



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

## SECOND SECTION

### **CASE OF CANAVCI AND OTHERS v. TÜRKİYE**

*(Applications nos. 24074/19 and two others – see appended list)*

### JUDGMENT

Art 8 • Private life • Art 15 • Derogation in time of emergency • Monitoring and recording of the applicants' meetings with their lawyers while in prison, pursuant to a legislative decree adopted under the state of emergency declared in the aftermath of the coup attempt of 15 July 2016 • Application of impugned measures to third applicant not based on a public prosecutor's decision as required by the decree • Lack of individualised grounds in decisions to apply impugned measures to remaining applicants • Open-ended application of measures undermined legal certainty • Absence of sufficient legislative safeguards against abuse and arbitrariness not justified by respondent State's derogation • Judicial review not adequate or effective • Interference "not in accordance with the law"

STRASBOURG

14 November 2023

**FINAL**

**08/04/2024**

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



**In the case of Canavcı and Others v. Türkiye,**

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

Arnfinn Bårdsen, *President*,

Egidijus Kūris,

Pauliine Koskelo,

Saadet Yüksel,

Lorraine Schembri Orland,

Frédéric Krenç,

Diana Sârcu, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the applications (nos. 24074/19, 44839/19 and 9077/20) 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 three Turkish nationals, Mr Mehmet Ali Canavcı (“the first applicant”), Mr Ramazan Çaylı (“the second applicant”) and Mr Harun Altun (“the third applicant”; together “the applicants”), on the various dates indicated in the appended table;

the decision to give notice to the Turkish Government (“the Government”) of the complaints concerning Articles 8 and 13 of the Convention, and to declare the remainder of the applications inadmissible;

the parties’ observations;

Having deliberated in private on 14 November 2023,

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

## INTRODUCTION

1. The present case concerns the monitoring and recording of the applicants’ meetings with their lawyers while they were in prison, pursuant to a legislative decree which had been adopted under the state of emergency declared in the aftermath of the coup attempt of 15 July 2016. The applicants complain of a violation of Articles 8 and 13 of the Convention.

## THE FACTS

2. The applicants’ details and the names of their representatives are listed in the appendix.

3. 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.

## I. BACKGROUND TO THE CASE

4. During the night of 15 to 16 July 2016 a group of persons in the Turkish armed forces launched a *coup d'état* aimed at overthrowing the democratically elected parliament, government and President of the Republic. During that night of violence more than 250 individuals were killed and over 2,500 were injured.

5. On 20 July 2016 the Turkish government declared a state of emergency for a three-month period starting on 21 July 2016. The state of emergency was subsequently extended every three months by the Council of Ministers, chaired by the President.

6. On 21 July 2016 the Turkish authorities notified the Secretary General of the Council of Europe of a derogation from the Convention in respect of Article 15.

7. After the attempted military coup, public prosecutors' offices throughout Türkiye initiated criminal proceedings against those who had been directly involved in the attempted coup and also against those who had not been directly involved but were suspected of being part of the structural organisation of the "Fetullahist Terror Organisation/Parallel State Structure" (Fetullah Terör Örgütü/Paralel Devlet Yapılanması – hereinafter "the FETÖ/PDY"), which was considered by the national authorities to have instigated the coup attempt.

8. During the state of emergency, the Council of Ministers, chaired by the President, enacted thirty-seven emergency legislative decrees (nos. 667-703) under Article 121 of the Constitution. The Government explained that Emergency Legislative Decree no. 667, which came into force on 23 July 2016, had set forth measures during the state of emergency relating to the fight against terrorism and the coup attempt, including measures under section 6 concerning investigations and criminal proceedings in respect of certain offences.

9. On 18 July 2018 the state of emergency was lifted.

## II. APPLICATION No. 24074/19

### **A. The first applicant's detention and the order for the monitoring of meetings with his lawyer**

10. On 21 July 2016 the Bakırköy Magistrate's Court ordered the first applicant's pre-trial detention for membership of the FETÖ/PDY and for attempting to overthrow the government of the Republic of Türkiye or preventing it wholly or partly from performing its duties. On the same day, he was placed in Silivri Prison.

11. On 25 July 2016, in a notice issued to the Silivri Prison administration, the Bakırköy Chief Public Prosecutor's Office stated that in view of the

structure of the FETÖ/PDY, its communication methods and the fact that some members of that organisation had still not been captured, meetings with lawyers could endanger the security of the nation and the penal institutions, as the meetings were likely to be used for transmitting secret, open or encrypted messages among the members of the organisation, as well as orders from the organisation to its members in detention. The Bakırköy Chief Public Prosecutor's Office therefore considered that it was necessary to take certain measures under section 6(1)(d) of Emergency Legislative Decree no. 667.

12. In this connection the Bakırköy Chief Public Prosecutor's Office ordered the Silivri Prison administration to have an officer monitor meetings between those in detention for membership of the FETÖ/PDY and their lawyers during the state of emergency. On the same ground, the Bakırköy Chief Public Prosecutor's Office also ordered the audio or video recording of such meetings by means of technical devices.

13. On 1 February 2017 the first applicant lodged a complaint with the Silivri enforcement judge and requested the lifting of the order for the monitoring and recording of meetings with his lawyer.

14. On 21 March 2017 the Silivri enforcement judge noted that the subject of the complaint was the decision of the Bakırköy Chief Public Prosecutor's Office. The judge, citing a lack of jurisdiction to deal with complaints about judicial decisions, rejected the first applicant's complaint without examining it on the merits. Subsequently, the Silivri Assize Court dismissed an objection lodged by the first applicant against the enforcement judge's decision, holding that it had been in line with the law and procedure.

## **B. Individual application to the Constitutional Court**

15. On 18 May 2017 the first applicant lodged an individual application with the Constitutional Court, complaining about the monitoring and recording of his meetings in prison with his lawyer. In his application form he complained, *inter alia*, of a violation of his right to respect for his private life, referring to Article 8 of the Convention. On that point, he argued that in the absence of a prosecutor's decision on the matter, the audio and video recording and monitoring by an officer of his meetings in prison with his lawyer, as well as the seizure of documents relating to his defence, had amounted to a violation of his right to respect for his private life.

16. In a decision of 1 February 2019 (no. 2017/26587), the Constitutional Court examined the first applicant's individual appeal in the light of the right to a fair trial and dismissed it, holding that he had failed to exhaust domestic remedies.

**C. The first applicant's meetings with his lawyer**

17. The first applicant had nine meetings with his lawyer between 9 August 2016 and 3 July 2017, all of which were the subject of audio and video recordings by means of technical devices. Moreover, those meetings took place with an officer present in the meeting room.

18. On 18 July 2017 the first hearing was held before the Istanbul Assize Court in the criminal proceedings against the first applicant. During that hearing, he requested that the trial court end the practice of monitoring and recording meetings with his lawyer. The Istanbul Assize Court allowed his request and decided to discontinue the measure in question without providing any justification for its decision.

19. The applicant had a further twenty-nine meetings with his lawyer. These meetings were neither recorded nor monitored by an officer.

**III. APPLICATION No. 44839/19**

**A. The second applicant's detention and the order for the monitoring of meetings with his lawyer**

20. On 21 July 2016 the Zonguldak Magistrate's Court ordered the second applicant's pre-trial detention for membership of the FETÖ/PDY and for attempting to overthrow the government of the Republic of Türkiye or preventing it wholly or partly from performing its duties. On the same day, he was placed in Zonguldak Prison. On 31 July 2016 he was transferred to Kocaeli Prison.

21. On 2 August 2016 the Zonguldak Chief Public Prosecutor's Office notified the Kocaeli Prison administration of its decision that meetings between those in detention for certain offences, including membership of a terrorist organisation, and their lawyers were to be monitored by an officer and recorded on audio and video devices throughout the duration of the state of emergency. The Zonguldak Chief Public Prosecutor's Office based its decision on section 6(1)(d) of Emergency Legislative Decree no. 667.

22. The Zonguldak Chief Public Prosecutor's Office considered in its notice that such measures were necessary for the proper conduct of investigations and criminal proceedings and to prevent the transmission of organisational orders and instructions, as well as any attempts to commit further offences or tamper with evidence.

23. On 8 August 2016 the second applicant lodged a complaint with the Kocaeli enforcement judge and requested the lifting of the order for the monitoring and recording of his meetings. He complained that such a measure interfered with lawyer-client contact and constituted an interference with his right to a fair trial under Article 6 of the Convention.

24. On 28 September 2016 the Kocaeli enforcement judge rejected the second applicant's complaint without examining it on the merits, citing a lack of jurisdiction in respect of the prosecutor's judicial decision, which had essentially concerned the proper conduct of criminal investigations. In the decision, the enforcement judge accepted jurisdiction only as regards the prison administration's decisions and acts. Subsequently, the Kocaeli Assize Court dismissed an objection lodged by the applicant against the enforcement judge's decision, holding that it had been in line with the law and procedure.

### **B. Individual application to the Constitutional Court**

25. On 28 November 2016 the second applicant lodged an individual application with the Constitutional Court, complaining about the monitoring and recording of meetings in prison with his lawyer. In this context, he complained of, *inter alia*, a violation of his right to respect for his private life, relying on Article 20 of the Turkish Constitution and Article 8 of the Convention. The applicant argued that the measure in question amounted to an interference with the confidentiality of lawyer-client contact.

26. In a decision of 24 July 2018 (no. 2016/76352), the Constitutional Court examined the second applicant's complaint in the light of the right to respect for private life. The court dismissed the complaint on the grounds that he had failed to exhaust the available remedies. In its decision the Constitutional Court referred to its case-law, noting in a general manner the requirement of exhausting the available remedies in the judicial system before lodging an individual appeal. The high court did not specify which remedy the applicant had failed to pursue.

### **C. The second applicant's meetings with his lawyer**

27. The second applicant had three meetings with his lawyer in Zonguldak Prison without any restrictions. In the following period, he had fifteen meetings with his lawyer in Kocaeli Prison with an officer present. The administration made audio and video recordings of all the meetings.

28. At the end of the criminal proceedings the applicant was convicted and sentenced to a term of imprisonment. On 2 July 2019, by a decision of the Court of Cassation, his conviction became final on appeal. No information or documents have been made available to the Court by the parties indicating that the measures relating to meetings between the applicant and his lawyer were lifted at any point during the criminal proceedings.

IV. APPLICATION No. 9077/20

**A. The third applicant's detention and the order for the monitoring of his meetings with his lawyer**

29. On 29 August 2016 the Düzce Magistrate's Court ordered the third applicant's pre-trial detention for membership of an armed terrorist organisation. On the same day, he was placed in Düzce Prison.

30. The applicant's meetings with his lawyer in Düzce Prison were recorded and monitored by an officer.

31. On 29 June 2018 the third applicant applied to the Düzce Prison administration requesting information as to the grounds for the recording of the meetings with his lawyer. On the same day, the Düzce Prison administration responded to the applicant's request, notifying him that the recording of the meetings had taken place on the basis of section 6(1)(d) of Emergency Legislative Decree no. 667.

32. The applicant lodged a complaint with the Düzce enforcement judge against the prison administration's decision, stating that the measure imposed on him was unlawful and had no legal basis.

33. On 14 July 2018 the Düzce enforcement judge dismissed the applicant's complaint, holding that the prison administration's decision had been in line with the law and procedure. Subsequently, the Düzce Assize Court dismissed an objection lodged by the applicant against the enforcement judge's decision.

**B. Individual application to the Constitutional Court**

34. On 14 September 2018 the third applicant lodged an individual application with the Constitutional Court, complaining about the recording of his meetings in prison with his lawyer. In this connection, he complained of a violation of his right to communication under Article 22 of the Turkish Constitution, asserting that Turkish law did not permit any restriction on detainees' communication with their lawyers.

35. In a decision of 21 November 2019 (no. 2018/28341), the Constitutional Court examined the third applicant's individual application in the light of the right to a fair trial. The Constitutional Court dismissed the application, stating that it could not be concluded that the domestic courts' decisions in the case had been arbitrary. In addition, the court noted, referring to its case-law, that the other admissibility criteria regulated under Law no. 6216 (on the establishment and rules of procedure of the Constitutional Court) had not been met.

### **C. The third applicant's meetings with his lawyer**

36. The third applicant had four meetings with his lawyer in Düzce Prison. The prison administration recorded all the meetings by means of technical devices and monitored them by placing an officer in the meeting room.

## **RELEVANT LEGAL FRAMEWORK AND PRACTICE**

### **I. DOMESTIC LAW AND PRACTICE**

#### **A. Legal regime governing the state of emergency**

37. For a presentation of the legal regime governing the state of emergency which was declared following the coup attempt of 15 July 2016 and of the notice of derogation which Türkiye transmitted to the Secretary General of the Council of Europe after the declaration of the state of emergency, see *Pişkin v. Turkey* (no. 33399/18, §§ 32 and 55, 15 December 2020).

#### **B. Law no. 4675 on enforcement judges**

38. Section 4 of Law no. 4675 on enforcement judges lays down the powers of the enforcement courts in ruling on objections concerning, *inter alia*, prison authorities' decisions or actions relating to the execution of sentences, communication of detainees and convicted prisoners with the outside world and the imposition of disciplinary sanctions. Furthermore, section 6 specifies that an enforcement court must give a decision on the basis of the case file after obtaining the written opinion of the relevant public prosecutor and without holding a hearing. The enforcement court may conduct an examination *ex proprio motu* or request further information from the parties if the interests of justice so require.

39. An objection against the decisions of the enforcement courts lies to the nearest assize court. The assize court examines the objection on points of fact and law without holding a hearing.

#### **C. Law no. 5275 on the enforcement of sentences and preventive measures**

40. The relevant part of section 59 of Law no. 5275, as in force at the material time (as amended by section 5 of Law no. 5351), provided as follows:

“...

(4) A lawyer's documents and files relating to the defence and the records of meetings with his or her client shall not be subject to examination. However, if it emerges from

documents or other evidence that visits by lawyers to a person convicted of the offences set out in Article 220 of the Criminal Code or sub-chapters 4 and 5 of Chapter 2 of the Criminal Code are serving as a means of communication with a terrorist organisation or of committing a crime or otherwise jeopardising the security of the prison, the enforcement judge may, on an application by the prosecution, impose [the following measures]: the presence of an officer during the lawyer's visits; inspection of documents exchanged between the prisoner and his or her lawyers during such visits; and/or the seizure of all or some of those documents by the judge. The parties concerned may appeal against that decision in accordance with Law no. 4675."

41. Section 59(4) of Law no. 5275 on the enforcement of sentences and preventive measures (which entered into force on 13 December 2004) was amended by section 6 of Emergency Legislative Decree no. 676, adopted during the state of emergency, published in the Official Gazette on 29 October 2016 and approved by Law no. 7070 of 1 February 2018. By the same legislative decree, several subsections were also added after section 59(4) of Law no. 5275. The relevant part of section 59 of Law no. 5275 provided as follows:

"...

(4) During the interview, the documents or copies of documents, files and records kept by the convicted person and his or her lawyer regarding the conversations between them shall not be examined; the conversations of the convicted person with his or her lawyer shall not be listened to or recorded.

(5) In the event that information, findings or documents are obtained which indicate that the security of society and the penal institution is endangered, terrorist organisations or other criminal organisations are being directed, orders and instructions are being given to those organisations or secret, open or encrypted messages are being transmitted through comments made during meetings with the lawyers of those convicted of the offences defined in Article 220 of the Turkish Criminal Code and those defined in the Fourth, Fifth, Sixth and Seventh Chapters of the Fourth Part of the Second Volume [of the Criminal Code], as well as the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), following a request by the Chief Public Prosecutor's Office and a decision by the enforcement judge, for a period of three months, audio or video recordings of the meeting may be made using a technical device, an officer may be present at the meeting in order to monitor the conversations between the convicted person and the lawyer, the documents or copies of documents, files and records exchanged between the convicted person and the lawyer may be seized or the days and times of the meetings may be limited.

...

(10) The provisions of this section shall also apply to convicted persons in high-security penal institutions in accordance with section 9(3) [of this Law] and to those convicted of offences referred to in the fifth subsection [of this section] who meet with their lawyers as suspects or defendants in relation to another offence.

(11) The magistrate at the investigation stage and the court at the prosecution stage shall have the authority to decide in accordance with the provisions of this section in respect of detainees."

## **D. Emergency Legislative Decree no. 667 (Law no. 6749)**

42. The relevant parts of Emergency Legislative Decree no. 667 on measures adopted during the state of emergency, published in the Official Gazette on 23 July 2016 and approved by Law no. 6749 of 18 October 2016, read as follows:

### **Section 6**

“(1) In the course of the state of emergency, in respect of the offences defined in the Fourth, Fifth, Sixth and Seventh Chapters of Part Four of the Second Volume of the Turkish Criminal Code (Law no. 5237 of 26 September 2004), the offences falling within the scope of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991) and the offences committed collectively;

...

(d) Where there is a possibility that, during the meetings of detainees with their lawyers, the security of the nation and the penal institution may be endangered, that the terrorist organisation or other criminal organisations may be directed, that orders and instructions may be given to those organisations, or that secret, open or encoded messages may be transmitted through their comments, at the request of the public prosecutor audio or video recordings of the meetings may be made; an officer may be present so as to monitor the meeting between the detainee and his or her lawyer; the documents or copies of documents and files exchanged between the detainee and his or her lawyer and the records kept by them in relation to the conversations between them may be seized; or the dates and times of the meetings may be restricted following a decision by the public prosecutor. Where it is understood that the meeting of the detainee is intended for [any of] the purposes indicated above, the meeting shall be terminated immediately and the issue shall be noted in a report providing the relevant reasons. Prior to the meeting, the parties shall be warned in this regard. If a report is drawn up in respect of the detainee, the enforcement judge may prohibit the detainee from having a meeting with his or her lawyers. The detainee and the relevant bar association shall immediately be notified of the prohibition order so that a new lawyer may be appointed. The public prosecutor may submit a request for the replacement of the lawyer assigned by the bar association. ...”

## **E. Case-law of the Constitutional Court**

### *1. Decision of 24 July 2019 (E.2016/205, K.2019/63)*

43. In this decision, on an application for annulment submitted by 122 members of the Turkish Grand National Assembly, the Constitutional Court reviewed, *inter alia*, the constitutionality of section 6(1)(d) of Law no. 6749 on the monitoring and recording of detainees’ meetings with their lawyers.

44. The Constitutional Court conducted an examination as to the compatibility with the right to object to detention and the right to a fair trial, provided for by Articles 19 and 36 of the Turkish Constitution respectively, of the following part of section 6(1)(d) of Law no. 6749:

“... following a decision by the public prosecutor, an officer may be present so as to monitor the meeting between the detainee and his or her lawyer; the documents or

copies of documents and files exchanged between the detainee and his or her lawyer and the records kept by them in relation to the conversations between them may be seized; and the dates and times of the meetings may be restricted ...”

45. The Constitutional Court held firstly that the provision in issue imposed a restriction on the above-mentioned rights beyond the safeguards prescribed under Article 13 of the Constitution in ordinary circumstances.

46. However, noting that this rule had been introduced within the context of the state of emergency, the Constitutional Court continued its examination in the light of Article 15 of the Constitution, which provided for the suspension and restriction of the exercise of fundamental rights and freedoms during a state of emergency. In this connection, the Constitutional Court noted that it was necessary to consider the scope and extent of the restriction in question, as well as the characteristics of the events leading to the declaration of the state of emergency in Türkiye and the circumstances emerging after the declaration of the state of emergency.

47. The Constitutional Court noted at the outset that the restriction on contact between detainees with their lawyers during the state of emergency could be considered a sufficient and essential measure for the protection of the constitutional order and national security.

48. The Constitutional Court, moreover, considered that the rule did not set forth an arbitrary restriction in respect of detainees’ contact with their lawyers. In that context, it emphasised that the restriction in question did not concern all detainees, but only those being detained in respect of certain offences, namely offences against national security, offences against the constitutional order and the operation of constitutional rules, offences against national defence and offences falling within the scope of Law no. 3713 (the Prevention of Terrorism Act).

49. The Constitutional Court further pointed out that the rule specified that the restriction could only be applied under certain conditions in pursuit of its aims. In that connection, the Constitutional Court held that a prosecutor could decide to apply the restriction only when there was a possibility that during meetings of detainees with their lawyers, the security of society and the penal institution might be endangered, a terrorist organisation or other criminal organisations might be directed, orders and instructions might be given to such organisations, or secret, open or encoded messages might be transmitted through comments made at the meetings.

50. In the light of the foregoing analysis and taking into consideration the specific circumstances of the 15 July 2016 coup attempt leading to the declaration of the state of emergency, the Constitutional Court concluded that it could not be said that the relevant regulations restricted the right to receive legal assistance or the right to object against detention in such a manner as to exceed the extent required by the exigencies of the situation. Consequently, the Constitutional Court dismissed the application for annulment.

## 2. *Decision of 24 July 2019 (E. 2018/73, K. 2019/65)*

51. In this decision, on an application for annulment submitted by 114 members of the Turkish Grand National Assembly, the Constitutional Court examined, among other things, the constitutionality of subsections (5), (10) and (11) of section 59 of Law no. 5275 on the enforcement of sentences and preventive measures, which had been added to that section by Law no. 7070 (see paragraph 41 above).

52. The Constitutional Court carried out its examination of the constitutionality of subsection (5) concerning the measures restricting convicted prisoners' meetings with their lawyers in the light of Article 20 of the Constitution, which guarantees the right to privacy. The Constitutional Court firstly noted that the subsection in question had the legitimate aims of protecting national security and the security of prisons, as well as preventing the commission of public-order offences. It then carried out its proportionality assessment. Noting that the provision in issue required certain conditions for the imposition of restrictions, that it provided a time-limit for its application, and that such restrictions could only be imposed by a judicial body, whose decision was open to appeal, the Constitutional Court concluded that the provision contained sufficient legal safeguards to prevent the arbitrary use of the authorities' power to impose such a restrictive measure. In the light of the foregoing, the Constitutional Court dismissed the application for annulment in so far as it concerned subsection (5) taken alone.

53. The Constitutional Court subsequently examined subsection (10) in the light of Article 36 of the Constitution, which provides for the right to a fair trial. Considering the importance of legal assistance and the right to a fair trial, the Constitutional Court concluded that the measures of audio and video recording of meetings with lawyers, the presence of an officer at the meetings and the seizure of documents or copies of documents, files and records exchanged between suspects or defendants and lawyers were not proportionate, and were thus contrary to Articles 13 and 36 of the Constitution. In the light of that conclusion, the Constitutional Court struck down the following part of subsection (10):

“... and those convicted of offences referred to in the fifth subsection [of this section] who meet with their lawyers as suspects or defendants in relation to another offence ...”

in relation to the following part of subsection (5):

“...audio or video recordings of the meeting may be made using a technical device, an officer may be present at the meeting in order to monitor the conversations between the convicted person and the lawyer, and the documents or copies of documents, files and records exchanged between the convicted person and the lawyer may be seized ...”

## 3. *Individual applications*

54. The Government referred to two judgments delivered by the Constitutional Court in the context of individual applications which

concerned the recording and monitoring of meetings in prison with lawyers during the state of emergency. In *Yasin Akdeniz* (no. 2016/22178, 26 February 2020), the applicant had complained of a violation of the right to seek an effective judicial review of his detention. On the other hand, in *Orhan Patarya* (no. 2018/23568, 20 May 2021) the applicant had alleged a violation of his right to a fair trial, complaining that on account of the recording and monitoring of his meetings with his lawyer, he had been denied access to effective legal assistance.

55. In its judgment in *Yasin Akdeniz* the Constitutional Court initially acknowledged that the restrictions on the applicant's right to receive legal assistance in the context of his right to object to his detention were contrary to the safeguards set out under Article 19 of the Turkish Constitution on the right to liberty and security. Noting, however, that the applicant had been detained in the context of the events leading to the declaration of the state of emergency and that the state of emergency had still been in force at the time of the examination of the objection to his detention, the Constitutional Court continued its assessment under Article 15 of the Constitution.

In that connection, the Constitutional Court referred to its judgment of 24 July 2019, in which it had examined the constitutionality of section 6(1)(d) of Law no. 6749, which provided for the measures of recording and monitoring meetings with lawyers, and concluded that those measures were "required by the exigencies of the situation" (see paragraphs 43-50 above). Accordingly, noting that there was no reason to depart from that conclusion in the case before it, the Constitutional Court dismissed the individual application. The Constitutional Court held that, having regard to the safeguards provided by law and the circumstances of the state of emergency, it could not be concluded that the restrictions in question on meetings with lawyers were not proportionate, as long as the legal conditions were met.

56. In *Orhan Patarya* the Constitutional Court examined the applicant's complaint that his right to legal assistance had been violated on account of the recording by means of technical devices and the monitoring by an officer of his meetings with his lawyer. As in its judgment in *Yasin Akdeniz*, the Constitutional Court examined the complaint from the standpoint of Article 15 of the Constitution. In that regard, the Constitutional Court noted that the measure in question had been taken at a time when the threat and danger posed not only by the coup attempt, but also by the FETÖ/PDY, had been ongoing. The Constitutional Court added that the public authorities' concerns that the organisation might carry out a new coup attempt had not completely disappeared at the relevant time and that not only had the procedures for removing members of the organisation from the public administration been ongoing, but there had also been continuing efforts to take legislative, administrative and legal measures in relation to the organisation. The Constitutional Court further took into account the fact that the FETÖ/PDY carried out its activities on a basis of secrecy and used communication

methods which ensured secrecy; thus, it concluded that the recording and monitoring of meetings with lawyers at that time had been a reasonable measure.

The Constitutional Court considered the specific circumstance of the case, such as the fact that only two meetings which had taken place during the investigation stage had been subjected to restrictions and that the applicant had been able to have meetings in full confidentiality, apart from those meetings, in the subsequent stages of the proceedings. The Constitutional Court further observed that no evidence capable of incriminating the applicant had been obtained during the period when the restrictions had been applied. Lastly, emphasising the reduction in the number of personnel assigned to the duty of ensuring security in the prisons and in the number of law-enforcement officers, the Constitutional Court took the view that the measure of recording meetings with lawyers had been in accordance with the exigencies of the situation.

Accordingly, the Constitutional Court ruled that the applicant's right to legal assistance from a lawyer in the context of the right to a fair trial guaranteed in Article 36 of the Constitution, read together with Article 15 of the Constitution, had not been violated.

## II. INTERNATIONAL MATERIAL

### **A. Opinion on Emergency Legislative Decrees nos. 667-676 adopted by the European Commission for Democracy through Law of the Council of Europe (Venice Commission)**

57. On 12 December 2016 the Venice Commission made public its opinion, adopted at its 109th plenary session (9-10 December 2016), concerning Emergency Legislative Decrees nos. 667-676, enacted in the framework of the state of emergency (Opinion on Emergency Decree Laws nos. 667-676 adopted following the failed coup of 15 July 2016 (CDL-AD(2016)037)).

58. The Venice Commission noted that Emergency Legislative Decree no. 667 introduced certain rules which were aimed at simplifying the task of the investigative bodies, prosecution and courts in examining cases related to a number of serious offences. In that connection the Venice Commission observed that oral consultations between detainees and their lawyers could be recorded for security reasons. The Venice Commission assessed this measure in respect of the right to be effectively defended by a lawyer. The relevant parts of the opinion read as follows:

“173. The Venice Commission would like to stress the need for ‘individual assessment of the particular circumstances of the case’. Indeed, under the [Convention], a decision to restrict access to legal aid or put conditions limiting confidentiality of lawyer-client contacts may be based on a combination of several presumptions of fact, convincingly showing the presence of a security risk. Thus, as the [Court] stressed in

*Khodorkovskiy and Lebedev*, ‘there could be legitimate restrictions related to the security risks posed by the defendant. The existence of any “security risk” may be inferred from the nature of the accusations against him, by the detainee’s criminal profile, his behaviour during the proceedings, etc. Thus, the Court has tolerated certain restrictions imposed on lawyer-client contacts in cases of terrorism and organised crime ...’.

174. However, the use of presumption of facts does not exclude the need for individualised examination of the circumstances of each particular case. Such limitations as described in the decree laws should not be generally imposed and should not become a routine procedure but remain a rare and narrowly circumscribed exception. This is particularly true where, as here, there are valid concerns regarding allegations of ill-treatment and torture (see sub-section 3, below). Decisions imposing temporary limitations on contacts with the lawyer may be imposed only in exceptional situations in individual cases, where the existence of security risks is convincingly demonstrated, should be reasoned with reference to the facts of the case, should be notified to the defence, and the court should be able to review the validity of any such limitations.”

## **B. Other international material**

59. For a detailed description of the international standards concerning the privacy of communications between a prisoner and his or her chosen representative, see *Altay v. Turkey (no. 2)* (no. 11236/09, §§ 32-34, 9 April 2019).

## **THE LAW**

### **I. JOINDER OF THE APPLICATIONS**

60. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

### **II. PRELIMINARY REMARKS**

61. The Government first pointed out that the applicants’ complaints should be examined in the light of the Notice of Derogation transmitted to the Secretary General of the Council of Europe on 21 July 2016 under Article 15 of the Convention, which reads as follows:

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

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

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it

has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

62. The Government submitted that, having availed itself of its right of derogation from its obligations under the Convention in accordance with Article 15, Türkiye had not infringed the provisions of that instrument. In that connection, they stated that there had been a public emergency threatening the life of the nation on account of the risks arising from the attempted military coup and that the measures adopted by the national authorities in reaction to that emergency had been made strictly necessary by the situation.

63. At this stage the Court notes that it has previously held that the attempted military coup revealed the existence of a “public emergency threatening the life of the nation” within the meaning of the Convention. As to whether the measures taken in the present cases were strictly required by the exigencies of the situation and consistent with the other obligations under international law, the Court considers it necessary to examine the applicant’s complaints on the merits and will do so below (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 93, 20 March 2018, and *Pişkin v. Turkey*, no. 33399/18, § 59, 15 December 2020).

### III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

64. The applicants complained that the monitoring by an officer of their lawyers’ visits and the recording of those meetings by means of technical devices had contravened their right to confidential communication with their lawyers, in breach of their right to respect for their private life under Article 8 of the Convention. Relying on Article 13 of the Convention, they also complained of a lack of an effective domestic remedy in that respect.

65. By virtue of the *jura novit curia* principle the Court is not bound by the legal grounds adduced by an applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018)

66. In the present case, the Court notes that the essence of the applicants’ complaints as set out above is that their right to respect for their private life was breached on account of the monitoring and recording of their meetings in prison with their lawyers. Accordingly, having regard to the formulation of the applicants’ complaints and the nature of the measures in issue, the Court considers that it is appropriate to examine the facts complained of solely from the standpoint of Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life ... and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

## **A. Admissibility**

67. The Court notes that the Government put forward two objections of inadmissibility in respect of the applications, namely that the applicants had not exhausted domestic remedies and that they had not suffered any significant disadvantage on account of the alleged violation of the Convention.

### *1. Exhaustion of domestic remedies*

#### **(a) The parties' submissions**

68. The Government argued that in their individual applications to the Constitutional Court, the applicants had failed to justify and explain in substance how the measure in question had violated their right to respect for their private life. Thus, they had not validly raised their complaints under Article 8 of the Convention before that court. According to the Government, in their applications to the Constitutional Court, the applicants had essentially complained that they had been prevented from enjoying the effective benefit of legal assistance from their lawyers on account of the monitoring and recording of their meetings. In that connection, the Government submitted that the Constitutional Court had declared the applicants' individual applications inadmissible for non-exhaustion of domestic remedies while carrying out its examination from the standpoint of the right to a fair trial. The Government asserted that, in view of the foregoing, the applicants had not raised their complaints under Article 8 of the Convention before the Constitutional Court. That being said, they argued that the applicants' complaint should be examined from the standpoint of the right to a fair trial and be declared inadmissible on the ground that the criminal proceedings against them had still been ongoing at the time when they had lodged their individual applications with the Constitutional Court and subsequently with the Court.

69. The first applicant contested the Government's submission. He argued that in his individual application to the Constitutional Court, he had clearly raised his complaints as regards his right to respect for his private life but that the Constitutional Court had mistakenly, and in a manner conflicting with the Court's case-law, considered his complaints under the right to a fair trial.

The second applicant also contested the Government's argument. He argued that he had followed the necessary steps for the exhaustion of the available remedies, having first raised his objection against the impugned measure before the enforcement judge and the assize court and ultimately by lodging a complaint with the Constitutional Court in individual application proceedings.

The third applicant stated that it had been established in the Court's case-law that the right to confidential communication with a lawyer fell within the concept of "private life" within the meaning of Article 8 of the Convention. In that context he submitted that although he had relied on that concept in his complaint to the Constitutional Court, that court had conducted its examination only in respect of the right to a fair trial.

**(b) The Court's assessment**

70. The Court reiterates that under its well-established case-law, the purpose of the exhaustion rule is to afford a Contracting State the opportunity of addressing, and thereby preventing or putting right, the Convention violation alleged against it. It is true that under the Court's case-law it is not always necessary for the Convention to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance". This means that the applicant must raise legal arguments to the same or like effect on the basis of domestic law, in order to give the national courts the opportunity to redress the alleged breach. However, as the Court's case-law bears out, to genuinely afford a Contracting State the opportunity to prevent or redress the alleged violation requires taking into account not only the facts but also the applicant's legal arguments, for the purposes of determining whether the complaint submitted to the Court had indeed been raised beforehand, in substance, before the domestic authorities (see *Radomilja and Others*, cited above, § 117). Indeed, it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 75, 25 March 2014).

71. In several cases the Court has held that domestic remedies had been exhausted for the purposes of Article 35 § 1 of the Convention even though the applicant's constitutional appeal had been declared inadmissible: it considered that the substance of the complaint had been sufficiently raised before the Constitutional Court (see, among other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 144, ECHR 2010; see also *Uhl v. Germany* (dec.), no. 64387/01, 6 May 2004; *Storck v. Germany* (dec.), no. 61603/00, 26 October 2004; and *Schwarzenberger v. Germany*, no. 75737/01, § 31, 10 August 2006). In other cases, however, it has ruled

that domestic remedies were not exhausted, for instance where an appeal had been declared inadmissible because the applicant had committed a procedural error (see *Jalloh v. Germany* (dec.), no. 54810/00, 26 October 2004).

72. Turning to the present case, the Court observes that, in their individual applications to the Constitutional Court, the applicants complained of the monitoring of meetings with their lawyers by prison officers and the recording of those meetings by means of technical devices. In relation to that complaint, together with their other complaints, the first and the second applicants, directly relying on Article 8 of the Convention, expressly stated in their application forms that the monitoring and recording of meetings with their lawyers had violated their right to respect for their private life (see paragraphs 15 and 25 above). Similarly, the third applicant complained that the measure in question had contravened his right to confidential communication with his lawyer. He relied on Article 22 of the Turkish Constitution on freedom of communication (see paragraph 34 above). In these circumstances, in accordance with the requirements of its case-law, the Court is of the opinion that the applicants sufficiently explained the factual background giving rise to their complaints, as well as their legal arguments relating to their allegations of a violation of their right to respect for their private life under Article 8 of the Convention.

73. In view of those circumstances, the Court considers that the applicants did indeed raise their complaints of a violation of their right to respect for their private life before the Constitutional Court, thereby providing that court with an opportunity to consider those matters and to prevent, or provide redress for, the alleged violations for the purposes of Article 35 of the Convention (see *Marić v. Croatia*, no. 50132/12, § 53, 12 June 2014).

74. Accordingly, the Government's plea on non-exhaustion of domestic remedies must be dismissed.

## 2. *Lack of a significant disadvantage*

### (a) **The parties' submissions**

75. The Government argued that the applications were inadmissible since the applicants had not suffered any significant disadvantage in relation to the monitoring and recording of their meetings in prison with their lawyers. They submitted that the applicants had been able to maintain contact with their families and receive news and information from outside prison in various ways during their detention. In addition, the Government submitted that the applicants had been able to have a number of meetings with their lawyers and that they had been able to participate actively in the criminal proceedings against them with legal assistance from their lawyers. They noted that the applicants had been able to lodge their complaints against the respective prison administrations with the domestic courts. Lastly, they argued that the

applicants had not explained what impact the measure in question had had on their freedom of communication, in particular on their personal situations.

76. The first applicant contested the Government's submission on two grounds. Firstly, he argued that although he had made use of all the available domestic remedies, the domestic courts had failed to duly examine his arguments and had failed to provide adequate reasoning. Secondly, he submitted that confidential contact with his lawyer had been important to him as his only source of communication with the outside world. Considering the atmosphere in Türkiye in the immediate aftermath of the coup attempt, and the very nature of the right in question, he asserted that confidential contact with a lawyer had been vitally important to him and that by being deprived of such contact, he had been put at a significant disadvantage.

The second applicant contested the Government's argument. In his submission, in view of the importance of the privacy and confidentiality of meetings with a lawyer to those in detention, a restriction on that privilege was tantamount to grave interference.

The third applicant did not specifically comment on this point. However, he reiterated that the measure in question had constituted a breach of his right to respect for his private life under Article 8 of the Convention.

#### **(b) The Court's assessment**

77. The Court notes that, following the entry into force of Protocol No. 15 on 1 August 2021, it has considered the rule contained in Article 35 § 3 (b) of the Convention to consist of two criteria: firstly, whether the applicant has suffered a "significant disadvantage"; and secondly, whether respect for human rights compels the Court to examine the case (see *Bartolo v. Malta* (dec.), no. 40761/19, § 22, 7 September 2021).

78. The first question, whether the applicant has suffered any "significant disadvantage", represents the main element. Inspired by the general principle *de minimis non curat praetor*, this first criterion of the rule rests on the premise that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case (see, among other authorities, *Biržietis v. Lithuania*, no. 49304/09, § 36, 14 June 2016). In other words, the absence of any "significant disadvantage" can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant. However, the applicant's subjective perception cannot alone suffice to conclude that he or she has suffered a significant disadvantage. The subjective perception must be justified on objective grounds (see *C.P. v. the United Kingdom* (dec.), no. 300/11, § 42, 6 September 2016, with further references).

79. Turning to the facts of the present case, the Court notes at the outset that the applicants' complaints concerned their right to confidential communication with their lawyers but not their right to a fair trial. That being so, the Court takes the view that the Government's submissions in respect of the applicants' ability to benefit effectively from the legal assistance of their lawyers during the criminal proceedings against them is not directly related to their grievances under Article 8 of the Convention. The Court notes that the impugned measure was applied for a long period of time starting from the very beginning of each of the applicants' detentions and covered numerous meetings between them and their lawyers. As the confidentiality of the lawyer-client relationship is a fundamental rule which can only be derogated from in exceptional cases (see § 96 below) the Court does not agree that, in the circumstances, the prolonged periods during which the applicants' meetings were subjected to restrictions could constitute an "insignificant" disadvantage. The Government's objection concerning the alleged lack of a significant disadvantage must therefore be dismissed (see, *mutatis mutandis*, *Subaşı and Others v. Türkiye*, nos. 3468/20 and 18 others, § 63, 6 December 2022).

80. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The applicants**

81. The applicants relied on the universally acknowledged principle of lawyer-client confidentiality, and in particular they mentioned the principle under Turkish law according to which communications between a lawyer and his or her client in detention could not be subjected to any restriction.

82. The first applicant submitted that no decisions in line with the law and procedure had been taken in relation to the restriction of his meetings with his lawyer. In that connection, the preconditions for imposing the impugned measure under section 6(1)(d) of Emergency Legislative Decree no. 667 had not existed. He noted that the mere referral to the above-mentioned provision was not sufficient and that the domestic authorities had not shown any justified and credible evidence proving that his meetings with his lawyer had put public security or the security of the prison in danger. He emphasised that the restriction had been applied for a long period of time, namely one year. The applicant asserted that, therefore, it had not been strictly required by the exigencies of the situation and had been disproportionate.

83. The second applicant asserted that the impugned measure had had no legal basis in domestic law as, pursuant to the Turkish Constitution, measures

concerning the right to a fair trial had to be adopted by means of a law and not a legislative decree. He noted that the relevant public prosecutor had not mentioned any concrete reason in relation to his personal situation when he had ordered the monitoring and recording of meetings with lawyers in prison, but the order had taken the form of a blanket ban, covering all those in detention for certain offences. In view of the foregoing, the applicant asserted that the provision constituting the legal basis for the measure could not be regarded as foreseeable or as having sufficient clarity. Lastly, he submitted that although the law had required this, he had not been warned about the monitoring and recording prior to the meetings with his lawyer.

84. The third applicant submitted that no decisions had been adopted by a public prosecutor ordering the restriction of his meetings with his lawyer in accordance with section 6(1)(d) of Emergency Legislative Decree no. 667. He further noted that according to the Court's case-law, the confidentiality of lawyer-client contact constituted an aspect of private life and that the Court had found violations of the right to respect for private life on account of restrictions on that confidentiality. In that context, the applicant requested that the Court apply the same principles in his case.

**(b) The Government**

85. The Government submitted that the interference with the applicants' rights under Article 8 of the Convention on account of the restriction of the confidentiality of their meetings with their lawyers had been justified under the second paragraph of that Article.

86. The Government argued that it was not necessary to examine the lawfulness of the interference, as the applicants had not raised any objection in that respect. The Government submitted, however, that the interference had been prescribed by law, that is to say, by section 6(1)(d) of Emergency Legislative Decree no. 667, and that the law in question had been foreseeable and accessible.

87. Furthermore, the Government referred to three decisions of the Constitutional Court: one concerning the compatibility of section 6(1)(d) of Emergency Legislative Decree no. 667 with the Constitution and two others in relation to individual appeals (see paragraphs 43-50 and 54-56 above). The Government noted that in all those decisions the Constitutional Court had examined the impugned measure in the light of the right to receive legal assistance and the right to object against detention and had concluded that the restriction had not exceeded the extent required by the exigencies of the situation within the meaning of Article 15 of the Constitution, which provided for the suspension and restriction of the exercise of fundamental rights and freedoms during a state of emergency. In that connection, the Government suggested that the Court should examine the applicants' complaint in the same manner and reach the conclusion that the measure had not exceeded the extent required by the exigencies of the situation.

88. The Government added that the applicants had been able to effectively benefit from legal assistance from the very beginning of the relevant criminal proceedings against them and that they had not suffered any disadvantage on account of the impugned measure. In that context, the Government noted that no evidence or incriminating statement had been obtained from the applicants in the period during which the measure had been imposed. They had been able to submit their requests for release from detention and their counter-arguments against the accusations levelled at them. The Government argued that the applicants had been able to actively participate in the criminal proceedings and that the measure had not constituted a blanket ban on their meetings with their lawyers, but that they had been able to have a number of meetings with their lawyers whenever they wished.

89. Furthermore, the Government argued that the provision contained all the necessary safeguards to avoid abuse. Firstly, the application of the measure was subject to certain conditions and was possible only in circumstances where it had been understood that the meeting could endanger the security of the public or the prison. Secondly, the provision had required that the detainees and their lawyers be warned about the monitoring and recording prior to the meeting. Thirdly, the detainees had been entitled to apply to the enforcement judge for a review of the measures concerning the monitoring and recording of the meetings with their lawyers. In view of foregoing, the Government asserted that the provision in question had provided for sufficient legal guarantees and review mechanisms.

90. Lastly, the Government submitted that the Convention institutions had examined similar complaints concerning the monitoring of client-lawyer contact in *Kempers v. Austria* (no. 21842/03, Commission decision of 27 February 1997, unreported) and *Erdem v. Germany* (no. 38321/97, ECHR 2001-VII (extracts)) and had found no violation, taking into account that the measures in question had been taken in the context of investigations in respect of terrorism or organised crime.

## 2. The Court's assessment

### (a) Existence of an interference

91. The Court reiterates that a person's communication with a lawyer in the context of legal assistance falls within the scope of private life since the purpose of such interaction is to allow an individual to make informed decisions about his or her life. More often than not, the information communicated to the lawyer involves intimate and personal matters or sensitive issues. It therefore follows that whether in the context of assistance for civil or criminal litigation or in the context of seeking general legal advice, individuals who consult a lawyer can reasonably expect that their communication is private and confidential (see *Altay v. Turkey* (no. 2), no. 11236/09, § 49, 9 April 2019).

92. The Court observes that all the second applicant's meetings – eighteen in total – with his lawyers were monitored and recorded, while nine of the first applicant's meetings were subjected to the restriction in question. Lastly, all of the third applicant's four meetings with his lawyer were monitored and recorded by means of technical devices (see paragraphs 17, 27 and 36 above). In view of the foregoing, the Court finds, and this has not been disputed by the parties, that there has been an "interference by a public authority" within the meaning of Article 8 § 2 of the Convention with the applicants' right to respect for their private life in the context of the privacy of oral communications with their lawyers on account of the monitoring by an officer and the recording by means of technical devices of their meetings.

**(b) Justification of the interference**

93. Such interference infringes Article 8 unless it is "in accordance with the law", pursues one or more legitimate aims under the second paragraph of that Article and is "necessary in a democratic society" in order to attain them.

94. The Court reiterates that any infringement of a right guaranteed by the Convention must have a basis in domestic law. The expression "in accordance with the law" in Article 8 § 2 not only requires that the impugned measure have a legal basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must, moreover, be able to foresee its consequences for him or her, and compatible with the rule of law. The phrase thus implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts)). In order to satisfy the condition of foreseeability, the law must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be with appropriate advice – to regulate their conduct (see *Altay*, cited above, § 54, and *Klaus Müller v. Germany*, no. 24173/18, § 50, 19 November 2020). In particular, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II).

95. The Court has further held, in the context of Article 8 of the Convention, that it is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged (see, *mutatis mutandis*, *Campbell v. the United Kingdom*, 25 March 1992, § 46, Series A no. 233).

96. The Court has tolerated certain restrictions imposed on lawyer-client contact in cases of terrorism and organised crime (see, in particular, *Erdem*,

cited above, § 65, and *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 627, 25 July 2013). Nonetheless, the privilege that attaches to correspondence between prisoners and their lawyers constitutes a fundamental right of the individual and directly affects the rights of the defence. For that reason, the Court has held in the context of Article 8 of the Convention, that the fundamental rule of respect for lawyer-client confidentiality may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place (see, *mutatis mutandis*, *Erdem*, cited above, § 65).

97. In the instant case, the Government stated that the legal basis for the interference with the confidentiality of the applicants' meetings with their lawyers had been section 6(1)(d) of Emergency Legislative Decree no. 667.

98. The Court notes that section 59(4) of Law no. 5275, which was in force at the material time, provided that a lawyer's documents and files relating to the defence and the records of meetings with his or her client were not subject to examination (see paragraph 40 above). That provision did not envisage any restrictions involving the monitoring by an officer or the recording by technical means of meetings between those in pre-trial detention and their lawyers. Following the entry into force on 23 July 2016 of Emergency Legislative Decree no. 667 on measures adopted under the state of emergency, public prosecutors were empowered to impose such restrictions on the confidentiality of the meetings of detainees with their lawyers (see paragraph 42 above). The Court further observes that Emergency Legislative Decree no. 676, which came into force after some three months, on 29 October 2016, amended section 59(4) of Law no. 5275 and added further subsections to that section concerning, *inter alia*, the monitoring and recording of detainees' meetings with their lawyers (see paragraph 41 above). Furthermore, section 59 of Law no. 5275, as amended by Emergency Legislative Decree no. 676, subjected the imposition of measures involving the monitoring and recording the detainees' meetings with their lawyers to more adequate safeguards. In accordance with the new version of section 59, such measures could only be imposed for three months and only following a decision by a magistrate at the investigation stage or by the (trial) court at the prosecution stage following a request by the public prosecutor. In the light of the foregoing, the Court considers that as of the entry into force of the new version of section 59 of Law no. 5275, which was also amended by an emergency legislative decree during the state of emergency, this being the most recent provision governing the monitoring and recording of detainees' meetings with their lawyers, there arose an ambiguity in respect of the applicable domestic law in relation to the measures in question. Although the imposition of those measures pertained to the period after the entry into force of Emergency Legislative Decree no. 676, the new legal framework in respect of the monitoring and recording of the meetings with lawyers does not seem to be applied to the applicants. This

issue was not discussed in the domestic courts' decisions, nor did the Government submit an explanation in that regard. However, as the domestic authorities and the courts based their decisions on the legal framework prior to the entry into force of Emergency Legislative Decree no. 676 and the applicants did not contest the Government's reference to that legal framework as the legal basis of the measure in question, the Court will carry out its lawfulness test for the purposes of Article 8 of the Convention in respect of section 6(1)(d) of Emergency Legislative Decree no. 667.

99. The Court notes that Emergency Legislative Decree no. 667, which came into force on 23 July 2016, set forth measures which were considered indispensable by the Turkish authorities for the fight against the coup attempt as well as the threat of terrorism during the state of emergency, including the measures under section 6 concerning investigations and criminal proceedings in respect of certain offences. In accordance with that provision, during the state of emergency the public prosecutor could order that a prison officer be present during meetings of detainees with their lawyers or that audio and video recordings of such meetings be made, but only when there was a possibility that the meetings might endanger the security of the nation and the institution, that terrorist organisations or other criminal organisations might be directed, that orders and instructions might be given to those organisations, or that secret, open or encoded messages might be transmitted through the comments made during the meetings.

100. The Court notes that the third applicant (application no. 9077/20) asserted that no decision had been adopted by a public prosecutor ordering the monitoring or the recording of his meetings with his lawyer in accordance with section 6(1)(d) of Emergency Legislative Decree no. 667. In that context, in response to his enquiry as to the grounds for the measure he had been subjected to, the Düzce Prison administration merely referred to section 6(1)(d) of Emergency Legislative Decree no. 667 as the legal basis but did not mention any public prosecutor's decision ordering the restriction (see paragraph 31 above). There was also no reference to any public prosecutor's decision in the Government's submissions in relation to the measures imposed in relation to the third applicant's meetings with his lawyer. Thus, the Court cannot but note that the restrictions on the third applicant's meetings with his lawyer were not based on a decision adopted by a public prosecutor in compliance with section 6(1)(d), in other words, in accordance with domestic law. The Court finds, therefore, that the interference was not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention in respect of the third applicant.

101. As to the first and second applicants (applications nos. 24074/19 and 44839/19 respectively), the Court observes that restrictions on the confidentiality of their meetings with their lawyers were imposed by decisions of the relevant chief public prosecutors' offices based on section 6(1)(d) of Emergency Legislative Decree no. 667. Once the restrictive

measures had been ordered by a public prosecutor in accordance with that provision, the prison administration was authorised, and indeed required, to monitor and record the detainees' meetings with their lawyers. However, the legislation did not specify how the information obtained during the surveillance should be used, kept or destroyed. Nor did it indicate which authority could be held liable in the event that the applicants sought to have the application of that measure declared abusive or arbitrary. Indeed, the extent of and the procedures for the exercise of the discretionary power left to the authorities were not defined and no sufficient safeguards against abuse and arbitrariness were put in place.

102. In the present case, the public prosecutors noted in their decisions that in view of the structure of the FETÖ/PDY, its communication methods and the fact that some members of that organisation had still not been captured, meetings with lawyers could endanger the security of the nation and the prisons, as they were likely to be used for transmitting secret, open or encrypted messages among the members of the organisation, as well as orders from the organisation to its members in detention. On those grounds, the public prosecutors ordered the monitoring by an officer and the recording by means of technical devices of all the meetings of those in detention for membership of the FETÖ/PDY in the prisons under their jurisdiction. In this connection, in their decisions to restrict the confidentiality of the detainees' meetings with their lawyers, the public prosecutors did not demonstrate the existence of security risks based on the specific circumstances of the applicants' individual situations, but their assessment rather concerned general points as regards the possibility that the meetings might constitute a risk to the security of the nation and the prison. In that context, the public prosecutors imposed the impugned measure on all those in detention for certain offences, including membership of the FETÖ/PDY. The lack of individualised grounds in the decisions to apply the impugned measures inherently created difficulties for the applicants in raising their counter-arguments before a court during a review of the necessity of the measures and gave rise to a risk of arbitrariness in their application.

103. Furthermore, section 6(1)(d) of Emergency Legislative Decree no. 667 did not specify the duration of measures involving the monitoring and recording of meetings with lawyers and the conditions that had to be met in order for such measures to be terminated. Under that provision, the measures could be ordered for the duration of the state of emergency without any set intervals at which its necessity could be reviewed. Moreover, Article 121 of the Turkish Constitution, as in force at the material time, did not set a maximum duration in respect of the state of emergency and, in accordance with that Article, the Turkish Grand National Assembly had the authority to extend the state of emergency after its necessity was reassessed, which was to be done every four months at a minimum. In other words, section 6(1)(d) of Emergency Legislative Decree no. 667 allowed for the imposition of the

impugned measures during the state of emergency, for which no maximum time-limit was set in domestic law. In view of the foregoing, the Court finds that the provision did not set forth any safeguards in respect of the duration of the impugned measures, preventing those concerned from knowing or foreseeing when they would cease to be applied. This open-ended application of the measures in question undermined the principle of legal certainty (see, *mutatis mutandis*, *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 139, ECHR 2013).

104. The Court further notes that section 6 of Emergency Legislative Decree no. 667 did not provide for a mechanism requiring an automatic and permanent review of the need for the measures in question, bearing in mind that what is justified in the immediate aftermath of a major public crisis may not be needed several months later (see *Brannigan and McBride v. the United Kingdom*, 26 May 1993, § 54, Series A no. 258-B). In the present case, once the relevant public prosecutors had ordered the restrictions on the confidentiality of lawyer-client meetings in the immediate aftermath of the 15 July 2016 coup attempt, those restrictions were applied for one year in respect of the first applicant and four years in respect of the second applicant, without any assessment being initiated by the domestic authorities as to their necessity. The domestic courts dismissed the applicants' appeals challenging the imposition of the restrictions on the confidentiality of their meetings with their lawyers on the ground that such measures had been taken in accordance with a legislative decree adopted during the state of emergency, without conducting a thorough examination of the measure at issue, the impact of which on the right to respect for private life of the persons concerned was nevertheless significant. The enforcement judges did not adopt any decision examining the merits of the applicants' complaints, holding instead that they lacked jurisdiction in respect of the prosecutors' decisions (see paragraphs 14 and 24 above). In those circumstances, it appears that, in the present case, the national courts failed to fulfil their obligation to ascertain whether the reasons put forward in the relevant decisions had justified the monitoring and recording of the applicants' meetings with their lawyers contrary to the principle of client-lawyer confidentiality (see also paragraphs 16, 26 and 35 above). Consequently, the Court is of the opinion that the judicial review of the application of the contested measures was not adequate or effective in the present case (see, *mutatis mutandis*, *Pişkin*, cited above, §§ 226-28, and *Telek and Others v. Türkiye*, nos. 66763/17 and 2 others, § 124, 21 March 2023).

105. In the light of the foregoing, the Court cannot but find that the discretion enjoyed by the public prosecutors in imposing restrictions on the applicants' communication with their lawyers was not subject to any conditions, that the scope of that discretion and the manner of its exercise were not defined and that no other specific guarantees were provided in that regard. This being so, it considers that, in the circumstances of the present case, the adoption of the impugned measures against the applicants, which

were enforced for a limited period during the state of emergency, was liable to be arbitrary and incompatible with the requirement of lawfulness (see, *mutatis mutandis*, *Bykov v. Russia* [GC], no. 4378/02, § 81, 10 March 2009, and *Vig v. Hungary*, no. 59648/13, § 62, 14 January 2021).

106. In the light of the foregoing considerations, the Court finds that the impugned interference was not “in accordance with the law” within the meaning of Article 8 § 2 of the Convention.

107. As to Article 15 of the Convention, the Court reiterates that when a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of Article 15 must leave a place for progressive adaptation (see *Ireland v. the United Kingdom*, 18 January 1978, § 220, Series A no. 25). However, turning to the present case, for the reasons set out above in support of its conclusion, the Court considers that the absence of any safeguards against arbitrariness and abuse in section 6(1)(d) of Emergency Legislative Decree no. 667 cannot be regarded as having been justified by the respondent State’s derogation of 21 July 2016 under Article 15 of the Convention (see, *mutatis mutandis*, *Pişkin*, cited above, §§ 152, 153 and 229, and *Telek and Others*, cited above, § 126).

108. In the light of that conclusion, the Court considers that it is not necessary to examine whether the interference pursued one or more legitimate aims and was necessary in a democratic society within the meaning of Article 8 § 2 in the present case.

109. Accordingly, the Court concludes that there has been a violation of Article 8 of the Convention.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. 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.”

111. The first applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage. He also claimed a total of EUR 2,000 in respect of costs and expenses incurred before the Court, including lawyer’s fees. In support of his claims, he submitted a fee agreement with his lawyer and a timesheet showing the hours spent by him on the case.

112. The second applicant claimed EUR 80 in respect of pecuniary damage and EUR 12,000 in respect of non-pecuniary damage. He also claimed EUR 4,942 in respect of costs and expenses incurred before the

Court, including lawyer's fees. In that context, he submitted a fee agreement with his lawyer and a timesheet showing the hours spent by him on the case.

113. The third applicant claimed EUR 30,000 in respect of non-pecuniary damage. He also claimed EUR 2,184 in respect of costs and expenses incurred before the Court, including lawyer's fees. In that context, he submitted a fee agreement with his lawyer and a timesheet showing the hours spent by him on the case, as well as the fee scale of the Ankara Bar association.

114. The Government contested those claims.

115. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. However, ruling on an equitable basis, the Court awards the applicants EUR 9,750 each in respect of non-pecuniary damage.

116. As to costs and expenses, the Court notes that the applicants submitted legal fee agreements with their lawyers and timesheets showing the hours spent by their lawyers, stating that they were under a legal obligation to pay the sums mentioned above. Regard being had to the documents in its possession and to its case-law (see, among many others, *L.B. v. Hungary* [GC], no. 36345/16, § 149, 9 March 2023), the Court considers that the sums claimed should be awarded in full. The Court therefore awards the first applicant EUR 2,000, the second applicant EUR 4,942 and the third applicant EUR 2,184 for costs and expenses.

117. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds*
  - (a) that the respondent State is to pay 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 the currency of the respondent State at the rate applicable at the date of settlement:
    - (i) EUR 9,750 (nine thousand seven hundred fifty euros) to each of the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;

- (ii) EUR 2,000 (two thousand euros) to the first applicant, EUR 4,942 (four thousand nine hundred and forty-two euros) to the second applicant, and EUR 2,184 (two thousand one hundred and eighty-four euros) to the third applicant, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 November 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı  
Registrar

Arnfinn Bårdsen  
President

## APPENDIX

List of cases:

| No. | Application no. | Case name          | Lodged on  | Applicant<br>Year of birth<br>Place of residence | Represented by     |
|-----|-----------------|--------------------|------------|--------------------------------------------------|--------------------|
| 1.  | 24074/19        | Canavcı v. Türkiye | 01/04/2019 | <b>Mehmet Ali CANAVCI</b><br>1978<br>Istanbul    | Tarık Said GÜLDİBİ |
| 2.  | 44839/19        | Çaylı v. Türkiye   | 20/09/2018 | <b>Ramazan ÇAYLI</b><br>1978<br>Zonguldak        | Ahmet Can DEMİRCİ  |
| 3.  | 9077/20         | Altun v. Türkiye   | 03/02/2020 | <b>Harun ALTUN</b><br>1979<br>Ankara             | Yakup GÖNEN        |