the applicants, the Government had actively intervened in the HSYK elections held in September 2014 and allowed the election of members with their agreement. By way of the new appointments, the newly formed HSYK had reorganised all judicial institutions.

(b) The Government

132. The Government explained that, while section 82 of Law no. 2802 required prior authorisation in order for an investigation to be opened, section 83 of the same Law provided for an exception: judicial inspectors were authorised to investigate, without prior authorisation, facts that they had become aware of during their inspections, when a delay in the investigation of these facts would be prejudicial. They noted that the procedure under section 83 of Law no. 2802 had been implemented in the applicants’ case; the HSYK Inspection Board had started, on 25 April 2015, a general inspection of Istanbul Criminal Courts following irregularities reported by the press. It explained that on the same day an examination (*inceleme*) was launched *ex officio* as during the said inspection, the inspectors were informed that the applicant Metin Özçelik, as judge of the Istanbul 29th Criminal Court, had granted the suspects’ request for recusal of magistrate’s courts without having

competence to do so and had assigned the Istanbul 32nd Criminal Court to rule on the requests for release of the suspects and that the applicant Mustafa Başer, as judge of the latter court, had ordered the release of all of the suspects.

133. The Government noted also that the investigations into the suspects whom the first applicant had decided to release had been linked to terrorist offences. Almost all the suspects had been high-ranking police officers, and there was serious evidence that the individuals had committed the alleged offences in cooperation with and with the assistance of FETÖ/PDY's members within the judiciary, using their position. In view of the organisation's network within public institutions and its power as regards the media, a delay in opening an investigation would have been detrimental in the applicants' case.

134. The Government noted that the judicial inspector – after reviewing the decisions taken by the applicants, the responses sent by the magistrates' courts and the public prosecutor's office, the statements of the clerks working with the applicants, and the duty list – had proposed in his preliminary report of 26 April 2016 that the applicants be suspended from their posts on the grounds that their continued service would impair the proper conduct of the investigation, as well as the authority and reputation of the judiciary; that proposal had been accepted by the Second Chamber of the HSYK.

135. In so far as the applicants alleged that there had been a violation of section 88 of Law no. 2802, the Government submitted that it was not possible to say that the restrictions provided for by this provision could still be applied after the decision to continue the investigation. The Government explained that once the Third Chamber of the HSYK had decided to move on to the investigation phase, there had no longer been any obstacle to investigative acts, including preventive measures, being carried out. Alternatively, they submitted that the offences that had justified the applicants' detention had fallen within the jurisdiction of the 2nd Assize Court. Given the continuous nature of the actions attributed to the applicants and the seriousness of their intent, as well as the repeated nature of the organisational offences, it could have been considered that the applicants had been caught *in flagrante delicto*.

136. With regard to the applicants' allegation that the 2nd Bakırköy Assize Court had lacked competence, the Government observed that the 2nd Bakırköy Assize Court had been the competent court to rule on the applicants' pre-trial detention under section 85 of Law no. 2802, since under section 89 of the same Law, it had been the competent authority to decide whether to open a trial. In view of the offence which the applicants had allegedly committed – membership of an armed terrorist organisation – the application for pre-trial detention had been directly addressed to the 2nd Bakırköy Assize Court as a specialised court. As the 2nd Bakırköy Assize Court had been the competent court to decide to open a trial under

section 89 of Law no. 2802, it could not be considered arbitrary that that court had been considered competent to decide on the applicants' pre-trial detention under section 85 of the same Law.

137. The Government added that the judges sitting at the Bakırköy Assize Court had been appointed by the HSYK, like all other judges, and enjoyed the same constitutional guarantees. In terms of independence, there was no reason to consider that those judges were different from the judges sitting in other courts in Bakırköy.

138. Referring to paragraph 68 of Recommendation CM/Rec(2010)12 of the Committee of Ministers (paragraph 118 above), the Government argued that a judge who had acted maliciously during judicial activity could incur criminal liability, despite apparent judicial activity.

139. The Government stated that impunity for judges could not be inferred from the principle of independence because of their decisions and actions; it was possible to bring criminal proceedings against judges who committed acts which were prescribed as offences by law.

2. *The Court's assessment*

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

(a) *Relevant principles*

141. The deprivation of liberty must be "lawful". Where the "lawfulness" of detention is in issue, including the question of whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of that law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 74, 22 October 2018, and *Ilmseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 135, 4 December 2018).

142. On this last point, the Court stresses that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009, *Khlaifia and Others v. Italy* [GC],

no. 16483/12, §§ 91-92, 15 December 2016, and *Alparslan Altan v. Turkey*, no. 12778/17, § 103, 16 April 2019).

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

144. The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (see *Baka v. Hungary* [GC], no. 20261/12, § 165, 23 June 2016, with further references). This consideration, set out in particular in cases concerning the right of judges to freedom of expression, is equally relevant in relation to the adoption of a measure affecting the right to liberty of a member of the judiciary. In particular, where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with. Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018), the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention (see *Alparslan Altan*, cited above, § 102, and *Baş v. Turkey*, no. 66448/17, § 144, 3 March 2020).

145. Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty should be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law should be clearly defined and that the law itself should be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires all law to be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Del Río Prada*, cited above, § 125; *Medvedyev and Others v. France*, no. 3394/03, § 80, 10 July 2008; *Creangă v. Romania* [GC], no. 29226/03, § 120, 23 February 2012; *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 92, 15 December 2016; and *Alparslan Altan*, cited above, § 103).

(b) The application of these principles to this case

146. The Court notes that the applicants' detention on remand was decided by the 2nd Bakırköy Assize Court under Article 100 of the CCP and section 85 of Law no. 2802, on the grounds that they were suspected of attempting to overthrow the government and undermine its operation, and of being members of an armed organisation, crimes prohibited by Articles 312 and 314 of the Criminal Code.

147. The applicants asserted that their detention had breached domestic law in several respects. They firstly complained that their detention had been decided without prior authorisation from the President of the HSYK as provided for by domestic law. In this regard, assuming that the investigation had been regular, they claimed to have been detained in disregard of section 88 of Law no. 2802. Lastly, the applicants alleged that the 2nd Bakırköy Assize Court had not had competence to decide on their detention, and that that court had lacked independence and impartiality.

(i) Prior authorisation for initiating a criminal prosecution

148. The Court notes that the present case concerns the pre-trial detention of judges in relation to offences allegedly committed during the exercise of their duties. According to section 85 of Law no. 2802, the implementation of the pre-trial detention measure is conditional on the opening of an investigation and can only be implemented at that stage. Therefore, the issue of prior authorisation for the investigation is of crucial importance in respect of the lawfulness of the applicants' detention within the meaning of Article 5 § 1 of the Convention.

149. In this respect, the Court notes that the Turkish legal system provides for a special regime as regards judges' criminal responsibility in relation to offences committed in the course of the exercise of their duties. In particular, in order to secure their independence, the domestic law provides for procedural immunity to the judges in the form of prior authorisation for the initiation of criminal investigations against them. Section 82 of Law no. 2802, which is similar to the provision under Article 159 of the Constitution, makes the opening of an investigation against judges and prosecutors, for offences related to their duties, conditional on the authorisation to be given by the Ministry of Justice acting as the President of the HSYK.

150. In the present case, the Third Chamber of the HSYK decided not to act in accordance with the rule laid down by section 82 of Law no. 2802 but applied the exception provided for by section 83 of that law. Indeed, on 28 April 2015, the Third Chamber decided to move on to the investigation phase, without obtaining the prior approval of the President of the HSYK, on the grounds that a delay in initiating an investigation would be detrimental (paragraph 49 above).

151. In this connection, the Court reiterates that the requirements of legal certainty become even more paramount where a judge has been deprived of his liberty (*Baş*, cited above, § 158). As noted in paragraph 144 above, where domestic law has granted judicial protection to members of the judiciary to safeguard the independent exercise of their functions, namely under section 82 of Law no. 2802 and Article 159 of the Constitution, it is essential that such provisions are complied with. In particular, given the prominent place that the judiciary occupies amongst the State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (*Alparslan Altan*, cited above, § 102), the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was issued from the standpoint of the provisions of the Convention, particularly when the detention has resulted from the application of an exception.

152. Thus, the Court considers that where the authorities decide to apply an exception that has the effect of depriving members of the judiciary of procedural guarantees granted by domestic law in the context of their detention – as in the present case – that exception must be narrowly interpreted and applied, and the necessity of its application must be convincingly established and demonstrated by the authorities in their decisions. It is therefore on the basis of the reasons given in the Third Chamber’s decision of 28 April 2015 that the Court is called upon to examine whether the conditions for the application of section 83 have been met.

153. The implementation of the exception provided for by section 83 of Law no. 2802 require two conditions to be met: a) existence of facts that the judicial inspectors have become aware of during an inspection or investigation, and b) delay in launching the investigation would be prejudicial (paragraph 111 above). The Court notes however that, in its decision to move to the investigation phase, the Third Chamber merely referred to section 83 of Law no. 2802, without giving any explanation or engaging in a discussion as to whether the conditions required for the application of the aforementioned provision were met.

154. As regards the first condition required by section 83 – namely the existence of facts that the judicial inspectors have become aware of during an inspection or investigation – the Court observes that the Third Chamber’s decision to move on to the investigation phase was based on certain irregularities attributed to the applicants as identified in the preliminary report dated 26 April 2015, as well as to some articles published in the press and on the Internet criticising the decisions taken by the applicants (paragraph 49 above). In this respect, since the inspection was initiated and the examination was launched *ex officio* after the publication of some articles concerning irregularities imputed to the applicants, a serious doubt arises as to whether the case was about irregularities that the authorities “became aware of during

an inspection” as required by the above-mentioned provision. The Third Chamber’s decision contains no information about the date of the articles reporting irregularities nor on their content and, consequently, it does not allow the Court to verify whether the information concerning the irregularities imputed to the applicants was actually discovered during the inspection or whether that information was already available beforehand. Thus, the Court considers that the Third Chamber failed to demonstrate in its decision that the case was about issues that the authorities “became aware of during an inspection”, as required by the above-mentioned provision.

155. The Court further notes that the charges on the basis of which the applicants’ pre-trial detention was decided were closely linked to their actions and decisions in relation to the processing of the requests for recusal of judges and release of suspects. In this respect, it is noteworthy that all the decisions adopted by the HSYK since the very beginning, starting with the opening of an inspection on 25 April 2015, and finally also the decisions to place the applicants in pretrial detention, were based in fact on these actions and decisions of the applicants. Having regard to this subject matter and the lack of information showing that the inspection or examination was related to any other issues, as well as the timing of the decision to open an inspection and examination (taken immediately after the contested actions and decisions of the applicants), the Court is not convinced that the investigation concerned “facts that the judicial inspectors have become aware during an inspection or investigation” within the meaning of section 83. To hold otherwise would undermine the procedural safeguards which members of the judiciary are afforded under section 82.

156. In conclusion the Court has very serious doubts as to whether the first condition in section 83 for dispensing with a prior authorisation for the investigation and, in consequence, also for ordering the applicants’ pre-trial detention was met.

157. As regards the second condition required by section 83 – namely the risk that a delay in opening an investigation would be detrimental – the Court takes note of the Government’s position on that point (see paragraph 133 above). However, it notes that the Third Chamber decided to apply the exception set out in that provision without explaining why a delay in opening an investigation would be detrimental. On this point, the Court refers to section 37 of the Inspection Board Regulations, which provides that when moving to the investigation phase without prior authorisation, the President of the HSYK should be notified of the reasons together with the relevant information and documents that served as the basis for the opinion that a delay in opening an investigation would be detrimental (paragraph 112 above). Similarly, the judges and prosecutors who were deprived of procedural guarantees should also be informed in detail of the reasons which led to the application of the exception.

158. In the Court's opinion, the Third Chamber's decision, which is laconic and refers solely to the legal provision in question, lacked sufficient reasoning and failed to provide protection from arbitrariness in the context of the judges' detention in connection with the offences allegedly committed during the exercise of their duties.

159. In the light of the foregoing, the Court concludes that the applicants' detention, ordered in conditions depriving them of the procedural safeguards afforded to judges in relation to offences allegedly committed in the course of the exercise of their duties, did not take place in accordance with a procedure prescribed by law, as required by Article 5 § 1 of the Convention. There has therefore been a violation of that provision.

160. This being so, the Court does not consider it necessary to examine the complaint concerning the application of section 88 of Law no. 2802, submitted by the applicants in a subsidiary manner.

(ii) Jurisdiction of the 2nd Bakırköy Assize Court to decide on the applicants' detention, and the independence and impartiality of the judges sitting at that court

161. The Court notes that in accordance with section 85 of Law no. 2802, the detention of judges and prosecutors is decided by the competent authority which decides on the opening of a trial. Section 89 of the same Law provides that it is the assize courts closest to the judicial district of the assigning court that have jurisdiction over the opening of the trial –, namely the 2nd Bakırköy Assize Court in the case of the applicants.

162. In this regard, the question of the 2nd Bakırköy Assize Court's jurisdiction to decide on the applicants' detention was examined by the Constitutional Court in the context of the right of individual application brought by the applicants. The Constitutional Court noted that the applicants had been remanded in custody by the 2nd Bakırköy Assize Court, which had been designated by the HSYK as a specialised court for terrorist offences. According to the Constitutional Court, since the offences of which the applicants had been accused were offences which could be tried by that specialised court, and the Second Bakırköy Assize Court had jurisdiction to decide to open a trial under section 89 of Law no. 2802, it could also be considered competent to rule on detention under section 85 of the same Law.

163. The applicants' allegation that the 2nd Bakırköy Assize Court lacked competence was also examined by the Criminal General Assembly of the Court of Cassation, which was called upon to rule on the applicants' appeal in cassation. It observed that the 2nd Bakırköy Assize Court had competence to decide on both detention and the opening of a trial. It explained that the HSYK had given second assize courts the competence to judge terrorist offences, in order to ensure specialisation. For these reasons, it considered that the fact that the 2nd Bakırköy Assize Court – whose jurisdiction was not limited to a particular case, person or group, and which functioned as a

specialised court – had decided on the applicants’ detention and the opening of the trial did not reveal any irregularities.

164. As regards the conclusions reached by the Constitutional Court and the Court of Cassation, and in view of its limited power to monitor applications for compliance with national law, the Court concludes that the jurisdiction of the 2nd Bakırköy Assize Court to decide on the applicants’ detention had a legal basis (for a similar approach, see *Michalák v. Slovakia*, no. 30157/03, § 121, 8 February 2011). The applicants’ detention by the 2nd Bakırköy Assize Court does not reveal any evidence of arbitrariness which would render their detention incompatible with Article 5 of the Convention.

165. The applicants complained that they had been detained by a specialised court, and the Court notes that on 12 February 2015, before the applicants were detained, the HSYK had decided that in judicial districts with more than two courts, the second assize courts would specialise in dealing with terrorist offences. The aim was to ensure specialisation in the courts.

166. The Court reiterates that it has previously considered that the creation of a special criminal court to deal with terrorist offences was in accordance with Article 6 § 1, and that making an existing court specialised was a matter of internal administration and could not be regarded as the creation of a special court (see *Erdem v. Germany* (dec.), no. 38321/97, 9 December 1999, for the creation of an additional chamber within an existing court; see also *Fruni v. Slovakia*, no. 8014/07, § 142, 21 June 2011; and *Bahaettin Uzan v. Turkey*, no. 30836/07, § 50, 24 November 2020).

167. As regards the independence and impartiality of the judges sitting on the bench of 2nd Bakırköy Assize Court, the Court points out that the employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when referring to the “special trust and loyalty” that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions *a fortiori* based on the requirements of law and justice, without fear or favour. It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality (see *Grzęda v. Poland* [GC], no. 43572/18, § 264, 15 March 2022). However, having examined the information and documents submitted by the applicants, the Court considers that the applicants have failed to substantiate their allegation concerning the lack of objective impartiality of the judges of the 2nd Bakırköy Assize Court. It further finds that the judges sitting on the bench of that court enjoyed the same constitutional and legislative guarantees

ensuring their independence and impartiality (see *Gültekin and Others v. Turkey* (dec.), no. 52941/99, 13 May 2004, and *Halit Çelebi v. Turkey* (dec.), no. 54182/00, 28 September 2004). Moreover, there is no indication that there was any prejudice or bias on the part of the judges in question as regards the personal circumstances of the applicants.

168. In view of the above, the Court considers that there has been no violation of Article 5 of the Convention insofar as the applicants complain about the lack of jurisdiction of the 2nd Bakırköy Assize Court to decide on their detention, and the independence and impartiality of the judges sitting on the bench of that court.

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

1. The parties' arguments

(a) The applicants

169. The applicants claimed to have been remanded in custody in the absence of concrete evidence of a strong suspicion that they had committed the alleged offences. The finding that they had acted in accordance with FETÖ/PDY's instructions had not been based on any concrete evidence, and it had been impossible to establish a link between the decisions which they had adopted and the words of Fetullah Gülen, or a link between those decisions and the suspects.

170. According to the applicants, the only acts attributable to them were the judicial decisions which they had taken. They claimed to have acted within their jurisdiction and in accordance with the law.

171. They explained that when a judge heard an application for recusal, he was obliged to rule on it. In this regard, they criticised the Constitutional Court for failing to include certain factual information in its judgment, including the decision of the 9th Assize Court of 20 February 2015 (paragraph 4 above) which showed that criminal courts had jurisdiction to decide on applications for recusal. The only criticism that could be made in respect of the second applicant in this regard was a possible error of judgment in relation to his competence, an error which could not be punished so severely.

172. The applicants also argued that the 10th Istanbul Magistrate's Court had not been competent to declare a decision by a criminal court null and void; assuming that their decisions had been unlawful, the remedy to use would have been an appeal in the interests of the law. The applicants noted that new judges had been appointed to sit at the 29th and 32nd Criminal Courts after they had been suspended; the fact that the public prosecutor had asked those new judges to rule again on the decisions which they had adopted

showed that the decisions adopted by the 10th Magistrate's Court had not been valid.

173. The applicants justified the fact that the applications for recusal had been registered the day after they had been received by referring to their workload. As regards the fact that the second applicant had ruled on the applications solely on the basis of documents submitted by the suspects, they pointed out that the prosecutors in charge of the investigations had refused to send the relevant files, and that according to a judgment of the Court of Cassation, if it was impossible to obtain files, a judge could take a decision on the basis of photocopies submitted by the parties, and was not required to consult the files on UYAP.

174. The applicants then defended the merits of the decisions allowing the applications for recusal. They questioned the independence and impartiality of all magistrates' courts, which had been specially created to combat the "Gülenist" movement.

175. The first applicant claimed to have reviewed the applications for release in accordance with the decision of the second applicant, who had appointed him to rule on those applications. As regards the fact that he had decided on the applications for release in the space of one day, he noted that he had not reviewed the merits of the cases, but merely the legality of the detention of those concerned, and that he could not be criticised for acting promptly. According to the first applicant, it had not been necessary to read all the contents of the files in order to rule on the applications for release, but only the documents relating to detention. Assuming that he had issued an incomplete or erroneous decision, his detention would have been a disproportionate measure.

176. The applicants further argued that the provisions on which the charges against them had been based had not met the quality requirements of a statute. They stated that, by an extensive interpretation, acts relating to freedom of expression and freedom of assembly could fall under those provisions. In their view, their detention as a result of the decisions which they had taken was an example of such an extensive interpretation.

177. The applicants also contended that the elements of the alleged offences had not been satisfied. They pointed out that at the time of their detention FETÖ/PDY had not yet been identified as a terrorist organisation by any court decision. They argued that there had been no evidence of the use of force and violence by the Gülenist network. Thus, given the absence of a terrorist organisation, the applicants did not see how it could be alleged that they had received instructions from such an organisation. They submitted that it could not be said that the decisions rendered by them had involved elements of force and violence.

178. Referring to statements made by representatives of the executive and the HSYK in the days following their detention, they claimed to have been detained as a result of pressure from the executive.

179. The applicants argued that the Government's submissions concerning the attempted *coup d'état* of 15 July 2016, in their comments on the case, were irrelevant to this case, given that the event had occurred after they had been detained.

180. The applicants explained that Gülenists' infiltration into various State institutions and the establishment of a secret parallel State structure had been denounced as early as 2010 by the opposition and various non-governmental organisations. At the time, the ruling party had defended the Gülenist movement. After the emergence of conflicts of interest between the Government and that movement, as a result of operations between 17 and 25 December 2013, the authorities had reportedly begun to regard the movement as a terrorist organisation and to refer to it as FETÖ/PDY. The applicants accused the Government of trying to manipulate public opinion and concealing the truth about the attempted coup.

(b) The Government

181. The Government firstly observed that the applicants had been detained under Article 5 § 1 (c) of the Convention as part of a criminal investigation.

182. The Government considered that there had been convincing and sufficient evidence for the applicants' detention, in view of: the course of events; the chronology of events; the fact that the applicants had allowed applications lodged in an organised manner, in disregard of established practice; and FETÖ/PDY's level of organisation within public institutions.

183. The Government also noted that a few days before the impugned decisions, the Constitutional Court had rejected individual appeals by the suspects concerning the legality of their detention as manifestly unfounded.

184. The Government also drew the Court's attention to a document found on a USB stick seized during a search of a certain F.Y.'s home on 26 July 2016. F.Y. had been prosecuted for belonging to FETÖ/PDY and was believed to have been a graphic designer for *Zaman*, a daily newspaper. The document is a copy of a card in the name of Fetullah Gülen and signed by him, dated 19 April 2015 and written in Pennsylvania, in the United States. The document translates as follows:

"Honourable Judge of the Criminal Court,

I feel the need to liberate ... our brothers of the *Medrese-i Yusufiye*. *Inshallah*, you will also adhere to the prayer 'My God, free them with ease'. Thanks to your effort, ten million families will rejoice, *inshallah*.

I ask you this because our ideas are parallel. I'm kissing you with my eyes.

Fetullah Gülen"

2. *The Court's assessment*

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

(a) **Relevant principles**

186. The Court reiterates that a person may be detained under the first branch of Article 5 § 1 (c) of the Convention only in the context of criminal proceedings, for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX, and *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 124, 20 March 2018). 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).

187. Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as “reasonable” will, however, depend upon all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182, *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; and *Mehmet Hasan Altan*, cited above, § 125).

188. The Court further reiterates that Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities have obtained sufficient evidence to bring charges at the time of arrest. The purpose of questioning during detention under Article 5 § 1 (c) is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A, and *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, § 52, 31 May 2016).

189. The Court's task is to determine whether the conditions laid down in Article 5 § 1 (c) of the Convention, including the pursuit of the prescribed legitimate purpose, have been fulfilled in the case brought before it. In this context, it is not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which are better placed to assess the evidence adduced before them (see *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016, and *Mehmet Hasan Altan*, cited above, § 126).

190. As it has consistently held, when assessing the “reasonableness” of a suspicion, the Court must be able to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured. Consequently, the respondent Government have to furnish at least some facts or information

capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence (see *Fox, Campbell and Hartley*, cited above, § 34 *in fine*; *O'Hara*, cited above, § 35; and *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 89, 22 May 2014).

191. The Court also reiterates that the suspicion against a person at the time of his or her arrest must be “reasonable” (see *Fox, Campbell and Hartley*, cited above, § 33). This applies *a fortiori* when a suspect is detained. The reasonable suspicion must exist at the time of the arrest and the initial detention (see *Ilgar Mammadov*, cited above, § 90).

192. In addition, the requirement for a judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion that the arrested person has committed an offence – already applies at the time of the first decision ordering detention on remand, that is to say “promptly” after the arrest (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 102, 5 July 2016).

(b) Application of these principles to this case

193. The Court is called upon to consider whether, at the time of the applicants’ detention, there was a reasonable suspicion that they had committed an offence.

194. The Court observes that the second applicant was placed in pre-trial detention on 30 April 2015, and the first applicant was placed in pre-trial detention on 1 May 2015; they were detained because they were suspected of attempting to overthrow the government and impair its operation, and of being members of an armed organisation. They were indicted on 21 September 2015. The public prosecutor demanded that they be convicted not just for attempting to overthrow the government and undermine its functioning, and for being members of FETÖ/PDY, but also for abusing their power, and for breaching the confidentiality of an investigation. On 24 April 2017 the applicants were found guilty of membership of an illegal organisation and abuse of power, and were convicted by the 16th Criminal Chamber of the Court of Cassation. Their conviction was confirmed on 26 September 2017 by the General Assembly of the Court of Cassation in Criminal Matters.

195. The Court takes note of the Government’s argument that the organisation in question was atypical in nature and had extensively infiltrated influential State institutions and the judicial system under the guise of lawfulness. Such alleged circumstances might mean that the “reasonableness” of the suspicion justifying detention cannot be judged according to the same standards as are applied in dealing with conventional offences (see, *Baş*, cited above, § 183).

196. The Court nevertheless emphasises that the exigencies of dealing with terrorist crime cannot justify stretching the notion of “reasonableness” to the point where the essence of the safeguard secured by Article 5 § 1 (c) of

the Convention is impaired (compare *Fox, Campbell and Hartley*, cited above, § 32). The Court's task in the present case is therefore to ascertain whether there were sufficient objective elements at the time of the applicants' initial detention to satisfy an objective observer that they could have committed the offence of which they were accused of by the authorities. In so doing, it must assess whether the measure in question was justified on the basis of information and facts available at the relevant time which had been submitted to the scrutiny of the judicial authorities that ordered the detention. It should be borne in mind that these considerations are particularly important for members of the judiciary, and in this instance for the applicants, judges at the time they were placed in pre-trial detention.

197. The Court notes that the 2nd Bakırköy Assize Court, after examining all the material in its possession, considered that there was a strong suspicion that the applicants had acted in concert with the suspects in order to allow their release. In doing so, it relied on all the material in the investigation file, namely: the record relating to the transcript of Fetullah Gülen's speech; the court decisions rendered by the applicants and by the 10th Magistrate's Court; the letter of 26 April 2015 sent by the chief clerk of the 29th Criminal Court; the judicial inspector's preliminary report of 26 April 2015; the table showing the duty courts and magistrates; the opinion issued on 6 February 2015 by the Directorate; the testimony of the clerks of the 29th Criminal Court; and the information obtained from UYAP.

198. The Court notes that the examination of this material suggested indeed that the applicants had disregarded the rules of procedure and the usual practice of the courts in adopting the contested decisions. It thus showed that the applications for recusal and release submitted by the lawyers for sixty-three of the suspects had not been registered and processed in accordance with the usual procedure of the courts; the applications had been handed over by the lawyers and delivered directly into the hands of the second applicant, who had personally acknowledged receipt, joined them to each other and not registered them in UYAP until the following evening. The chief clerk of the 29th Criminal Court had not been informed of the applications, whereas usually she would have been. The evidence available to the assize court also showed that the second applicant had acted in disregard of the procedural standards relating to recusal, namely Article 26 § 1 of the CCP, which explicitly and clearly provided for an application for recusal being sent to the judge who was being challenged. Moreover, according to the clerk's statements, by requesting that the applications for release be submitted to the first applicant, the second applicant had acted in disregard of the rules of competence, since only the magistrates courts were competent to decide on pre-trial detention at the investigation stage. The evidence available to the assize court also suggests that the first applicant, in ruling on the applications for release, ignored section 10 of Law no. 5235, which gives magistrates' courts the competence to take the decisions to be taken by a judge at the

investigation stage. In the Court's view, however, these irregularities attributed to the applicants as regards the process by which they adopted the contested decisions cannot be considered as sufficient objective elements at the time of the applicants' initial detention to satisfy an objective observer that they could have committed the offences of overthrowing of the government and membership of a terrorist organisation. The evidence available was not sufficient to make a strong link between the applicants' conduct and these offences, and to consider that they acted upon the instructions of the organisation of which they were allegedly members.

199. Insofar as the Government rely on evidence seized during a search of a certain F.Y.'s home on 26 July 2016, suggesting that the applicants acted upon the instructions of Fetullah Gülen (paragraph 184 above), it should be noted that the relevant evidence was not adduced until long after the applicants' initial detention. Thus, the Court considers that it is not necessary to examine this evidence to ascertain whether the suspicion existing on the date of their initial detention was "reasonable". It should be noted in this connection that in the context of the present case, the Court was called upon to examine whether the applicants' initial detention was based on a reasonable suspicion, and not whether such suspicion persisted in relation to their continued detention.

200. The fact that, before being placed in pre-trial detention, the applicants were questioned by the Bakırköy Assize Court on 30 April and 1 May 2015 in connection with imputed offences reveals, at most, that the authorities genuinely suspected them of having committed these offences; but that fact alone would not satisfy an objective observer that the applicants could have committed the offences in question.

201. The Court is mindful of the fact that the applicants' case has been taken to trial. It notes, however, that the complaint before it relates solely to their initial detention. Moreover, it would emphasise that the fact that they have been convicted at first instance and on appeal (see paragraph 97 above) has no bearing on its conclusions concerning this complaint, in the examination of which it is called upon to determine whether the measure in issue was justified in the light of the facts and information available at the relevant time, that is, on 30 April and 1 May 2015.

202. In view of its above analysis, the Court considers that no specific fact or information giving rise to a suspicion justifying the applicants' detention were mentioned or produced during the initial proceedings by the 2nd Bakırköy Assize Court, which nevertheless concluded with the adoption of such a measure in respect of the applicants, who were judges at the time. Since the Government have not provided any other evidence, "facts" or "information" capable of satisfying it that the applicants were "reasonably suspected", at the time of their initial detention, of having committed the alleged offences, it finds that the requirements of Article 5 § 1 (c) regarding

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

203. The Court therefore concludes that there has been a violation of Article 5 § 1 of the Convention for lack of reasonable suspicion that the applicants committed an offence.

C. Alleged failure to provide sufficient reasons for the applicants’ pre-trial detention

204. Having regard to its finding under Article 5 § 1 of the Convention (see paragraph 203 above), the Court considers that it is unnecessary to examine whether in the present case the authorities satisfied their requirement to give relevant and sufficient reasons for detention – in addition to the persistence of reasonable suspicion that the arrested person had committed an offence – from the time of the first decision ordering pre-trial detention, that is to say “promptly” after the arrest.

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

205. The applicants complained that they had been unable to effectively challenge their detention, as they had not had access to the evidence contained in the investigation files.

They invoked Article 5 § 4 of the Convention, which reads:

“4. Any person deprived of his liberty by arrest or detention has the right to appeal to a court, so that he may rule at short notice on the legality of his detention and order his release if the detention is unlawful.”

206. The Government noted that at their hearing before the 2nd Bakırköy Assize Court, the applicants had been informed of the charges against them and had had the opportunity to properly challenge the reasons for their pre-trial detention which had been presented. On that occasion, all available material contained in the investigation file had been read out. The applicants would therefore have had sufficient knowledge of the evidence used as the basis for their detention.

207. The Court notes that this case differs from cases where the applicants complained of restricted access to their own investigation records. There was no decision in this case restricting access to the file of the investigation against the applicants. They had access to all the evidence gathered by the judicial inspector and submitted to the 2nd Bakırköy Assize Court which served as the basis for their pre-trial detention. Instead, the restriction as regards the applicants related to the investigation files of the suspects whose applications for recusal and release they had decided on. According to the applicants, access to the investigation files relating to the suspects was of

fundamental importance to the offences of which they (the applicants) were accused.

208. The Court was not persuaded by the applicants' argument. It notes that the evidence underlying the decision to place them on remand was based on specific acts which could be personally attributed to them. While the Court recognises that access to the investigation files of the suspects was of fundamental importance in considering the merits of the suspects' detention, it does not see how this would have been the case as regards the applicants' detention. It therefore considers that the applicants had sufficient knowledge of the evidence that was essential for challenging the legality of their deprivation of liberty.

209. Considering the above, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS

210. Invoking Article 5 § 3 of the Convention, the applicants complained about the length of their pre-trial detention.

211. In relation to Article 5 § 4, the applicants alleged that the 2nd Assize Court had failed to respond to the arguments they had made in their objection.

212. The applicants also complained that there had been a violation of Article 7 of the Convention because the criminal investigating authorities had interpreted criminal laws in an arbitrary and extensive manner.

213. The applicants alleged that there had been a further violation of Article 10 of the Convention because they had been detained as a result of their decisions. They accused the Constitutional Court of examining their allegations of an infringement of the right to freedom of expression from the perspective of Article 5.

214. As regards the complaint about the length of their detention, the Court notes that the applicants complained to the Constitutional Court of the legality of their pre-trial detention and the lack of adequate grounds for that detention, but did not complain to it of anything else. As they failed to present their complaint about the length of their pre-trial detention in the context of that complaint before the Constitutional Court, the applicants did not duly exhaust the domestic remedies. Accordingly, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

215. As regards the applicants' allegation that the 2nd Assize Court failed to respond to arguments which they had made in the context of their objection and that there was therefore a violation of Article 5 § 4, the Court notes that the applicants did not indicate what new argument they made in their objection, which had not been advanced at their hearing before the 2nd Bakırköy Assize Court and which would have required further

consideration. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

216. Regarding the complaint under Article 7 of the Convention, the Court notes that the Constitutional Court's decision does not mention such a complaint. In any event, when the Constitutional Court ruled on the individual applications brought by the applicants, the criminal proceedings against them before the first instance court were ongoing, and the lodging of this complaint was premature. In this respect the applicants could have used the constitutional remedy after the decision of the Court of Cassation. Accordingly, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

217. Lastly, with respect to the applicants' complaint under Article 10 of the Convention that they were detained because of the decisions which they had made, the Court considers that it is unnecessary to examine either the admissibility or the merits of that complaint.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

218. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage and costs and expenses

1. *The applicant Mustafa Başer*

219. The applicant Mustafa Baser alleged that he had sustained pecuniary damage corresponding to the wages and the retirement bonus he would have received as a judge had he not been dismissed. He claimed 1,000,000 euros (EUR) on that account. In addition, he sought an award of EUR 1,000,000 in respect of non-pecuniary damage. Lastly, he claimed 50,000 Turkish Lira (TRY) in respect of costs and expenses, without producing any supporting documents.

220. The Government contested those claims.

221. The Court observes that this judgment concerns the applicant's initial pre-trial detention, and not his dismissal from office. Accordingly, it does not discern a causal link between the violation it has found and the pecuniary damage alleged, and therefore rejects the applicant's claim under that head.

222. As regards non-pecuniary damage, the Court observes that it has found a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicant's initial pre-trial detention and the lack of reasonable suspicion that he had committed a criminal offence. That being

so, it considers that the applicant must have sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. It therefore awards the applicant the sum of EUR 5,000 in respect of non-pecuniary damage.

223. As regards the claim in respect of costs and expenses, the Court reiterates that an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. It reiterates in addition that Rule 60 §§ 2 and 3 of the Rules of Court requires the applicant to submit itemised particulars of all claims, together with any relevant supporting documents, failing which the Court may reject the claims in whole or in part. In the present case, considering that the applicant did not produce any documents in support of his claim, the Court decides to reject it in its entirety (see *Paksas v. Lithuania* [GC], no. 34932/04, § 122, ECHR 2011 (extracts)).

2. *The applicant Metin Özçelik*

224. The applicant Metin Özçelik claimed TRY 1,500,000 in respect of pecuniary and non-pecuniary damage on account of his detention, his family and lawyer's prison visits to him requiring serious time and expenses, attorney fees that he paid and will pay in the future, the actual and future deprivation of his salary, the sorrow he and his family members suffered and the loss of professional prestige.

225. The Court observes that as noted above this judgment concerns the applicant's initial pre-trial detention, and not his continued detention nor his dismissal from office. Accordingly, it does not discern a causal link between the violation it has found and the pecuniary damage alleged, and rejects the applicant's claim under that head.

226. As regards the claim for non-pecuniary damage, the Court observes that it has found a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicant's initial pre-trial detention and the lack of reasonable suspicion that he had committed a criminal offence. That being so, it considers that the applicant must have sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. It therefore awards the applicant the sum of EUR 5,000 in respect of non-pecuniary damage.

227. As regards the claim in respect of costs and expenses, the Court reiterates that an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. It reiterates in addition that Rule 60 §§ 2 and 3 of the Rules of Court requires the applicant to submit itemised particulars of all claims, together with any relevant supporting documents, failing which the Court may reject the claims in whole or in part. In the present case, seeing that the applicant did not produce any documents

in support of his claim, the Court decides to reject it in its entirety (see *Paksas v. Lithuania* [GC], no. 34932/04, § 122, ECHR 2011 (extracts)).

FOR THESE REASONS, THE COURT,

1. *Decides*, unanimously, to join the applications;
2. *Declares*, unanimously, the application admissible as regards the complaints concerning the alleged unlawfulness of the applicants' initial pre-trial detention and the alleged lack of reasonable suspicion that they had committed an offence;
3. *Declares*, unanimously, the application inadmissible as regards the complaints concerning the denial of access to the investigation files, the length of their pre-trial detention and the failure of the 2nd Assize Court to respond to the arguments they had made in their objection as well as the complaint under Article 7 of the Convention;
4. *Holds*, by six votes to one, that there has been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicants' initial pre-trial detention for lack of prior authorisation for initiating a criminal investigation;
5. *Hold*, unanimously, that there has been no violation of Article 5 § 1 of the Convention on account of the unlawfulness of the applicants' initial pre-trial detention insofar as the applicants complained about the lack of jurisdiction of the 2nd Bakırköy Assize Court to decide on their detention;
6. *Holds*, unanimously, that there has been a violation of Article 5 § 1 c) of the Convention on account of the lack of reasonable suspicion, at the time of the applicants' initial pre-trial detention, that they had committed an offence;
7. *Holds*, unanimously, that it is unnecessary to examine either the admissibility or the merits of the complaint under Article 5 § 3 of the Convention as regards the alleged failure to provide reasons for the applicants' initial pre-trial detention;
8. *Holds*, by six votes to one, that it is unnecessary to examine either the admissibility or the merits of the complaint under Article 10 of the Convention;

9. *Holds*, unanimously,

- (a) that the respondent State is to pay each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

10. *Dismisses*, by five votes to two, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Jon Fridrik Kjølbro
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Partly dissenting opinion of Judge Ranzoni joined by Judge Koskelo;
- (b) Partly dissenting opinion of Judge Kūris;
- (c) Partly dissenting opinion of Judge Yüksel.

J.F.K.
H.B.

PARTLY DISSENTING OPINION OF JUDGE RANZONI
JOINED BY JUDGE KOSKELO

1. I agree with the main parts of the judgment, in particular the finding that Article 5 § 1 of the Convention has been violated on account of the unlawfulness of the applicants' pre-trial detention as well as the lack of reasonable suspicion that they had committed criminal offences. I also agree that the applicants have sustained non-pecuniary damage and that the above findings do not constitute in themselves sufficient just satisfaction. However, I am unable to accept the low amount of 5,000 euros (EUR) awarded under Article 41 of the Convention, for which the majority provide no reasoning whatsoever.

2. The same amount was awarded in *Turan and Others v. Turkey* (nos. 75805/16 and 426 others, 23 November 2021). However, the Court in that case found "only" a violation of Article 5 § 1 on account of the unlawfulness of the initial pre-trial detention of the applicants, who were also judges like the applicants in the present case, and then decided – as a matter of judicial policy – not to examine the remaining complaints, notably the complaint of a lack of reasonable suspicion. Although having found just one violation of the Convention, in contrast to the present case, the Court awarded each of the applicants EUR 5,000. It thereby took into account, *inter alia*, the repetitive nature of the legal issues examined in that case and the number of similar applications pending before it (*ibid.*, § 106).

3. From that reasoning it can logically be inferred that the award in respect of non-pecuniary damage would have been significantly higher if these special circumstances had not existed, in particular if only a single application had been examined, and if a violation of Article 5 § 1 had also been found on account of the lack of reasonable suspicion, which would have been very likely if the Court had indeed assessed that complaint. Therefore, the present case is very different as regards the award in respect of non-pecuniary damage.

4. An award of a considerably higher amount than EUR 5,000 would also have been in line with the Court's recent case-law in other Turkish cases. For example, in *Tercan v. Turkey* (no. 6158/18, 29 June 2021), where the Court likewise found violations of Article 5 § 1 on account of the unlawfulness of the applicant's arrest and the lack of reasonable suspicion, it awarded EUR 20,000. While there were also breaches of Article 5 § 3 and Article 8, those additional violations were obviously of minor importance in the context of the case and did not constitute the main reasons for the difference of EUR 15,000 compared to the present case.

5. In *İlker Deniz Yücel v. Turkey* (no. 27684/17, 25 January 2022) the Court found a violation of Article 5 § 1 on account of the lack of reasonable suspicion. While it held that Article 5 § 5 and Article 10 had also been breached, it found no violation of Article 5 § 1 on account of unlawfulness.

The just satisfaction award, taking into account the sum already awarded by the Constitutional Court, nevertheless amounted to EUR 16,000.

6. The same amount of EUR 16,000 in respect of non-pecuniary damage (in some instances, partly including the sums awarded by the Constitutional Court) concerning applicants' pre-trial detention has also been awarded in comparable cases such as *Taner Kılıç v. Turkey* (no. 2) (no. 208/18, 31 May 2022), *Ilıcak v. Turkey* (no. 2) (no. 1210/17, 14 December 2021), *Öğreten and Kanaat v. Turkey* (nos. 42201/17 and 42212/17, 18 May 2021), *Ahmet Hüsrev Altan v. Turkey* (no. 13252/17, 13 April 2021), *Murat Aksoy v. Turkey* (no. 80/17, 13 April 2021), *Atilla Taş v. Turkey* (no. 72/17, 19 January 2021), *Şık v. Turkey* (no. 2) (no. 36493/17, 24 November 2020), and *Sabuncu and Others v. Turkey* (no. 23199/17, 10 November 2020). In *Akgün v. Turkey* (no. 19699/18, 20 July 2021) the Court awarded EUR 12,000 for one violation under Article 5 § 1 (lack of reasonable suspicion) and additional violations under Article 5 §§ 3 and 4.

7. This brief overview clearly shows that the sum of EUR 5,000 in respect of non-pecuniary damage in the case at hand does not correspond at all to what the Court has recently awarded in cases concerning pre-trial detention. While I do not suggest, given the specific circumstances of the present case, that the applicants should have been compensated with EUR 16,000 each, a substantially higher amount than EUR 5,000 would have been justified. In this connection, it is worth bearing in mind that the applicants' pre-trial detention was not lawful within the meaning of Article 5 § 1 and not based on a reasonable suspicion of their having committed criminal offences, and that it lasted two years until their criminal conviction.

8. For the above reasons, I disagree with the majority's judgment on the issue of non-pecuniary damage.

PARTLY DISSENTING OPINION OF JUDGE KÜRIS

1. I disagree that it is “unnecessary to examine” the applicants’ complaint under Article 10. The Court should have endeavoured to elucidate the scope of the applicability of Article 10 of the Convention to situations like the one dealt with in the present case, which involves the performance by the applicants of their judicial functions as allegedly amounting to their exercise of their “freedom of expression”.

2. The Court tends to treat “freedom of expression” quite broadly. At times too broadly. I dealt with some extremities of this inclination in my separate opinions in *Brisco v. Romania* (no. 26238/10, 11 December 2018) and, more recently, in *İmrek v. Turkey* (no. 45975/12, 10 November 2020). “Freedom of expression” has thus become one more inflated umbrella term, and it is hard to shake off the impression that that umbrella is increasingly expanding. While it is obvious that “freedom of expression” is indeed a spacious notion, the Court should make it clear once and for all that the umbrella of Article 10 does have edges, in the same vein as it has rightly done with regard to Article 8 (compare the unduly broad approach to the scope of applicability of that Article in, for example, *Erményi v. Hungary*, no. 22254/14, 22 November 2016, and its rectification in *Denisov v. Ukraine*, [GC], no. 76639/11, 25 September 2018). In the present case (as in, alas, a non-negligible number of others), the Court missed the opportunity to make this clear.

3. The Court’s overly permissive approach to what may be covered by the concept of “freedom of expression” prompts the invocation, at least by some applicants, of Article 10 even where, from the common-sense point of view, the impugned interference has nothing to do either with “expression” or with “freedom” in any meaningful sense of these words, taken separately or in conjunction. The applicants’ complaint under Article 10 relates to their judicial functions (irrespective of whether their performance was diligent or negligent). It would require an extremely pregnant imagination to accept that the release (or non-release) of someone from detention, or any other judicial decisions which must be based on the applicable law, are acts of “expression”, or that judges making such decisions are merely exercising their “freedom”. The next step in this direction would be to expand this so-called logic to other professions – from police officers to surgeons to military to air traffic controllers. Needless to say, this would take us way too far.

4. Meanwhile, there is a sound basis in the Court’s case-law for finding the applicant’s complaint under Article 10 inadmissible (see, for example, *Augustė v. Lithuania* [Committee], no. 65717/14, §§ 32-37, 26 February 2019, and the case-law cited therein).

5. One last point. When the Court refrains from examining a complaint, it should make known the reasons underlying the non-examination, even if briefly, and not leave the readership guessing. Otherwise, the decision not to

examine a complaint is a mere judicial fiat. It would be a rhetorical question to ask how the Court treats judicial fiats issued by domestic courts. In the present case, any explanation of the reasons for not examining the applicant's complaint under Article 10 is missing. Regrettably, in this regard this case is far from exceptional. Rendering *quod licet Iovi, non licet bovi* a principle for the application of the Convention is hardly a jurisprudential achievement.

PARTLY DISSENTING OPINION OF JUDGE YÜKSEL

1. I agree with the majority in finding a violation of Article 5 § 1 of the Convention, on account of the lack of reasonable suspicion at the time of the applicants' initial pre-trial detention. However, I respectfully do not agree with the majority's conclusion that the applicants' detention did not take place in accordance with a procedure prescribed by law.

2. As mentioned in the judgment, the Turkish legal system provides for a special regime as regards judges' criminal responsibility in relation to offences committed in the course of the exercise of their duties, since it grants them procedural immunity in the form of prior authorisation for the initiation of criminal investigations (see paragraph 149 of the judgment). It also provides for an explicit exception to this condition. The implementation of this exception, provided for by section 83 of Law no. 2802, requires two conditions to be met: 1) existence of facts that the judicial inspectors have become aware during an inspection or investigation; and (2) delay in launching the investigation would be prejudicial (see paragraph 153 of the judgment). In the present case, the Third Chamber of the High Council of Judges and Prosecutors ("the HSYK") had applied the exception on the basis of the irregularities alleged in respect of the applicants as identified by the judicial inspector in his preliminary report and moved on to the investigation phase under section 83 of Law no. 2802 and section 37(2) of the Inspection Board Regulations (see paragraph 49 of the judgment).

3. As regards the first condition required by section 83, the majority, firstly, expressed a serious doubt as to whether the case concerned irregularities that the authorities had "become aware of during an inspection" as required by the provision, since the inspection was initiated and the examination was launched *ex officio* after the publication of some articles concerning irregularities imputed to the applicants. Thus, the majority seemed to consider that the authorities had become aware of the irregularities imputed to the applicants through articles published in the press. I wonder whether this approach is consistent with the observation that the case file contains no information about the date of the articles reporting irregularities or about their content and that the Third Chamber's decision to move on to the investigation phase was based on concrete irregularities attributed to the applicants as identified in the preliminary report dated 26 April 2015 (see paragraph 154 of the judgment). Secondly, the majority noted that all the decisions adopted by the HSYK were related to the applicants' actions and decisions in respect of the requests for the recusal of judges and the release of suspects. I fail to see an explanation in this view as to how those elements would undermine the procedural safeguards which members of the judiciary are afforded under section 82, taking into account the circumstances of this case (see paragraphs 35-38, 42-47 and 51-59 of the judgment as regards the irregularities imputed to the applicants).

4. As regards the second condition, it could be argued that the domestic authorities are in a better position to assess evidence relating to the existence of a risk of harm in the event of a delay in initiating an investigation. I have serious doubts about whether the lack of sufficient reasoning in the Third Chamber's decision could be a decisive point as regards the main legal issue in the present case. The lack of reasoning at stake in the present case does not relate to a decision ordering detention but to a decision which applied an exception to procedural guarantees granted to the applicants as judges and led to their placement in detention. Indeed, as seen in the case-law, even if the reasoning of the decision ordering detention is a relevant factor in determining whether a person's detention is to be considered arbitrary (see *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 92, 22 October 2018, and *Mooren v. Germany* [GC], no. 11364/03, § 79, 9 July 2009), a lack of such reasoning would lead to find a violation only on exceptional occasions (see, for example, *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002; *Nakhmanovich v. Russia*, no. 55669/00, § 70, 2 March 2006; and *Belevitskiy v. Russia*, no. 72967/01, § 91, 1 March 2007, cases in which the Court considered the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time to be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1; see also *Khudoyorov v. Russia*, no. 6847/02, § 157, ECHR 2005-X (extracts), where the reasons given were extremely laconic and without reference to any legal provision which would have permitted the applicant's detention, and the Court considered that the decision in issue would not offer sufficient protection from arbitrariness). Thus, I have serious concerns as to whether, in the circumstances of this case, a view which focuses on the lack of sufficient reasoning could provide a sound basis to conclude that the application of national law was flawed by arbitrariness.

5. It is important to highlight that according to its case-law, the Court has only limited power to deal with alleged errors of fact or law committed by the national courts, which have primary responsibility for interpreting and applying domestic law. Unless their interpretation is arbitrary or manifestly unreasonable (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 86, ECHR 2007-I), the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015; *Alparslan Altan v. Turkey*, no. 12778/17, § 110, 16 April 2019; and *Baş v. Turkey*, no. 66448/17, § 151, 3 March 2020).

6. In conclusion, I consider that there are no circumstances that may require derogation from the principle of subsidiarity in the present case, and that the applicant's detention took place in accordance with a procedure prescribed by law, as required by Article 5 § 1 of the Convention.