ANNEX-1

THE INDIVIDUAL APPLICATION TO THE CONSTITUTIONAL COURT

DETAILED EXPLANATIONS OF WHAT IS STATED ON THE APPLICATION FORM

THE APPLICATION OF CAFER TEKIN IPEK

(11 May 2023)

I. FACTS

A. PERSONAL INFORMATION ABOUT THE APPLICANT

1. The applicant **Cafer Tekin Ipek** was born in Adana on 21 January 1965 and is being held in Sincan No. 1 F Type Penitentiary Institution within the scope of the execution of a prison sentence imposed on him restricting his liberty on the date of this application. This application is about the human rights violations in the criminal proceedings where the said sentence is imposed.

2. The applicant, along with other family members, was a direct or indirect shareholder of the Koza-Ipek Media Group, which consisted of two television channels, a radio station and two newspapers at the time of the events subject to this application, as well as two gold mining companies and some other companies (see **Annex-2** for detailed information and documents regarding the company names and partnership shares). In addition to their commercial activities, Ipek Family members also established a family foundation and Ipek University was established under the umbrella of this foundation with a Law dated 3 March 2011 and the university started its higher education activities in February 2013. At the time of the events, Cafer Tekin Ipek was the chairman of the board of trustees of this university.

A. THE INVESTIGATION PHASE

3. After the Gezi Park Protests (in Istanbul) in the summer of 2013, some journalists who were columnists for the newspapers *Bugun* and *Millet* wrote some articles criticising the government. On 17-25 December 2013, two corruption investigations were launched against some ministers, bureaucrats and businessmen. The Koza-Ipek media organisations covered these investigations.

1. The Establishment of the Commercial Company called *Koza Ltd* in England, The Establishment of Criminal Judgeships of Peace and "The MASAK Preliminary Report"

4. On 2 June 2014, The Financial Crimes Investigation Board (MASAK) started an investigation after some news appeared in the media about the establishment of ***Koza Ltd*** in England in 2014 by the Koza Ipek Group with capital of 60 million British pounds.

5. With Law No. 6545 dated 18 June 2014, Criminal Judgeships of Peace, which are exclusively authorised to carry out the proceedings at the investigation stage, were established. The then Prime Minister defined the establishment of criminal judgeships of peace as, "*Infrastructure work to combat the parallel structure*".

6. The MASAK Preliminary Report was completed on 4 August 2014. The financial structure of the Koza Ipek Group was analysed in the report. In summary, although it has been stated that this group invested in media companies that had suffered 'serious' losses, there was no illegal aspect of investing in media companies and increasing the

commercial value of the companies. Investing in loss-making commercial companies and making them profitable is a "risky" business activity and to undertake the said commercial risk belongs to the investing business people and doesn't concern the state. Despite this, the aforementioned MASAK Preliminary Report recommended investigating the establishment of Koza Ltd in the United Kingdom, but no criminal charges were made against the media companies or the company shareholders in the report, and there was no mention of terrorism in any form **(Annex-3)**. It is understood that the preliminary report was sent to the Ankara Chief Public Prosecutor's Office on 5 September 2014.

7. On 26 July 2015, Sabah newspaper wrote that "*the judges who were not determined to fight the Parallel Structure were appointed to other courts and that a total of 138 peace judges were dismissed and appointed to other courts.*". On 5 February 2015, the HSYK (The Council of Judges and Prosecutors) appointed the 5th Criminal Judge of Peace, S.K., to the labour court, and appointed Yunus Süer as the 5th Criminal Judge of Peace. On 23 July 2015, the 6th Criminal Judge of Peace H.T. was appointed to another court and Judge Savaş Şahinbay was appointed as the 6th Criminal Judge of Peace. However, for the first time in Turkey, peace judges were appointed on 16 July 2014, just one year ago. In other words, the judges in question were dismissed without even having worked for a year in the court they were assigned to, and new judges were appointed in their place. According to the Regulation on the Appointment of Judges and Prosecutors, even if it is a Class 5 region, a judge cannot be appointed to another court without having worked in the same court for a minimum of 2 years. Ankara is a Class 1 region and a judge appointed to an Ankara Courthouse cannot be appointed to another court without working for a minimum of 7 years or without his request.[1]

2. "*The Çomaklı Report*" and the Appointment of Trustees to the Koza-Ipek Group Companies

8. On 31 August 2015, Ankara 7th Criminal Judge of Peace issued a search and seizure order regarding the companies in which the applicant was a shareholder, and these proceedings lasted for two weeks. After 15 September 2015, the prosecutor formed an expert committee headed by Şafak Ertan Çomaklı. The experts in question were not selected from among the people whose names were on the official expert list at the Ankara Courthouse, and were selected from outside the list for some inexplicable reason. The head of this committee was a person who publicly criticised the Gülen movement, and the shareholders of the companies subject to the application were also accused of being members of this movement. It is understood that he is prejudiced

1 https://www.mevzuat.gov.trFileGeneratePdfmevzuatNo=8063&mevzuatTur=KurumVeKurulusYonetmeligi&mevzuatTertip=5

against the companies and their shareholders. As stated below, although an objection was raised to this panel of experts on the grounds that they were not impartial, the objection was rejected (ECHR ***Test Achat v. Belgium*** decision).

9. The television stations and the radio channels belonging to the Koza-Ipek Group were removed from all digital broadcasting platforms in Turkey on 8 October 2015. Upon the request of an individual consumer, Mersin 1st Consumer Court found this decision unlawful. An investigation was immediately initiated against the judge M.C. who made the decision and he was relocated from Mersin to Çorum, and his decision was ultimately not implemented.

10. The expert report (**The Çomaklı Report**) was completed (in just 4 weeks) on 16 October 2015. The report contained allegations of financial irregularities, accounting crimes and allegations regarding money laundering, mostly related to the gold companies. The report made no mention of the financing of terrorism. As mentioned below, the hasty "findings" of this report were conclusively refuted by the MASAK final reports dated 4 May 2016[2]. The Çomaklı Report was added to the investigation file on 20 October 2015 and the prosecutor demanded that the Ankara 5th Criminal Judgeship of Peace appoint trustees to 18 companies in which the applicant was a shareholder. (See Annex-4, first page).

11. On 26 October 2015, the Ankara 5th Criminal Judgeship of Peace, depending primarily on the Çomaklı Report, and pursuant to Article 133 of the CPC (Criminal Procedure Code), decided to appoint trustees to 18 companies belonging to "the Koza Ipek Group" (not to the family foundation) (**Annex-4**). In the decision, it was briefly stated that the money collected as donations (himmet) was shown as earned from gold production and that trustees were appointed due to the claim that the unrecorded money was used to finance the terrorist organisation. According to the judge, these funds were later deposited in banks on behalf of front companies and then were transferred to the organisation called "FETÖ/PDY". Pursuant to Article 133 § 4 of the CPC (Criminal Procedure Code), trustees were appointed based on the accusations of money laundering through assets obtained from crime, and supplying weapons to an armed organisation and to such organisations. However, the Gulen movement had not been declared a terrorist organisation at the time when all these events took place and no concrete evidence could be found that the donation money was obtained from gold production. The decision did not include any concrete evidence or justification showing that the conditions in the law regarding the appointment of trustees to media organisations had been met.

---

[2] Since all the allegations in t**he Çomaklı Report** were refuted in the MASAK Final Report No. 6 dated 5 May 2016, they were not included in the indictment dated 9 June 2017 and they were not relied on in the conviction decision. Therefore, this report is not included in the annexes.

12. With the decision to appoint trustees to the management of the Koza-Ipek Group companies, all management and audit powers and responsibility of the applicant and other Ipek Family members over the companies have been transferred to the trustees, and **as of 26 October 2015** no blame or responsibility can be placed on the applicant in connection with the companies.

13. Before the decision dated 26 October 2015, judge Yunus Süer, who signed the decision to appoint trustees, shared hate messages inciting violence such as "traitor" and "betrayers" and "watering with blood" on his Twitter account: "*The treason will not end unless the heads that betrayed the state are cut off and the soil is awash with their blood as a warning to others.*" *"We're still on the Archers' Hill. We have not abandoned it; we will not abandon it"*[3] **(Annex-5)**.

14. According to the information obtained from open sources, the people appointed as trustees to the Koza-Ipek companies seem to have close relations with the ruling party. The decision to appoint trustees was published in the Trade Registry Gazette on 3-4 November 2015 contrary to Article 133 § 1 of the CPC and was brought into force without being published. On 28 October 2015, although the the relevant parties were not notified of the decision of the Criminal Judge of Peace until around midday, the police broke into the building where the television channels were located at 06:30 and the live broadcast of KANALTÜRK TV was forcibly stopped at 16:34. More than 100 journalists were dismissed in a short period of time, the websites of all media outlets were shut down and their internet archives were completely destroyed. The broadcasting policies of media organisations were changed completely and turned into a propaganda tool of the ruling party, thus media organisations lost 90% of their daily customers and ratings. The daily readership of newspapers fell from 165,000 to 14,000 in a short period of time. All this is a direct and predictable consequence of the appointment of trustees by the Criminal Judgeship of Peace.

15. On 17 November 2015, TÜRKSAT A.Ş. terminated the broadcasting services of BUGÜN TV, KANALTÜRK TV and KANALTÜRK Radio over the Türksat 4A satellite. On 29 February 2016, the trustee committee completely closed down the newspaper and television stations and ended all media activities.

3. Objection Against the Trustee Decision, Rejection of the Objection and Subsequent Events

16. On 24 November 2015, the decision to appoint trustees dated 26 October 2015 was appealed **(Annex-6)**. In this objection, it was stated that the Çomaklı Report contained unrealistic and fabricated allegations, that unrealistic and fabricated allegations were used in the decision based on this report, that material errors were made and the decision was unlawful, and that there was no organisation named "FETÖ/

[3] https://twitter.com/ArrestedLawyers/status/881993469186764801

PDY" at the time of the allegations. It was also stated that there was no concrete evidence showing the existence of a strong suspicion that a crime had been committed, and no evidence showing that crimes continued to be committed within the scope of the activities of each company. Based on Article 162 of the CPC, an objection was also raised for the lack of jurisdiction by reason of the place (ratione loci) of the peace judges regarding the media companies. The objection also stated that the decision violated Article 30 of the Constitution (freedom of the press). It has also been argued that the principle of adversarial proceedings, the independence and impartiality of judges, and the right to property have been violated.

17. On 27 November 2015, the Ankara 6th Criminal Court of Peace rejected the objection without answering many of the arguments (**Annex-7**). The argument that there is no concrete evidence has been rejected with the following explanation: "*In the law, the existence of a strong suspicion of crime is considered sufficient for the appointment of a trustee in terms of catalogued crimes and concrete evidence is not needed for strong suspicion of crime.*" This argument means that there is no concrete evidence in the file showing the accuracy of the allegations.

4. 12 Different "MASAK Final Reports" Completed in 2016 regarding the Allegations

18. On 11 November 2015, The Ankara Chief Public Prosecutor's Office requested MASAK to conduct a detailed examination and research into the financial activities of all the 18 companies and the banking transactions of the company partners.

a-) 6 MASAK Final Reports dated 30 March and 4 May 2016

19. MASAK prepared six final reports on 30 March 2016 and on 4 May 2016. In Report No. 1, the capital increases of the companies within the "Koza-Ipek Group" were examined and it was stated that no irregularities were found: "*No assets, income or cash transfers of dubious origin have been identified.*" Money transfers were examined in Reports 2 and 4 and it was stated that no irregularities were found again. Report No. 3 consists of a single page and relates to a correspondence between MASAK and the prosecutor's office. The anonymous source of information which claimed that gold production was being misused in line with the interests of the Gülen movement was refuted in Report No. 5. According to this report, "*No data was found to support the claim of dubious gold production*." **In Report No. 6 dated 4 May 2016,** the account movements of 30 people (including the applicant) were examined and it was stated that almost all sums deposited in bank accounts were legal earnings and there were no suspicious money transfers. In the aforementioned Report No. 6, the 12 claims mentioned in **the Çomaklı Report** were examined in detail. It was stated that 9 of these allegations were completely untrue, and for 3 allegations concerning the CTL (Corporate Tax Law) and CML (Capital Markets Law) legislations, there were statements regarding

minor irregularities that required administrative fines and were not related to any catalogued crime. Briefly, the MASAK final reports refuted all the allegations in the "***Çomaklı Report"*** which was prepared quickly and which was the basis for the appointment of trustees. It stands to reason that in the first six final reports issued by MASAK between 30 March 2016 and 4 May 2016 (for the 6 MASAK final reports No. 1-6, see **Annex-8**), it was found that there was no criminal element except for minor deficiencies requiring administrative measures.

20. All monetary transactions and capital increases of the Koza-Ipek Group have been examined in the **MASAK Final Report No. 1** dated 30 March 2016.(88 pages). According to this report, *"[...] all bank account transactions since 2003 have been audited and it has been determined that the amounts deposited or transferred belong to personal or corporate legal gains. […] It has been determined that all money transactions in and out of company bank accounts have been recorded in the company books. […] In addition, no suspicious asset transfers or banking transactions have been detected in the bank accounts of the partners and companies [...] Since there is no inflow of cash the source of which is not disclosed by commercial transactions into the companies, it has been determined that the companies that have increased capital, have done so with their own resources. […] Koza-Ipek Group's capital increase of TL 1.9 billion was financed out of TL 2.9 billion, which is the total net profit of the companies between 2003 and 2013. No asset, income or cash transfer of dubious origin has been found. [The companies have not received any cash the source of which cannot be explained by commercial transactions, [...] no suspicious matter has been identified*" (pages 1-84).

21. According to **the MASAK Final Report No. 2** dated 30 March 2016 (3 pages) regarding the allegations against Koza-Ipek Foundation, MASAK concluded that the allegations of illegal money transfers in favour of the foundation were unfounded.

22. **The MASAK Report No. 3** consists of a one-page letter to MASAK's Public Prosecutor about the course of the investigations.

23. According to **the MASAK Final Report No. 4** (44 pages) dated 4 May 2016 regarding the alleged transfer of $7.4 billion USD by the companies in question to Malta, Bahrain and Cyprus, "*The specified transactions of the companies have been confirmed by matching the records in the companies' books, and it has been found that all outgoing and incoming payments have been recorded in the companies' books. [...] The cumulative total is increasing due to the fact that the money is sent to deposit accounts and returned more than once. [...] These transactions are in the form of short-term deposit returns, and all amounts going [abroad] have returned to domestic accounts*."

24. **The MASAK Final Report No. 5** (9 pages) dated 4 May 2016 relates to two allegations: a) dubious gold production (to finance FETÖ/PDY) pretending that unproduced gold was produced, and b) fund transfer to FETÖ/PDY through the transfer of $7.4 billion USD abroad and commercial activities. Regarding the first claim, MASAK stated, *"[...] in light of the above explanations, no data has been found to support the allegation of dubious gold production.*" As for the second claim, MASAK stated, "c*onsidering the MASAK Final Report No. 4, these transactions are related with short-term deposit accounts. All funds have been returned and no amount has been identified as being untraceable. Therefore, the second claim is also unfounded.*" This final report has completely refuted the main allegation (laundering money by way of showing donations as if they were earned from the production of gold and transfer them to FETÖ/PDY) in the Çomaklı report which was the basis for the decision to appoint trustees.

25. **The MASAK Final Report No. 6** (79 pages) dated 4 May 2016 a) examined the banking transactions and b) evaluated in detail the allegations stated in the Expert Report, which constituted the basis for the decision to appoint trustees. a) Regarding banking transactions, MASAK has concluded that almost all of the amounts deposited in the bank accounts are legal income of the companies and there are no suspicious transactions. (pp. 4, 7, 9, 12, 16, 20, 21) b) As for the assessment of the allegations made in the Çomaklı Expert Report dated 16 October 2015, MASAK examined in detail the 12 allegations stated in the Expert Report (pp. 32-79) and concluded that 9 allegations were completely unfounded for the following reasons:

> "*No suspicious or made-up dealings have been identified in the share transfers. There is nothing suspicious about the money transfers. No suspicious use of paid consulting fees has been identified. There is nothing to report in terms of money laundering crimes. There are no suspicious dealings regarding fraudulent accounting and unregistered money transfer allegations*.".

26. Regarding the 3 allegations referred to in the Expert Report, MASAK has identified minor irregularities in its Final Report No. 6 that are not related to the catalogued crimes (Article. 133 § 4 of the CPC) or the allegations on which the trustee decision is based and that only require an administrative fine: **aa)** Regarding the allegation of some irregularities in the Board of Directors' Resolution Book of some companies, MASAK has reached the following conclusion:

> *"In the light of the above findings in the Expert Report, there is no crime that may constitute a predicate offence of money laundering, since the sanctions for matters other than the determination that 'criminal investigation should be carried out due to dissimilar signatures' require administrative fines.*" (p. 35).

27. It should be noted right away that the court of first instance had an investigation carried out regarding the signatures in question, but no irregularities were

found, and it was decided that there was no need for any criminal investigation in this regard.

28. bb) MASAK has reached the following conclusion regarding the claim of "Considering the Investment Incentive Certificate containing Modernisation as a New Investment":

> "*A situation similar to the above was performed by Koza Altın İşletmeleri A.Ş. and has been the subject of criticism. <u>However this situation does not constitute any crime under the Law No. 5549.</u>"*

29. (cc) *"MASAK made the following assessment regarding the allegation that Koza Ipek Holding made a Disguised Transfer of Earnings through Transfer Pricing by way of Loss on Share Sales in 2011:*

> *"On the other hand, in accordance with Articles 5/1-e and 5/3 of the Corporation Tax Law, the deduction of 75% of the 15,452,311.33 TL, which is the loss on sale of participation shares, from the corporate tax base, may require criticism in terms of Tax Law. Therefore, with the letter numbered 7.0598378-663.05 [2015-19] - 5220 written to the Tax Inspection Board Presidency, it was stated that an investigation should be started regarding Ipek Holding A.Ş.*"

30. As can be understood, all of these minor irregularities are related to non-criminal criticism, the Corporation Tax Law (KVK), the Capital Markets Law (SPK) or just irregularities that may lead to administrative fines. These claims have nothing to do with <u>crimes of money laundering or supplying weapons to an armed organisation</u>.

31. Therefore, MASAK conclusively determined that the allegations that there were suspicious activities in some companies in the MASAK preliminary report prepared in 2014 were unfounded, and determined that none of the companies in question engaged in activities such as fraudulent transactions, accounting fraud, money laundering or financing of terrorism. Thus, all the grounds and allegations on which the decision to appoint a trustees were based, were refuted with the **<u>MASAK Final Report No. 6</u>**.

32. The allegation included in the Expert Report that Koza Gold made disguised profit distribution through transfer pricing was also evaluated in the **<u>MASAK Final Report No. 6.</u>** It was stated that there was no finding to support this claim, and the following was particularly emphasised: *<u>Regarding the matter, although information was requested from the expert Şafak Erdem Çomaklı 4 times over the phone, no information could be obtained</u>*" (pp. 36-37).

33. On 11 November 2015, the Office of the Chief Public Prosecutor asked MASAK a question about whether the companies within the Koza-Ipek Group and 30 people, including members of the Ipek family, transferred money to foundations and organisations affiliated with the organisation called "FETÖ/PDY". This question was answered in the MASAK Final Report No. 6 dated **<u>4 May 2016</u>** as, *"[…] there is no*

finding that the persons about whom information was requested transferred money to the aforementioned institutions." (p. 79).

b-) The Other 6 MASAK Final Reports dated 5 August, 26 September and 4 October 2016

34. Six more final reports (Reports No. 7-12) were issued by MASAK on 5 August 2016, 26 September 2016 and 4 October 2016. These reports reaffirmed that the allegations of money laundering and accounting fraud were unfounded, as well as confirming that the donations or the capital transfers had been made to the institutions such as the universities and the media companies that were closed down by the decree laws issued after 23 July 2016, and this fact has never been denied or concealed by the partners of the company. It is clearly stated in report No. 10 that there were no irregularities and illegalities in the acquisition of KanalTürk. The final report of MASAK No. 10 clearly stated that the UK company named Koza Ltd was incorporated in accordance with the law (for the complete MASAK final reports No. 7-12, see **Annex-9**).

35. **The MASAK Final Report No. 7** dated 30 June 2016 consists of a single page and is a letter written by MASAK to the Public Prosecutor.

36. **The MASAK Final Report No. 8** dated 5 August 2016 is related to the aid and donations made between 2010-2015 by the group companies that are the subject of the investigation. According to this report:

> "*The aid and donations made by the group companies subject to the investigation are as follows: A total of 214,117,590.05 TL was transferred in donations and aid to the universities, the foundations and the associations closed down under the decrees, namely, 183,953,822.33 TL to* ***Ipek University****, 29,791.767.72 TL to* ***Koza-Ipek Education Health Service Aid Foundation****, 300,000 TL to* ***Kimse Yok Mu Association****, 37,000.00 TL to* ***Halidiye Education Foundation,*** *and 35,000.00 TL to the* ***Media Association****."* (p. 1)

37. The total amount of aid and donations made in the relevant years to 226 organisations (listed in the attached table) excluding those closed down by decree laws is 15.497.155.00 TL." (pp. 2-6). We would like to point out that all these donations and aid were completely within the scope of legal activities at the time they were made and institutions and organisations that the donations were made to were also legal entities established with the permission of the state and operating legally on the date of donations under the supervision of state institutions. There is no finalised court decision about these institutions and organisations suggesting that they are affiliated with a criminal organisation (***Atilla Tas v. Türkiye***) preceding the date the donations were given. In other words, it is within the scope of benefiting from a basic human right to assist institutions and organisations operating within the scope of freedom of association (Article 11 of the ECHR) and under the protection of this freedom, therefore

exercising a fundamental right alone cannot be a crime. To consider a basic right as evidence of a crime without showing any other evidence violates both this right and the principle of no punishment without law, which is protected in Article 7 of the Convention. In addition, since there was no terrorist organisation under the name of "FETÖ/PDY" between 2010 and 2015, the donations in question cannot be used as criminal evidence to be charged of being a member of an organisation that was not [yet declared a terrorist organisation by a court decision] at the time the donations were made. If used as evidence, Articles 7 and 11 of the ECHR would be violated.

38. The MASAK Final Report No. 9 (5 pages) dated 5 August 2016, is related to the account movements of the members of the board of directors of the Koza-Ipek Foundation and of the foundation itself in 2012 and the following years. MASAK, in this report, *concluded that 5,125,000 TL was donated to Ipek University, which was closed down under the Decree Laws 667 and 668, and 15,000 TL to the Necip Fazıl Culture and Education Foundation.* However, these donations were made long before 2016 and, as explained above, were perfectly legal donations at the time they were made.

39. TheMASAK Final Report No. 10 (10 pages) dated 26 September 2016 has established that "*gold companies and the acquisition of KanalTurk TV and the establishment of Koza Ltd. are legal and that no suspicious dealings have been found.*". According to this report, "*no money laundering activity was found, either.*"

40. The MASAK Final Report No. 11 (10 pages) dated 26 September 2016 regarding the university expenditures concluded: "*In the above study, which was conducted to investigate whether the donations from Koza Group companies to Ipek University were used suspiciously by the university, no suspicious dealings have been identified concerning the university expenditures.*" (p. 10).

41. TheMASAK Final Report No. 12 dated 4 October 2016 confirms the investments made in the media companies, the donations made to Ipek University, the share donation made to Turgut Özal University, and the donations made to Koza Ipek Education Health Service and Aid Foundation and states that funds were withdrawn from personal accounts that are mentioned in the final report no. 9 . According to this report, **aa-)** "*It has been found that Koza Ipek Holding A.Ş. donated its capital commitment receivable of TL 11,332,015 from Atlantik Eğitim Yayın Taş. Info. A.Ş. to Turgut Özal University* on *26 June 2015*." **bb)** In the same report, it was stated that "*In terms of financing the media companies, the aforementioned companies are among the institutions that were closed down due to their connection with FETO through the Decree Law dated 27 July 2016 and numbered 668 and that ATP İnşaat ve Ticaret A.Ş. financed these companies with a total of TL 387,500,000 through capital increases.*"
cc-) It was found that 11 of the group companies donated a total of 243,226,265 TL to Ipek University, which was closed down by the decree law dated 23 July 2016 and numbered 667, that a total of 44.002.015 TL of share donation was made

by Koza İpek Holding A.Ş. including the share donation (with a value of 11,332.015 TL) made to Turgut Özal University, which was closed with the Decree-Law 667, that a donation of 9,235,000 TL was made to Koza-İpek Education Health Service and Aid Foundation, which was closed with the Decree-Law 667. It was stated it would be appropriate for the prosecutor's office to evaluate all these donations in terms of "the Financing of Terrorism". **dd-)** On the subject of cash withdrawn from the personal accounts of the company shareholders, based on the statement of Ali Önder, it has been concluded that, "*There are no issues that can be evaluated within the context of the investigation carried out, since the said incomes (regarding the cash money given to the account holders or other people and the way the savings are kept) of the aforementioned persons are generally the income from the company dividends*". (p. 17) (For all 12 MASAK Final Reports, see. **Annex-8 and Annex-9**).

42. Although all state institutions and organisations such as MASAK, The Police and MIT (National Intelligence Organisation) have conducted investigations in the most detailed manner, they have not reported that Koza Ipek Holding Group companies have provided a single penny of aid that can be considered within the scope of "terrorism" or "membership in an armed terrorist organisation" except for the donations and investments all of which are legal as mentioned above. All of the 12 MASAK final reports in the file prepared between 30 March 2016 and 4 October 2016 about the companies and their partners, ultimately refuted the financing of terrorism and similar allegations.

43. All these final reports were hidden from the shareholders of the company, including the applicant for about a year up until 9 June 2017, access to the MASAK final reports by the interested persons was not allowed, and it was not possible to effectively object to the decision to appoint trustees.

5. The Dissolution of the Media Institutions, the Foundation and the University with the State of Emergency Decrees and Seizure of the Assets without cost

44. After the coup attempt dated 15 July 2016, the State of Emergency (OHAL) was declared on 21 July 2016. Within the framework of the state of emergency and as stipulated in Article 2 of the Decree-Law (KHK) dated **23 July 2016** and numbered 667, "*foundations and associations together with foundation-run higher education institutions that have been found to pose a threat to national security and that belong to, are connected to or have contact with the Fetullahist Terrorist Organisation (FETÖ/ PDY) and that are in the Annexed lists numbered (III) and (IV) were closed down.*" , "*Koza-Ipek Education Health Service and Aid Foundation*" that was established on 22

April 2009 by the members of the Ipek Family and "*Ipek University*" that was established under this foundation have been closed down[4].

45. In accordance with the 2nd article of the Decree Law No. 668 dated **27 July 2016** that read as, *"private radio and TV stations and newspapers and magazines that have been found to pose a threat to national security and that belong to, are connected to or have contact with the Fetullahist Terrorist Organisation (FETÖ/PDY) and that are in the Annexed lists numbered (II) and (III) were closed down*", the media organisations in which the applicant is also a shareholder (***Bugün TV, KanalTürk TV, KanalTürk Radio, Bugün Newspaper, Millet newspaper)*** were closed down and all their assets have been confiscated without any compensation and transferred to the Treasury without cost.[5]

46. The language used in the Decree Laws 667 and 668, "that belong to, are connected to or have contact with the Fetullahist Terrorist Organisation (FETÖ/PDY)*"* accused the companies in which the applicant is a shareholder of being a member (belonging) of a terrorist organisation without any court decision, announced this in the Official Gazette, and the applicant was accused of investing [**in the past**] (transferring capital) in the said media companies and was punished. Therefore, the right to benefit from the principle of presumption of innocence for the company, the foundation and the university (legal entities) and the applicant in question has been violated.

47. Furthermore, according to provision 88 § 2 of the Constitution, "*The procedure and principles regarding the deliberation of government bills in the Grand National Assembly of Turkey shall be regulated by the Rules of Procedure.*" While the provisions of the Decree Law No. 667 and 668 should have been approved by the Grand National Assembly of Turkey within 30 days pursuant to provision 121 § 3 of the Constitution and Article 128 of the Parliamentary Rules of Procedure[6] in force at the time of the incident, they were approved[7] by the Turkish Grand National Assembly long after this period had elapsed, consecutively on 29 October 2016 (Law no. 6749) and 24 November 2016 (Law no. 6755). Approval laws are not ordinary "*laws"* but only a necessary and mandatory approval process for the relevant Decree Law to continue to exist as a valid legal norm during the State of Emergency. For this reason, Article 121 § 3 of the Constitution expressly uses the phrase "***approval"*** "[8] so that with the end of the state of emergency, the emergency decrees approved by the Parliament will automatically be repealed.

---

[4] https://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8-1.pdf, the foundation is in the 55th place in the list number 3, the university is in the first place in the list number 4.

[5] https://www.resmigazete.gov.tr/eskiler/2016/07/20160727M2..htm

[6] Article 128 of the Parliamentary Rules of Procedure was amended on 9 October 2018, and the regulation stipulating the approval of the the "Decree Laws" issued during the state of emergency *within 30 days* " is in force on the date of publication of Decree Laws No. 667 and 668 (https://setav.org/assets/uploads/2017/08/Analiz213.pdf)

[7] https://www.procompliance.net/ohal-kapsaminda-yayimlanan-khklar-tbmmce-kabul-ederek Kanunlasti/

[8] Article 121 § 3 of the Constitution, prior to the amendment made in the referendum of 16 April 2017, reads as follows: «During the state of emergency, the Council of Ministers convening under the chairmanship of the President may issue decrees having the force of law on matters necessitated by the state of emergency. These decrees are published in the Official Gazette and shall be submitted to the Grand National Assembly of Turkey on the same day for **approval,** the time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure." (https://www.lexpera.com.tr/mevzuat/kanunlar/turkiye cumhuriyeti-anayasasi-2709)

Legal regulations are legal norms that are subject to strict requirements in terms of their form, and regulations that are passed contrary to the form requirements in domestic law cannot be legal regulations. Therefore, Decrees No. 667 and 668 have lost their validity in the legal order after the 30-day period stipulated in the Rules of Procedure has passed, and these regulations have turned into legally invalid norms in the present case. So, no court decision can be based on Decrees 667 and 668 or Parliamentary approval decisions.

48. Article 19 of the Decree No. 674 published on 1 September 2016 stipulated that the powers of trustees should be transferred to the Savings Deposit Insurance Fund (TMSF) by a judicial decision. The Ankara 4th Criminal Judgeship of Peace decided in this direction on 6 September 2016 and as of this date, the management of the companies that were appointed to trustees on 26 October 2015 has been transferred to the SDIF, and as of the date of this application, these companies have been managed by the SDIF.

49. The State of Emergency Commission ('OHAL Komisyonu') was established with Decree No. 685 on 21 January 2017 and started to work on 17 July 2017. The Communiqué named "Procedures and Principles Regarding the Operation of the State of Emergency Procedures Investigation Commission" was published in the Official Gazette on 12 July 2017[9]. According to Article 3 of the Regulation "*The authority to make an application on behalf of the closed institutions belongs to those who are legally authorised to represent the institution in question at the date of closure. Unauthorised persons cannot apply to the [OHAL] Commission […]* According to Articles 6 § 1 and 7 § 1 of the Communiqué and the application system, only persons whose names have been pre-determined by the government can fill in the online application form and only these persons can apply to the State of Emergency Commission. Article 10 § 3(ç) of the Communiqué contains the following provision: "*If the application is made by persons other than persons legally authorised to represent the institution [for membership or other reasons], it will be rejected*". Evidently, on the date of their closure, the trustees were the legal representatives of the organisations and institutions closed down during the state of emergency and only the trustees could apply to the State of Emergency Commission as their legal representatives for all the media outlets that were closed down during the State of Emergency. The right of company shareholders to apply to the State of Emergency Commission was legally and practically prohibited.

50. On 12 September 2017, the lawyer of four shareholders still tried to apply online to the State of Emergency Commission against the decision to close down the media companies. However, the online application system established for this purpose did not allow applications to be made to the State of Emergency Commission. It was only possible to apply on behalf of *Koza-Ipek Education Health Service and Aid*

[9] https://www.resmigazete.gov.tr/eskiler/2017/07/20170712M1-1.htm

Foundation closed down with Decree No. 667 because no trustee had been appointed to that company.

6. The Detention and Arrest of the Applicant Cafer Tekin Ipek

51. The applicant, Cafer Tekin Ipek, was taken into custody on 24 April 2016, and after being questioned by the police, he was questioned by the public prosecutor and, in summary, the following questions were asked to him: **a)** Have you visited Fethullah Gülen? **b)** What do you think about the broadcasts of KanalTürk and Bugün TV after the operations dated 17-25 December 2013? **c)** Do you have any affiliation with the organisation? **d)** Some other questions based on CMB legislation. After the applicant's interrogation was over, Cafer Tekin Ipek put a question to Musa Yücel, the prosecutor in charge, "Prosecutor, you will not order my arrest with these questions, will you?" Then the prosecutor replied as follows: *If I order your arrest, it'll be just because you are Akın Ipek's brother.*" This incident took place in the office of the said prosecutor in the Ankara Courthouse, and the incident was witnessed by Lawyer Mehmet Kaya Batı, Lawyer Efsun Ünal and Lawyer Muhammet Gökhan Kılıç, who were in the same office. This statement of the prosecutor shows that an investigation was initiated against the applicant without any evidence of crime and that he was the subject of an investigation and criminal proceedings based on political reasons against his brother Hamdi Akın Ipek, who lives in England.

52. The prosecutor then ordered the applicant's arrest and he was arrested on 25 April 2016 (**Annex-10**). His detention was extended by the peace judgeships during the investigation phase and by the Ankara 24th Assize Court during the prosecution phase, and his objections and requests for release were also rejected by the national judges and courts. Therefore, the applicant was tried in pre-trial detention and is still being held in Sincan Prison.

53. During the state of emergency, the interviews he held with his lawyer in prison were carried out in the company of a guard and recorded with cameras, in both audio and video formats. The exchange of documents was only possible within the framework of the control and permission of the prison administration.

7. The Indictment and the Accusations dated 9 June 2017

54. On 9 June 2017, an indictment was issued by the Ankara Chief Public Prosecutor's Office against the shareholders of the company and thus the applicant. In the indictment, the allegations that formed the basis for the decision to appoint trustees, namely the Çomaklı Report, were not mentioned and were simply ignored. In the indictment the applicant **Cafer Tekin Ipek** was charged with the following: **a)** supporting illegal activities with legal appearance in connection with the organisation through Koza Holding A.Ş and its affiliated or related companies; as a manager in the foundation university, providing continuity both in the establishment and in the

evolution stages of the organisation through financial support in line with the ultimate purpose of the organisation as explained above; being in direct relationship with the organisation through the companies where he was the manager and to which the trustees were appointed. Regarding the companies where trustees were appointed and where the accused is a partner and manager; through these companies, providing systematic and intensive financial support to the FETÖ/PDY Armed Terrorist Organisation in a way that would ensure the continuity of the organisation as proved by The Financial Crimes Investigation Board (MASAK), The Capital Markets Board (SPK), the expert reports and the witness statements; acting in line with the purpose and strategy of the organisation by ensuring that the media companies that are constantly making losses are funded in line with the instructions of the leader and managers of the organisation; using the economic power they have in line with the interests of the organisation by allocating holding activities to the aims of the organisation and thus laundering financial resources which the organisation obtained illegally; being a member of the armed terrorist organisation on the grounds that he provided financial support within the limit of the legal deposit guarantee to support the bank after the call of the leader of the FETO Armed Terrorist Organisation **b)** committing the crime of abuse of trust 6 times in terms of the Capital Markets Law **c)** committing 13 offences of Tax Law violation depending on 13 different Tax Crime Reports **d)** committing forgery in a private document based on the allegation that fake invoices were used during the tax periods in question (**Annex-11**).

B. PROSECUTION

1. The Trial before the Court of First Instance: the Hearing Phase

55. Although the applicant was detained and arrested on **24 April 2016** and formally charged on that date, one year after this date, with its decision dated **24 May 2017** and numbered 778, the Council of Judges and Prosecutors (HSK) established the 21st, 22nd, 23rd and 24th Heavy Penal Courts in Ankara with the decision of the 1st Chamber and decided that the penal courts would be operational as of **12 June 2017.** The first judges appointed to this court were Muhammet Yavuz (President), Hasan Demirtaş, Fatih Güzel and Adem Karataş.[10].

56. A total of 22 hearings were held before the Ankara 24th Assize Court between 19 September 2017 and 9 January 2020, which lasted approximately 2 years and 4 months (for full hearing minutes, see **Annex-12**), and the panel of judges was changed many times during the hearings. The following judges attended the hearings: in the first hearing; Muhammet Yavuz, Hasan Demirtaş and Adem Karataş, in the hearings 2-4; Muhammet Yavuz, Hasan Demirtaş and Fatih Güzel, in hearings 5-6; Hasan Demirtaş (Chief Judge), Fatih Güzel and Adem Karataş, in hearing 7; Mustafa Yiğitsoy (Chief

[10] https://www.hsk.gov.tr/Eklentiler/files/_May%c4%b1s%202017_Ankara%c4%b0stanbul%20M%c3%bcstemir%20Yetki%20KARAR.pdf

Judge) Adem Karataş and Tuba Büyükşahin, in hearing 8; Mustafa Yiğitsoy, Fatih Güzel and Tuba Büyükşahin, in hearing 9; Fatih Güzel, Tuba Büyükşahin and Şevkiye Beyza Mert, in hearing 10; Fatih Güzel, Seyhan Aksan and Tuba Büyükşahin, in hearings 11-13; Fatih Güzel, Necati Gök and Tuba Büyükşahin and in hearings 14-22; Fatih Güzel (Chief Judge), Anıl Öztürk and Sinan Atahan. Thus, Anıl Öztürk and Sinan Atahan did not take part in any of the first 13 hearings, and Fatih Güzel did not attend the first hearing and the seventh hearing (See first pages of the hearing minutes, **Annex-12**).

57. As it can be understood, in the trials before the first instance court which lasted approximately 2 years and 4 months and consisted of 22 hearings, a total of 11 different judges attended the hearings, and the proceedings regarding the merits of the case were not repeated before the new judges who attended the hearings in place of the previous judges. Moreover, in the middle of the proceedings, two members were taken from the 24th High Criminal Court and appointed to other courts, and two new members were appointed in their place. According to the provisions of the Judge Prosecutor Appointment Regulation, it is prohibited for a judge, even in the 5th Region, to be appointed to another duty unless he has worked for two years in the place where he is appointed. Judges appointed to a region classified as 1st class, such as Ankara, cannot be removed from the court where they work, unless 7 years have passed or they have requested to move.[11]

58. All the witnesses heard at the hearings as evidence for the accusation of membership in a terrorist organisation **did not make any accusatory statements against the applicant Cafer Tekin Ipek.** **a)** Witness Selim Çoraklı said, "*I said I don't know; I do not know the guy who asked this question; I said I know two people*"; "*I do not know this guy; I've never heard of his name.*" **b)** Regarding the applicant, the witness Nadir Koç said, "*No, I've never seen or heard of anything like this.*" **c)** Witness Kemaleddin Özdemir said, "*From what I know of them, I have not seen, or thought or witnessed that Mr Tekin Ipek or Mrs Melek Ipek or their family members are in any way related to this structure. […] I haven't seen Mr. Tekin Ipek in the gatherings of the organisation. So if you ask me how close this family is to the organisation, I haven't witnessed it, your honour.*" **d)** Witness Adnan Günaydın said [addressing the applicant], "*I don't know him personally, I know him by name*" **e-)** Witness Adnan Günaydın said [regarding the applicant], "*I am not in a position to give information about him, I have no knowledge*" (See the hearing minutes, **Annex-12**).

59. During the prosecution phase, the applicant's HTS (digital traffic history) records, phone records, wiretaps, flight information were requested and added to the file, but it was concluded that no criminal element was found.

---

[11] https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuatNo=8063&mevzuatTur=KurumVeKurulusYonetmeligi&mevzuatTertip=5

60. In the introduction of the hearings, a defence was made for the claim that the applicant used ByLock for a while, and this claim was refuted. Although the applicant was alleged to have used ByLock over a phone line registered to the company and his detention was extended for this reason, according to the expert report dated 30 July 2019 regarding the CGNAT and HTS records (**Annex-13**), the applicant did not use the telephone line in question. Therefore, it was determined by the expert report that the applicant did not use the ByLock application.

61. In addition to the allegation at the beginning of the hearings that the applicant used ByLock, accusations against his brother Akın Ipek were also brought against the applicant, and violating the principle of the individuality of criminal responsibility, the activities attributed to Akın Ipek were also made basis for the applicant's conviction, as can be seen in the reasoned decision below. Nevertheless, neither the prosecutor's office nor the court asked any questions to the applicant about the activities attributed to Akın Ipek. Especially activities such as "*establishing media companies and universities based on the organisation's instructions"* have not been attributed to the applicant at the hearings.

62. Regarding the donations made by having the citizens in the villages where the mines are located sign documents; after the trustees were appointed to the companies, the mukhtars who signed the documents made claims that they did not receive the specified amount of aid, and these claims were taken by the trustees or private security officers and brought to the court. On page 2 of the second hearing dated 9 December 2017, although it was stated that answers were received to the instructions regarding the witnesses named [muhtars], Hassan Hüseyin Ataş, Sezai Akbulut, Halil Güngör and Safa Esit, only the witness Hasan Hüseyin Ataş was heard at the Bergama Heavy Penal Court without the applicant, and the other witnesses were not heard before any police, a prosecutor, a judge or a court. Despite this, the statements of the mukhtars in question were used by the court of first instance in the justification for the sentence that was restricting freedom, and article 6 § 3 d) of the ECHR has been violated.

63. On 6 August 2019, the Public Prosecutor submitted his opinion on the merits and accused the applicant of the following in particular: **a)** transferring capital to the Ipek Media institutions through the companies in which he is a partner, upon the instructions by the organisation, **b)** the establishment of Ipek University upon the instructions by the organisation, **c)** donating 500,000 TL to the *Kimse Yok mu* association in 2011 [within the scope of the aid program to Somalia on STV with the participation of the then Prime Minister Erdoğan], **d)** making donations through the

companies in which he is a shareholder[12] to the institutions mentioned above and in the **MASAK Final Reports No. 8 and 12** (§§ 35, 36, 40, above) (*Ipek University, Turgut Özal University, Koza-Ipek Education Health Service and Aid Foundation, Halidiye Education Foundation, Kimse You mu Association, Media Association*) between 2010-2015, **e)** awarding the contract of the construction of the Kayseri Himmet Dede Mine Quarry, in accordance with the national legislation, to *IK Academy Construction* which is a subsidiary of Ipek University and thus providing financial gain to the university, **f)** some accusations within the scope of CMB and the Tax Procedure Law VUK[13] (**Annex-14**).

64. Later, the applicant's lawyer made a defence regarding the allegations in September 2019 and on 14 October 2019, and in summary put forward the following arguments in particular: **a)** The capital transfer to the said media companies is within the scope of commercial activities and was made with the aim of making these loss-making companies profitable and increasing their brand values. There is no concrete evidence showing that capital transfers were made to the media companies upon instructions by the organisation, and there is no evidence for the accuracy of this claim, apart from the testimony of a witness (Çetin Acar), who testifies about almost everything in return for the money he receives. As of 24 July 2015, without working for any other place other than Ankara Municipality under the presidency of Melih Gökçek, by receiving 270,000 TL in 4 years[14] Çetin Acar, who acted as a witness covertly or publicly in the courts for a fee by printing a business card as a "FETÖ expert", was heard at the hearing on this issue, expressed his claim in an abstract way, and could not offer any explanation for the questions of the applicant and his lawyers such as "*where, from whom, when, how and under what conditions did you hear this claim?*" and just replied, "*I cannot say*". Apart from this, there is not even the slightest beginning of evidence in the file regarding the claim in question. **b)** There is no evidence in the file regarding the allegation that the university was established upon instructions by the organisation, but only an abstract claim of a fraudulent witness (Çetin Acar) who testifies for a fee.[15] He not only declared at the hearing that he did not know the applicant, but also replied to the question of "*when, from whom, in which setting, where*" he heard about the allegation as, "*I cannot say*". Thus, the possibility of investigating and confirming or refuting the accuracy of his claim with material findings (HTS records, etc.) has been eliminated. (For instance, if he said that the applicant told this in a gathering in which persons named A., B., C. were also present at Mr Çetin's house in Çankaya in Ankara on

[12] As stated in the MASAK Final Report No. 8, Koza Ipek Group companies also made donations to 226 institutions and organisations, and the majority of the donations that were made the basis for the accusation were made to the family foundation and university. A total of 232 institutions and organisations were donated, and donations made to only 6 legal entities were shown as evidence of the alleged crime.

[13] As per article 4 of the Turkish Civil Code (TMK), none of the charges under the SPK and VUK are considered crimes under the Anti-Terror Law.

[14] https://www.sozcu.com.tr/2019/gundem/feto-uzmani-ise-gitmeden-270-bin-tl-maas-almis-5379344/

[15] https://www.youtube.com/watch?v=9h-SWpLoH7Q

10 March 2011", it would be possible to find out whether the applicant was in the Çankaya district of Ankara together with A., B., C. at that time by HTS records and whether the witness statement is correct or can be confirmed or refuted by other material findings). The foundation, and therefore the university, is an institution established by law within the scope of social responsibility projects of companies, [if it is accepted as evidence of crime, all the ministers who have signed the law will also have committed the same crime. Since no investigation was started against them, Article 7 and 14 of the ECHR are violated together.] **c)** in 2011 after Acun Ilıcalı called and asked the applicant to make a donation in the live broadcast, which the then Prime Minister also participated and invited people to make donations to the association named *Kimse Yok mu*, he donated 500,000 TL to the people in Somalia, and this donation does not fall within the scope of any crime. Otherwise, those who encouraged and invited people to donate would also have committed crimes, and no investigation has been started against Acun Ilıcalı and other people. If this donation is considered as evidence of a crime, discrimination will have been made in benefiting from the principle of *no punishment without law* (violation of Articles 7, 11 and 14 of the ECHR) **d)** As for the claim of making donations to the legal entities named *Ipek University, Turgut Özal University, Koza-Ipek Education Health Service and Aid Foundation, Halidiye Education Foundation, Kimse You mu Association and Media Association* in 2010-2015 through the companies in which he is a shareholder; on the specified dates these organisations were legal organisations established in accordance with the domestic law and were operating under the supervision of the state. Most of the donations were made to the family foundation and the university within the framework of social responsibility projects, and the university was established by law. There had been no court decisions about the organisations in question before the donations were made stating that these organisations were affiliated to a terrorist organisation. The media organisations in question were, for example, completely legal media outlets at the time of the incident (***Ilicak v. Türkiye (no. 2)***, §§ 139, 141; ***Yasin Ozdemir v. Türkiye***, § 40; ***Atilla Tas v. Türkiye***, § 134). Moreover, there were 232 organisations to which donations were made. However, donations made to only 6 organisations out of 232 were shown as evidence of crime. In short, if making donations to legal non-governmental organisations in accordance with the law is not a crime at the time the donation is made, but is considered as evidence of a crime, the principle of *no punishment without law* will be violated. **e)** As for the allegation that the construction of the Kayseri Himmet Dede Mine Quarry was awarded to "IK Akademi İnşaat" (IK Academy Construction), a subsidiary of Ipek University, and thus financial gain was made by the university; there was no illegality in the said dealing, and there was no court decision which was finalised and suggested a connection between Ipek University and a terrorist organisation on the date of the incident, (***Atilla Tas v. Türkiye***). IK Akademi İnşaat is a company established and operating in accordance with national law, and since this company gave the most

suitable offer, the construction deal in question was given to this company. In short, there is nothing about this claim that would constitute a crime. **f)** Regarding the accusations within the framework of CML and TPL (Capital Market Law and Tax Procedure Law), the applicant's lawyer explained in detail each accusation one by one and it was stated that the allegations did not constitute any of the crimes in the aforementioned laws (**Annex-15**).

2. The MASAK Reports Sent to the Court in 2017 and 2018

65. The Financial Analysis Report dated **09/02/2017** and numbered 2017/MTR/(66)-13, 2017/MTR-18-7/8 prepared by MASAK is about the swift transaction that the applicant's driver, Alay YAVUZ, tried to send to [the applicant's son] Metin Ali Ipek, and no illegality was included in the report, and this report was not used in the reasoned decision (**Annex-16**).

66. MASAK responded to the Public Prosecutor's Office's requests dated 19 December 2016 and and 5 May 2017 with a letter dated 29 May 2017. The Evaluation Report dated 2 May 2017 and numbered 2017/MAR.84/15, which is the subject of this response, was sent to the prosecutor's office and entered into the file. This report is about the MASAK investigation on the issues subject to the complaint made by the CMB, and according to the CMB data, it was stated that the total donation amount of Koza-Ipek Group was 349.296,568 TL. Atlantik Eğitim A.Ş. made a donation to Turgut Özal University in the form of share transfer (TL 38,297,936) and the table of donations show that the donations were made to universities, foundations and miscellaneous institutions. When these donations are ignored, the other donations made by the Holding are not substantial. In the conclusion part of the report, it was stated that Ipek University (total donation of 218,570,823 TL), the foundation, Turgut Özal University and Kimse You mu Association and media organisations under the roof of Ipek Media Group were closed down as they belonged to, were connected to or were in contact with FETO/PDY with the Decree Laws numbered 667 and 668, and that "in case it is believed that the aforementioned legal entities are part of the organisation within the scope of the assets of FETÖ/PDY, have become a focal point for terrorism offences and are organisations that host terrorists, it would be possible to consider the **donations and investments to these organisations** as the crime of financing of terrorism in the context of Article 4 of the Law on the Prevention of the Financing of Terrorism and/or the abolished Article 8 of the Anti-Terrorism Law. […] and that the final discretionary power rests with the judicial authorities. In addition, an investment of 450,993,031 TL made to media companies between 2007 and 2015 was also mentioned, and it was stated that this investment could be considered within the scope of financing of terrorism (**Annex-16**). This report confirms the findings in the 12 Final Reports previously prepared by MASAK, only the way they are described has changed. After the coup attempt took place and the decrees numbered 667-668 and dated 23-27 July 2016

were published, the legal entities in question were accused of belonging to a terrorist organisation (belonging to, be a member) with these decree laws and were sentenced without trial by the regulations issued by the executive power. Based on this, donations and investments made to the aforementioned legal entities before 26 October 2015 [retrospectively] are considered as financing of terrorism. As will be seen below, the court of first instance also decided to convict the applicant based on this report, thus clearly violating the principle of non-retroactivity of penal laws.

67. With a letter dated 6 July 2017, Ankara 24th Assize Court requested MASAK "*to send the Financial Analysis Report showing the monetary and membership relations of the accused and his family members, especially with Bank Asya, associations, foundations, companies and real persons with whom FETÖ/PDY is in contact.*" In response to this letter, MASAK sent the Financial Analysis Report No. 97 dated **13/06/2018** and numbered 35344515-663.04.2017-12036-E20977 to Ankara 24th Assize Court with a letter dated 29 June 2018. According to this 83-page report, the applicant Cafer Tekin Ipek had 100,000 TL between the dates of 15/9/2014 and 15/10/2014, and 10,000 TL between the dates 31/10/2014 and 31/5/2015 in his account at Bank Asya (**Annex-16**). Apart from that, The Financial Analysis Report does not contain any issues or include any illegal transactions that contradict the content of the 12 final reports prepared by MASAK before. As will be seen below, this issue was not taken as a basis for conviction in the reasoned decision. If it is assumed that the first-instance court decision implicitly refers to these amounts in Bank Asya as "financing", we would like to point out that the bank in question was legally operating at the time of the deposits in question and it was the government institutions that had given permission to this bank and there is nothing criminal about putting a legally earned amount into an account in a legal bank. Suggesting it is a crime violates the principle of 'no punishment without law'.

68. In the Financial Analysis Report dated 30 January 2018 and numbered 2018/ MAR(3277)-13, which is the subject of the MASAK letter dated 20 March 2018, with the questions asked to MASAK again with the letter of the Ankara 24th Assize Court dated 6 July 2017, the monetary and membership relations of the defendants and their family members, associations, foundations, companies and real persons who were in contact with FETÖ/PYD and especially Bank Asya, were examined and no new findings were recorded apart from the ones in the 12 Final Reports mentioned above (**Annex-16**).

69. As a result, the last 4 MASAK reports, which were prepared after the coup attempt on 15 July 2016, again upon the request of the prosecutor's office and the court and when the trustees were in administration, confirmed the previous 12 MASAK final reports and showed that the said MASAK reports reflect the truth. The last 4 MASAK reports did not include even the slightest allegation that would fall within the scope of aiding a terrorist organisation or financing of terrorism. It simply re-described

the previous findings (material facts that have not changed), and based on the provisions of the Decree Laws dated 23-27 July 2016 and numbered 667 and 668, donations and investments made to legal institutions and organisations before 26 October 2015 were used as a basis for the accusation of membership in a terrorist organisation.

3. The First Instance Court Conviction Decision

70. The prosecution by the Ankara 24th Assize Court was terminated with the decision dated 9 January 2020 and numbered 2017/44 E, 2020/5 K, and the applicant was convicted on the grounds that he had committed many crimes (**Annex-17**).

a-) Activities used as a basis for the justification of the crime of being a member of a terrorist organisation

71. The applicant was given a heavy sentence of a total of 11 years and 3 months imprisonment on the grounds that he had committed the crime of being a member of a terrorist organisation. The decision was based on the following elements of evidence regarding this crime: **a)** being in the management of Koza Ipek Education and Health Foundation (This foundation was established in accordance with the law in 2010, and being a founder or a member of the board of directors of a foundation is within the scope of the exercise of a legal and even fundamental right (freedom of association) according to Turkish Law. Without showing any other element of crime, the activities of establishing and managing a foundation were legal at the time they were carried out and were even within the scope of the use of a fundamental right protected by Article 33 of the Constitution, therefore freedom of association and the principle of no crime and punishment without law were violated by taking these activities as a basis for conviction. Since these activities were not foreseen as a crime by law, punishment of the applicant for an activity that was legal at the time it was committed also violated the principle of 'no punishment without law'. **b)** Making donations collusively to institutions that are decided to be "members of (belonging to) a terrorist organisation" by the executive power, pursuant to the provisions of the Decree Law enacted after [23 July 2016]: All donations made are donations made in accordance with the legal regulations stipulated in the CML and the communiqués issued on this matter, and not a single claim has been made during the trial that they are collusive. The court of first instance fabricated this allegation and produced evidence, accused (the prosecutor) the applicant with the evidence it produced, without even taking his defence on this allegation, sentenced him on the basis of an accusation that is not in the file and lost its impartiality, thus violating the principle of adversarial trial. Moreover, all donations were made legally to legal organisations before 26 October 2015, and since a legal activity is made a basis for punishment, Article 7 of the ECHR has been violated. Furthermore, there is no organisation named "FETÖ/PDY" of which the applicant is alleged to have been a member before the aforementioned date. There is no

information or declaration by a court about the applicant resorting to violence. The first and only act of violence attributed to the organisation of this name occurred on 15 July 2016 when all powers in the companies in which the applicant is a shareholder had already been transferred to the trustees some 9 months previously on 26 October 2015 and the applicant had no authority at that time. Membership in an organisation that did not exist [yet] at the time the donations were made is counterintuitive, and almost all of the institutions where the donations were made, were made to the applicant's family foundation, a foundation university that was established by law and had to be financed, and the remaining part was made to legal entities operating legally at the date of the donation. All donations were legal when they were made, and making legal activities a basis for punishment violated the principle of 'no punishment without law'. **c)** Being on the Board of Directors during the growth process of companies with the financial support of FETO/PDY: There is not even the slightest trace of evidence in the file that supports this claim, and no such accusation was brought in the hearings. Moreover, if there was financial support, it would have been clearly stated in the MASAK reports. The applicant and the companies in which he is a shareholder are mainly accused of providing financial support to FETÖ/PDY, and the court produced this claim, assumed the role of a prosecutor, and lost its impartiality by asking the applicant for this allegation without obtaining his defence, without adversarial trial, and by making a conviction based on the evidence it produced. As stated above, in MASAK's final reports, it was clearly stated that there was no money movement from outside the company's resources, the source of which could not be explained. **d)** Managing the companies in line with the aims of FETÖ/PDY after their growth: As far as the applicant is concerned, there is not the slightest trace of evidence showing the accuracy of this allegation in the file, and no such accusation has been brought forward at the hearings. This claim was also produced by the court and therefore the principles of 'adversarial trial' and 'impartiality' were violated. **e)** In line with the aims of the organisation, establishing media companies, foundations and universities and achieving the goals of the organisation with these institutions and using publicly traded companies for this purpose: As far as the applicant is concerned, there is not even the slightest trace of evidence to prove the accuracy of this claim and the foundation was established in 2009. There was no organisation named FETÖ/PDY at that time, and the executive power supported the group in question until the end of 2013. Establishing a foundation is a right under Turkish law. Anyone can use this right. The university was also established by a law in 2011, and there was no organisation in question at that time, and the ministers established the university "by law". As almost all mining companies in the world have done, the applicant and his family members established a foundation within the scope of social responsibility projects and took part in the establishment of a university within this foundation. Pursuant to the provision of the law, the financing of the said university was under the responsibility of the board of trustees of the

foundation, and it was stipulated in the articles of association of the commercial companies in question that donations could be made and these donations were approved at the General Assembly. The donations in question were therefore in full compliance with domestic law. There was no terrorist organisation with the aforementioned name before 26 October 2015, and there is no criminal aspect of establishing foundations and universities and financing foundations and universities (donations) from the profits of companies. As for the media companies; as far as the applicant is concerned, the claim that the media organisations were established for the aims of the organisation is also completely fabricated, and there is not even the slightest trace of evidence to show the accuracy of this claim. If this allegation is the claim of a witness named Çetin Acar, who testified for 270,000 TL., he (Çetin Acar) declared at the hearing that he did not know the applicant, and his allegations consist only of the hearsay about the applicant's brother Akın Ipek. It does not concern the applicant in any way. Moreover, as explained above, there is nothing criminal about increasing the brand value of the companies by investing in the media companies; Before 26 October 2015, there was no terrorist organisation with the aforementioned name; it is a completely legal activity and making it the basis for a conviction violated the principle of 'no punishment without law', freedom of the press (the media outlets) and freedom of association (the foundation). **f)** Being a member of the board of directors in the process of transferring "himmet money (donations)" under the name of donation by Koza Ipek Holding through Atlantik Educational Institutions, half of which is owned by Koza Ipek Holding: This claim did not even make it to the agenda until the reasoned decision was announced, the prosecutor's office did not make any accusation in this direction, the court itself produced this accusation and took it as a basis for the decision and the principles of 'adversarial trial' and 'impartiality' were once again violated. Since the court produced more than half of the claims on which it took as the basis for its decision and decided on the basis of the fabricated allegations that were not in the file and were not discussed at the hearings, it made a completely arbitrary trial and therefore violated the right to a fair trial. Moreover, Koza-Ipek Group has never been on the board of directors of Atlantik; only participated in capital increases, and these shares belonging to Atlantik Eğitim A.Ş. were donated to Turgut Özal University in 2015, long before 26 October 2015. This donation is a completely legal activity. **g)** Making these transactions with the order of the organisation: Almost the majority of the transactions mentioned by the court were produced by the court itself, and there is absolutely no concrete evidence showing the accuracy of the allegations in the file. **h)** Finally, the claim of "*stock manipulations"* in the year 2001 was also made a basis for the decision of conviction, and the trial regarding this claim was completed in the past and it was definitively decided to abolish the (public) case, which was concluded with the final verdict dated 2 December 2009 (**Annex-18**). Although an action that has resulted in a final judgment cannot be the subject of a retrial, since the claim in 2001

was made the subject of a retrial and was taken as the basis for a conviction, the principle of *non bis in idem (no person should be tried twice for the same illegal act)* has also been violated. In addition, this claim, like many other claims, was not included in the indictment, was not discussed at the hearings, the defence of the applicant on this matter was not taken, and it was not put forward in the prosecutor's opinion. Therefore the court rendered a conviction by violating the principle of adversarial proceedings and its impartiality, and ignored the most fundamental principles of the right to a fair trial.

72. It should also be noted that the MASAK final reports dated 4 May 2016 have come to the conclusion that, "*in the transactions of Ipek family members, there is no suspicious movement of money the source of which is not known*". Despite this, the 24th High Criminal Court stated in its justification that it did not take into account the final reports of MASAK, which contained the aforementioned final results, which were prepared during the period when trustees were in charge and managed the companies, on the groundless justification that '*it was not known whether there was an investigation against those who prepared the reports'*. This justification means at least an incomplete examination which means that if the court would not take into account the conclusive evidence in favour of the applicant and prepared by a government agency, at least by writing to MASAK and asking if there was any investigation about those who prepared the reports, it should have asked for the new reports to be prepared and decide accordingly. Without doing this, the court, on the one hand, disregarded the official documents which were in favour of the applicant and which refuted all the accusations, has acted arbitrarily in the assessment of evidence, and on the other hand, while taking the evidence into account, ignoring the definitive official documents in favour of the applicant as being "based on hypotheses", in doing so without asking whether there is any investigation from the Ministry of Finance about those who prepared the reports, disregarding the official documents refuting all the accusations, has declared that it is not impartial and has lost its impartiality with its decision. However, the identities of the five inspectors who prepared the first 12 MASAK final reports are accessible and if they wished, the courts could learn from the "FETÖ/PDY" database whether there is an investigation about these persons or not, even through UYAP (national judiciary informatics system). Making a decision without doing this, the 24th High Criminal Court seems to have decided beforehand to ignore the conclusive evidence. Moreover, the applicant party considers that the inspectors who prepared the first 12 reports and the last 4 reports are the same persons. On the other hand, the findings in the first 12 reports and the findings in the last 4 reports are the same in terms of material findings; in some of the last reports however, different evaluations were made only in the description of the material findings, and subjective accusations were made by the investigators with no criminal law background. Since the material findings are the same, even if the inspectors who prepare the reports are

different, it does not make any difference. This confirms the accuracy of the applicant's allegations, and has done so. The same donation was shown to be legal in the first reports, and in the last reports it was described as the basis for being a member of a terrorist organisation. In fact, such description is only possible within the jurisdiction of the court. The inspectors or experts do not have such an authority and they have exceeded the limits of their authority.

b-) The crime of abuse of trust in terms of the Capital Markets Law (CML)

73. The same court sentenced the applicant to 6 years and 3 months in prison and a judicial fine of two thousand five hundred days, on the grounds that he also committed the crime of abuse of trust in terms of the Capital Markets Law (CML). The judicial fine was converted into a fine of 250,000 TL in total (100 TL per day).

c) Offences within the scope of Tax Law

74. aa) It was decided by the same court that the applicant should be sentenced to 4 years, 8 months and 7 days of imprisonment for the crime of participating in issuing fake invoices with the Tax Offence Report dated 29 September 2016 and numbered 2016-A-1717/50, for the taxation period of 2013.

.

75. bb) It was decided by the same court that the applicant should be sentenced to 3 years, 4 months of imprisonment for the crime of participating in issuing fake invoices with the Tax Offence Report dated 29 September 2016 and numbered 2016-A-1717/50, for the taxation period of 2014.

76. cc) It was decided by the same court that the applicant should be sentenced to 2 years, 6 months of imprisonment for the crime of participating in using fake invoices with the Tax Offence Report dated 29 September 2016 and numbered 2016-A-1717/50, for the taxation periods of 2012, 2014 and 2015.

77. dd) It was decided by the same court that the applicant should be sentenced to 3 years, 4 months and 15 days of imprisonment for the crime of participating in using fake invoices with the Tax Offence Report dated 29 September 2016 and numbered 2016-A-1717/50, for the taxation period of 2013.

78. ee) It was decided by the same court that the applicant should be sentenced to 3 years, 1 month and 15 days of imprisonment for the crime of participating in issuing fake invoices with the Tax Offence Report dated 5 June 2016 and numbered 2017-A-2623/49, for the taxation period of 2012.

79. ff-) It was decided by the same court that the applicant should be sentenced to 3 years, 5 months and 20 days of imprisonment for the crime of participating in issuing fake invoices with the Tax Offence Report dated 5 June 2016 and numbered 2017-A-2623/49, for the taxation period of 2011.

80. gg) It was decided by the same court that the applicant should be sentenced to 4 years, 9 months and 15 days of imprisonment for the crime of participating in using fake invoices with the Tax Offence Report dated 9 September 2016 and numbered 2016-A-1707/33, for the taxation period of 2013.

81. hh) It was decided by the same court that the applicant should be sentenced to 4 years, 9 months and 15 days of imprisonment for the crime of participating in using fake invoices with the Tax Offence Report dated 9 September 2016 and numbered 2016-A-1707/33, for the taxation period of 2014.

82. ii) It was decided by the same court that the applicant should be sentenced to 3 years, 9 months and 25 days of imprisonment for the crime of participating in issuing fake invoices with the Tax Offence Report dated 10 March 2017 and numbered 2017-A-1707/23, for the taxation periods of 2011, 2012 and 2013.

83. jj) Although it was requested that the applicant should be punished separately for the crimes of both using fraudulent documents and using fake invoices with the Tax Offence Report dated 26 September 2016 and numbered 2016-A-1707/48, for the taxation periods of 2013 and 2014, it was decided by the same court that the applicant should be sentenced to 4 years, 10 months and 10 days of imprisonment as the actions in question constituted a single crime of using fake invoices for the taxation period of 2013.

84. kk) It was decided by the same court that the applicant should be sentenced to 4 years, 4 months and 2 days of imprisonment for the crime of using fake invoices for the taxation period of 2014.

85. ll) Although it was requested that the applicant should be punished separately for the crimes of issuing fake expense receipts and using the same expense receipts in the same periods with the Tax Offence Report dated 10 March 2017 and numbered 2017-A-1707/11, it was accepted that the actions in question constituted a single crime of issuing fake expense receipts for the taxation periods of 2013 and 2014 for each period separately and that although it was requested that the applicant should be punished separately for the crime of issuing fake invoices with the Tax Offence Report dated 26 September 2016 and numbered 2016-A-1707/48 for the taxation period of 2013, it was decided by the same court that the applicant should be sentenced to 3 years, 7 months and 22 days of imprisonment as the actions in question fall into the same taxation period with the Tax Offence Report numbered 2017-A-1707/11 and constituted a single crime of issuing fake invoices and expense receipts for the taxation period of 2013.

86. mm) It was decided by the same court that the applicant should be sentenced to 3 years, 1 month and 15 days of imprisonment for the crime of issuing fake expense receipts for the taxation period of 2014.

87. The report written on 3 August 2019 by Prof. Dr. Duran Bülbül, whose name is in the official judicial expert witness list of the court, was not taken into account. The reason why it was not taken into account was not explained in the decision. Prof. Dr. Duran Bülbül made very important observations on both the SPK (Capital Markets Board and the VDK (Turkish Tax Inspection Board). Although it was understood that there were very important contradictions between the report prepared by Prof. Bülbül and the one written by the experts selected by the court of first instance, only negative reports were taken as the basis for conviction, without taking any action to eliminate these differences.

4. The Confiscation decision by the Court of First Instance

88. The Ankara 24th Assize Court first stated in its decision that the public prosecutor's office requested the confiscation of an amount of 1.5 billion TL from the company shareholders in proportion to their shares (pp. 16 and 214). Afterwards, the Court decided to confiscate the applicant's partnership shares in all companies to which a trustee was appointed, with the following justification:

> "*There is no doubt that if a company has been incorporated by members of a terrorist organisation and its* ***capital is provided from the resources of the terrorist organisation or if a company has been allocated to terrorism and a terrorist organisation in terms of its activities, then all the assets of the company and therefore the "partnership shares" of its apparent "partners" must also be confiscated.***"
>
> "*As it is seen, the companies under the control of the defendants Hamdi Akın İpek, Cafer Tekin İpek, Pelin Zenginer and Melek İpek used the financial resources obtained from the resources of the organisation, especially by entering the mining sector, and the unjust gain they obtained through share manipulations in order to expand their economic power. Using the management and controlling shareholding status provided by the shares they own in the companies, they managed the companies under the instructions of the organisation, used the revenues of the companies for the purposes of the organisation, […] committed the crimes of issuing and using false invoices within the scope of the tax procedure law for these purposes. They used the revenues they received for the purposes of the organisation by damaging the said companies, and they committed the crimes of disguised profit distribution for these purposes.* ***For these reasons, it has been confirmed by our court that the activities of the companies whose managements were controlled by the defendants were allocated to terrorism and terrorist organisations.*** *Although these companies were ostensibly mainly under the control of Hamdi Akın İpek, Melek İpek, Cafer Tekin İpek and Pelin Zenginer,* ***in some of these companies, the defendants Ebru İpek, Şaban Yörüklü and Ali Serdar Hasırcıoğlu also had shares but left the shares to the control of Hamdi Akın İpek, Melek İpek, Cafer Tekin İpek and Pelin Zenginer, who are members of the İpek family, and the shares were used according to the organisation's goals.*** *These facts are understood from the statements and the scope of the entire file.*"

"[…] *It has been evaluated that the confiscation of the trustee-appointed companies – which are determined to have supported the organisation systematically and continuously, in which the company executives abandoned their free will in line with the goals of the organisation, and which evidently became the focus of organisational discourse and actions as a result – is in accordance with the principles of legality, public interest and proportionality.*"

"*In line with all these explanations, it is legal to confiscate the shares of the defendants in the companies to which trustees were appointed […]; **financial resources provided by the terrorist organisation were effective in the growth of the companies in question**; **the economic power of the companies** that grew with the financial support of the terrorist organisation **was dedicated to these goals**; **financial resources were provided systematically and constantly for the subsistence of the organisation**; therefore, one of the most important reasons why the organisation survived, continued its activities and increased its economic power was the financing provided by the companies under the control of the defendants; accordingly, these resources must be cut off to prevent the FETÖ/PDY armed terrorist organisation from reaching its goal and to offset its power and effectiveness; consequently, confiscating the shares of the defendants in the companies to which trustees were appointed is in accordance with the principle of public interest; moreover, the companies could not have grown that big without the financial support of the FETÖ/PDY armed terrorist organisation; therefore, considering the activities of these companies, which grew with the support of the organisation, after their growth (when company revenues were used accordingly for organisational purposes); the intended purpose of the confiscation of shares of the defendants is required (for the democratic state based on national sovereignty); the intervention made in order to protect the constitutional order is proportional vis-à-vis the intervention with the individual right of the defendant (right to property). For these reasons, our court has concluded that the confiscation decision was proportional* (**ANNEX-17**, pp. 483-486)

89. As it can be understood from the above, although the prosecutor's office only demanded the confiscation of 1.5 billion TL, which is the sum of donations and investments stated in the MASAK reports, the court of first instance – despite the requirement to be restricted by this request – assumed the role of the prosecution, claimed that "***in terms of their activities the companies are allocated to terrorism and terrorist organisations,"*** and ruled that this claim was ***established by the court.*** The court fabricated allegations that were not in the file, not among the charges by the prosecutor and not discussed at the hearings, and not based on any concrete evidence (See the underlined places in the reasons),[16] and therefore lost its impartiality by both prosecuting and making a trial. The court decided to confiscate all of the applicant's assets based on fabricated allegations, without fulfilling the requirements of the principle of adversarial proceedings. The reasoning for the confiscation is almost

[16] [16] The allegations, which are not in the file, which were not put forward in any way regarding the applicant, and which were first mentioned in the reasoned decision by the court itself and used against the applicant, are also addressed individually in the evaluations regarding the reasoned decision above, and the reason for the confiscation is almost entirely based on these allegations made up by the court.

entirely based on allegations made up by the court. For example, the claim that "***the financial resources provided by the terrorist organisation were effective in the growth of the said companies*"** was never made against the applicant, and not even the smallest material evidence showing the accuracy of this claim could be revealed by MASAK. Although all bank accounts and company books and all other evidence between 2003 and 2015 were examined by MASAK, the police and the MIT, it was clearly stated in the MASAK reports that all the revenues of the companies were obtained from ordinary business activities and there was no entry with a questionable source. Although these official documents completely refute the allegation made up by the court, the decision to confiscate all assets based on these and similar fabricated claims does not only mean that the court prosecuted by itself and judged by itself (violation of impartiality) but also that the court made a decision without informing the applicant of this allegation and without taking his defence on this matter, hence violated the principle of adversarial proceedings.

90. The Criminal Procedure Code provides that "*a verdict is given only about the act the elements of which are set out in the indictment and the perpetrator*" (CPC art. 225 § 1), hence clearly expressing the principle that there can be no trial without prosecution. The acts in the concrete case, according to the indictment, are "*the donations to organisations such as İpek University, Koza-İpek Foundation, Turgut Özal University, and Kimse Yok Mu? Association and commercial investments in Koza-İpek Media Companies.*" The prosecutor's office considered these donations and the investments as financing of terrorism and demanded the confiscation of the donation and investment amount. The act in the indictment regarding confiscation is "***donations*** *to several organisations and* ***investments*** *in the İpek Media companies*" and the request is the confiscation of the amount of TL 1.5 billion, limited to the amount of this donation and the investment.

91. Ankara 24th Assize Court ruled for confiscation based on the claim that "[the applicant] *allocated the companies* [as a whole] for the goals of *FETÖ/PDY*" and thus used as a basis **an act that was not in the indictment** and a claim that was not brought as an accusation at the hearings. There was no evidence in the file regarding this allegation, the defence of the applicant was not taken, and the applicant saw the allegation in question in the reasoned decision for the first time. By issuing the confiscation decision based on an act that was not ascribed to the applicant at the investigation or prosecution stage, the court violated the principle that there can be no trial without prosecution, and in this context, it first made a claim by putting itself in the place of the prosecutor, and then, without taking any trial proceedings, decided that this allegation was established and assumed the role of a judge and thus lost his impartiality. It should be noted that pursuant to CPC 226 in case of a change in the nature of the crime, a verdict may be given after the defendant is given additional time to defend himself and his defence is received. According to the ECtHR, in case of re-

characterisation of the charged offence, the defendant must be given sufficient time to fully and effectively enjoy the rights of defence [especially set out in ECHR art. 6 § 3] (*Pélissier and Sassi v. France*[GC], 1999, § 62; *Block v. Hungary*, 2011, § 24; *Haxhia v. Albania*, 2013, §§ 137-138; *Pereira Cruz and Others c. Portugal*, 2018, § 198). The principle of adversarial proceedings was violated by not complying with this principle regarding confiscation.

92. The Ankara 24th Assize Court decided to confiscate the applicant's shares in all the companies based on its claim that "*he allocated the companies [as a whole]* for the goals of *FETÖ/PDY,"* which was not included in the prosecution's charges and requests (**ANNEX-17**, p. 495). Therefore, not only the principle of both impartial court and the principle of adversarial proceedings but also the right to a fair trial was violated in terms of the reason for the confiscation decision, which was based on fabricated evidence that was not in file. The right to property was also clearly violated because all these judicial guarantees were disregarded and a decision of confiscation of all assets was issued although it was not even demanded.

5. The Appeal Proceedings

a) The Petition of Appeal

93. The applicant's lawyers appealed against the decision of the Ankara 24th Assize Court on 20/5/2020 and 5/6/2020 and demanded a trial with a hearing. In summary, the following arguments were put forward in the petitions of appeal: **a)** There was no armed terrorist organisation at the time of the alleged activities; [legitimate activities] cannot be evidence of membership in an organisation that did not exist at the time of the commission. **b)** Elements of the crime of membership of a terrorist organisation have not occurred; there is no witness statement or other material evidence. Not a single order or instruction received by the applicant within the organisational hierarchy could be proven, and in fact, there is no order or instruction. None of the issues imputed in the two-year trial such as "ByLock, association membership, The Zaman Newspaper, Bank Asya" were included in the reasoned decision, and a conviction was given based on allegations that were not discussed in the hearings. The applicant was not charged with or asked a single question about the process of growing FETÖ/PDY with the help of Atlantik Eğitim Kurumları. The principles of legality of crime and punishment, no crime and punishment without law, and non-retroactivity of laws were violated. A crime cannot be fabricated by executive regulatory acts (Decree Laws); the decision was made based on assumptions. **c)** The allegations that Koza-İpek Group companies were grown with illegal money taken from FETÖ/PDY and was then controlled by FETÖ/PDY are completely unrealistic and abstract claims and are not based on any material evidence. It is not legally possible to use certain transactions carried out 15, 16 and 17 years ago as evidence of a crime in the reasoned decision without asking any questions to the applicant, without even discussing this issue at the

hearing, and by simply identifying manipulation; the accusation about manipulation (dated 2009) had resulted in a final verdict. Making the same claim the subject of a retrial by ignoring the final verdict (*which violates the principle of non bis in idem*) is illegal. The decision included the allegation that some manipulations were made between 2003 and 2006, yet these issues were not discussed at the prosecution stage, and they were taken as the basis of the verdict without revealing any evidence. Whether investments in completely lawful media outlets are right or wrong is not within the purview of criminal law; Participating in capital increases of one's own companies does not constitute a crime in any way, nor is it evidence of FETÖ/PDY membership. The fact that certain acts "are very remarkable" or "need explanation" cannot be evidence of crime. The applicant was convicted on the grounds of transactions or allegations that he was not a party to, that he had no knowledge of, and in which his name was not mentioned anywhere. A conviction decision was issued based on claims that were not discussed at the hearings, which is in violation of the right to defence and the principle of equality of arms. The allegation that the applicant acted for the benefit of the organisation in his business life both personally and through the companies he managed as well as the foundation and the university is untrue and unlawful. In the reasoned decision, it was claimed that the activities of the foundation, the university and the media companies were supportive of the terrorist organisation and the applicant was punished for this reason. Media organisations made publications within the scope of freedom of expression and press, which cannot be evidence of crime. The verdict was made on hypothetical grounds. There is no provision in the Press Law regarding the liability of newspaper and television owners. The responsibility attributed to the applicant in the conviction decision is against the law, so the principle of no punishment without law was violated. The claims that the foundation and the university operated for the benefit of the organisation are baseless. Donations made to universities, foundations and associations were legal at the time they were made. Declaring affiliation with a terrorist organisation with a decree-law does not constitute a basis for an accusation; it violates the principle of non-retroactivity of crime and punishment. Investigations were carried out long before the state of emergency was declared, and the applicant was arrested 4 months before. The transfer of the Atlantic Eğitim Kurumları shares to Turgut Özal University was made in 2015, that is before the criminal investigation and 1.5 years before the coup attempt. The applicant has nothing to do with the donations made by third parties to this organisation years ago; a situation to the contrary violates the principle of individuality of crime and punishment. Allegations that had nothing to do with the accusation of membership in an organisation (TPL, CML) were shown as evidence for the crime of membership of an organisation that did not exist at the time of the investigation and the allegations of violation of these laws were used as evidence in the conviction for the crime of membership of an organisation. **d)** Despite the fact that all institutions and

organisations of the state had conducted investigations and examinations regarding terrorism and "membership in an armed terrorist organisation," it has not been determined that even a single penny of aid was given to any organisation from Koza-İpek Group companies, which is confirmed by all the MASAK final reports. All the allegations made against the applicant during the investigation phase were refuted by the MASAK reports, and the allegations the applicant faced during the investigation phase were completely different from the allegations during the prosecution phase. In short, the allegations that Koza-İpek Group companies were grown by FETÖ/PDY and then came under its control are purely abstract and hypothetical, and a subjective assessment based on no evidence vis-à-vis the applicant. The MASAK Reports completely acquitted the client and his family members in terms of these allegations, and it was definitively determined that not even the smallest suspicious monetary transaction could be detected. The allegation of money laundering is irrational in the light of the MASAK reports. The allegations contained in the reasoned decision are attributed to the applicant's brother, Hamdi Akın İpek, and do not concern the applicant in any way. Since Akın İpek was abroad, even his defence on these issues was not taken. **e)** Not only was the decision based on evidence that was not presented and discussed at the hearing, but also the statements of some persons who were mentioned as witnesses in the indictment [village headmen Hasan Hüseyin Ataş, Sezai Akbulut, Halil Güngör and Safa Eşit] were taken by the company security coordinator, not by the prosecutor's office or the police, and tax crime reports were issued based on these statements, and these were included among the witness statements in the reasoned decision and used as evidence in the conviction decision. For all these reasons, it is unlawful to punish the applicant for membership of a terrorist organisation. **f)** The decision is unlawful, as a lawsuit was filed and a conviction was issued on the basis of unprecedented and unfounded allegations and activities that were legal at the time, which is contrary to the provisions of the CML. **g)** In terms of the CML, the elements of the crime of "*disguised profit transfer*" did not occur. This crime does not occur if the shareholders do not lose their rights, and there is no loss of rights; legal activities were made the basis of this crime. **h)** In terms of the CTL, the crime of "*disguised profit transfer*" did not occur in the concrete incident either; Treasury must be harmed for this crime to occur. There is no proof that such harm occurred. **i)** Incorporated in England, Koza Ltd was established in accordance with the law, and the capital transfer made within this framework was completely legal. The MASAK report also confirmed this situation. The characterisation of this investment as the *crime of disguised profit transfer* is unlawful: it cannot be characterised as disguised gains or breach of trust [which violates the principle of no punishment without law]. **j)** The allegation that disguised profit transfer was made when Koza Altın İşletmeleri A.Ş. made exorbitant dividend payments to members of the board of directors, namely Hamdi Akın İpek, Cafer Tekin İpek, Melek İpek and Pelin Zenginer (İpek) is unfounded. The dividends were

paid in accordance with market practices and precedent values, and this part of the decision also interpreted the penal law arbitrarily and applied it broadly: legal dividend payments cannot be considered a crime. In addition, this part of the decision is unlawful, since the decision was made without asking for precedent values and placing them in the file, as a result of incomplete examination, and based on information that is not available in the file. **k)** Payments of remuneration, bonus and dividend to the members of the Board of Directors are made in accordance with the Dividend Communiqué numbered II-19.1, published in the Official Gazette dated 23/01/2014 and numbered 28891 by the CMB, and they cannot be reviewed by the court as long as they comply with the regulation. The payments in the concrete case are in compliance with this communiqué, and considering a legal payment as a crime violates the principle that there should be no punishment without law. **l)** All the donations made from companies to İpek University and Koza-İpek foundation were made in accordance with the legal regulations in this area, and since legal activities were considered as the "crime of disguised profit transfer," the principle of no punishment without law was violated. **m)** The allegation that the crime of disguised profit transfer occurred when profits or assets were transferred to İK Akademi AŞ through various transactions during and after the tender for the Himmetdede Gold Mine Facility construction work is also baseless. The construction work was tendered to HR Academy A.Ş. "because it gave the most appropriate offer," which is in complete accordance with the legal regulations in this area. **n-)** The allegation that the crime of disguised profit transfer was committed when funds were transferred by ATP İnşaat A.Ş., a subsidiary of Koza Anadolu A.Ş. and İpek Enerji A.Ş., to the İpek Media Group companies, which were related parties, through various methods is also an accusation that was produced in ignorance of commercial activities. ATP İnşaat A.Ş. is a subsidiary of Koza Anadolu A.Ş. and İpek Enerji A.Ş. İpek media group companies are companies in which ATP İnşaat A.Ş. is a 99.9% - 100% shareholder and owner. Transfer of capital to these companies, which were incorporated by TP İnşaat A.Ş., through legal means is completely legal as well as a normal commercial activity. The evaluation of these legal activities, which were carried out to increase the brand value of media companies, as a disguised profit transfer violates the principle of no crime and punishment without law. **o)** The allegation that the crime of disguised profit transfer was committed when general administrative expenses were reflected by Koza İpek Holding A.Ş. to Koza Altın A.Ş., Koza Anadolu A.Ş. and İpek Energy A.Ş., which are publicly traded companies, and their subsidiaries consists of an arbitrary and broad interpretation and application of penal laws. In fact, the companies in question were audited by independent audit institutions and certified public accountants, and nothing contrary to the CML and tax legislation could be detected regarding the reflection of general administrative expenses in these audits. **p)** As for the confiscation decision, despite the efforts of all state institutions, not a single penny was found to indicate that any of the Koza-İpek Group companies gave donations

to any terrorist organisation or institutions associated with this organisation. On the last page (p. 79) of the MASAK final report No. 6 dated 4 May 2016, this situation was clearly accepted: Not a single penny could be determined that any donation was made to institutions and organisations related to the terrorist organisation. (See § 33 above). No violation of the CML, the tax legislation and the Terrorism Financing Law could be determined in any of the official and private audits. The reasoning for the confiscation decision of the first instance court is clearly unlawful. Although the prosecutor's office demanded the confiscation of the company partners' shares for 1.5 billion TL in the indictment, the court changed the nature of the charges regarding the confiscation and decided to confiscate all of the applicant's shares based on the allegations that were not in the file. In addition, no premiums or dividends were paid to the applicant for approximately 8 years. **q)** The decision was based on many pieces of [fabricated] evidence about which the applicant did not make his defence, about which no questions were asked, and which were not discussed during the hearings. The opinion on the merits and the reasoned decision are based on completely different events and facts (See the petition of appeal submitted by Lawyer Hüseyin Uğur Poyraz and Lawyer Oğuz Mescioğlu dated 5/6/2020, p. 8)" (For the petitions of appeal, see **ANNEX-19**).

b) The Decision of the Court of Appeal

94. With the decision of the 1st Chamber of the HSYK dated 25 March 2016, appointments were made to the Regional Courts of Justice throughout Turkey and it was decided that these courts would become operational on 20 July 2016.[17] The members of the 4th Penal Chamber of the Ankara Regional Court of Justice were appointed on the same date and this court became operational on 20 July 2016. The first judges appointed to the 4th Penal Chamber were Beytullah Metin (President), Zekeriya Samancı, Mustafa Demirel and Harun Dinç[18]. Mevhibe Başiraz Giriftinoğlu was also appointed to this court at a later date but was removed from this court on 3 July 2020 and appointed to the 9th Penal Chamber. Zekeriya Yavuz was appointed to the 4th Penal Chamber on the same date.[19]

95. The judges Beytullah Metin, İbrahim Polat and Azmi Çağatay have their signatures in the decision of the 4th Penal Chamber of the Ankara Regional Court of Justice, which made a ruling on the request for appeal on 27/4/2021. As can be understood, instead of Zekeriya Samancı, Mustafa Demirel and Harun Dinç, who were appointed to this court on 20 July 2016, İbrahim Polat and Azmi Çağayan Bilgin, who were not included in the composition of the 4th Penal Chamber until 3 July 2020 and who were subsequently appointed, decided on the applicant's appeal request.

---

[17] https://www.hsk.gov.tr/bolge-adliye-mahkemelerine-iliskin-duyuru

[18] https://www.adaletbiz.com/hukuk/ankara-istinaf-hangi-daire-hangi-davaya-bakacak-uyeleri-kim h77848.html

[19] https://www.hsk.gov.tr/Eklentiler/files/BAM%20Yetki%20Kararı.pdf

Moreover, the composition of the court of appeal changed many times in 4 years, and a judge appointed to the courts of appeal has a minimum term of 4 years in these courts.

96. The Ankara BAM (Regional Court of Justice) 4th Penal Chamber, whose composition changed many times in 4 years, rejected the appeal regarding 15 defendants on 27/4/2021 on the merits with the following rubber stamped reason as a result of its examination over the file, without even a hearing, and without answering to any of the dozens of arguments put forward by the applicant's lawyers: "No unlawfulness has been identified in the proceedings held, the content of the file and the minutes of the hearing, the legally valid and positive evidence shown and discussed at the place of decision, the opinion and discretion of the court that formed as a result of the prosecution as well as in the fact that the crimes that are punished were acknowledged and evaluated in accordance with the formation and nature of the crimes; that the characteristic and degree of aggravating reasons were evaluated for each defendant, the defences were rejected for convincing reasons; that the decision complied with the law in terms of the acquitted crimes; and that the reason was explained lawfully and sufficiently. Therefore, the requests by the public prosecutor, the representatives of the participating Revenue Administration Presidency, the representative of the participating Capital Markets Board Presidency, the representatives of the participating companies and the defendants and their lawyers that are found invalid are rejected. (**ANNEX-20**). Thus, the right to a reasoned decision was violated.

97. With this decision, the decision has been finalised for Cafer Tekin İpek in terms of penalties based on the crimes of Opposition to the Tax Procedure Law.

6. The Cassation Proceedings

a) The Petition of Cassation

98. The applicant's lawyers filed an appeal on 18/5/2021 and 27/5/2021 and demanded the reversal of the decision using the dozens of arguments in the petitions of appeal summarised above (**ANNEX-21**).

b) The Decision of the 3rd Penal Chamber of the Court of Cassation

99. The applicant's cassation request was rejected on 14 April 2023 by the 3rd Penal Chamber of the Court of Cassation, consisting of members Muhsin Şentürk (President), Hakan Yüksel, Ali Nevzat Açıkgöz, Nazım Durmaz and Kenan Zeybek (**ANNEX-22**).

100. With the Decree Law No. 696 dated 24 December 2017, amendments were made to the Laws of the Court of Cassation and the Council of State. According to Article 45 of Decree Law No. 696, "*Elections shall be held within six months at the latest from the effective date of this article for the entire staff of one hundred members of the*

Court of Cassation newly created on the effective date of this article."[20] The 100 members in question were elected by the HSK on 16 July 2018, i.e., 6 months after the date of 24 December 2017. Among these members are *Ali Nevzat Açıkgöz*, *Nazim Durmaz* ve *Kenan Zeybek,* who signed the decision about the client.[21] Thus, the structure of the court was changed by a decree law (not by law) while the applicant was on trial, but 100 new members were determined and appointed to the Court of Cassation even after the time stipulated in the decree elapsed, which is contrary to the provisions of the Decree Law. Because Decree Law No. 696 was approved by the Law No. 7079 dated 3 March 2018, i.e., 30 days after it was published on 24 December 2017, it violated Article 121 of the Constitution and Article 128 of Parliamentary Rules of Procedure. Since it was accepted without complying with the procedural requirements, this Decree Law cannot constitute a legal basis for the change to be made in the structure of the courts. In fact, "*The establishment, duties and powers, functioning and judicial procedures of courts are set out **BY LAW***" (Constitution Art. 142); they cannot be set out by decree laws. As a result, the formation of the court of first instance, which made a decision in the concrete case, was made up of members who were made members of the Court of Cassation both with a decree law that was not approved even in due time, and after the 6-month period specified in this decree law in violation of the principle of a court established by law.

101. In its Oleksandr Volkov v. Ukraine judgment, the ECtHR made the following decision: *According to Ukrainian law, the composition (members) of the Higher Administrative Court that decided the applicant's case was defined by the President of that court at the date of the incident. The judge, who was the President of the Council of State, was elected to this post for 5 years, and at the date of the incident, the 5-year term of office of the president in question had expired. Despite this, the judge in question (the President of the Higher Administrative Court) continued to carry out this duty.* The ECtHR considered the appointment of Chamber judges by the President of the Higher Administrative Court, whose term of office had expired, as a violation of the principle of a court established by law. In the concrete case, the Penal Chamber was formed in violation of the principle of the court established by law because the members were appointed to the Court of Cassation within 30 days (in violation of the domestic law) with a decree law that was not approved by the Grand National Assembly of Turkey and without complying with the 6-month period (without any legal basis) stipulated in the provision for the appointment of new members to the high courts.

102. At the date of submission of the petitions of cassation, the competent cassation authority in terms of jurisdiction in the proceedings regarding terrorism

---

[20] https://www.resmigazete.gov.tr/eskiler/2017/12/20171224-22.htm

[21] https://www.son.tv/haber-389205/

crimes was the 16th Penal Chamber of the Court of Cassation, and the First Presidency Board of the Court of Cassation gave this authority to the 3rd Penal Chamber with the decision dated 22 June 2021 and numbered 196.[22] Thus, after the applicant filed a cassation appeal, the appeal authority was changed and the appeal review was made by the 3rd Penal Chamber of the Court of Cassation, which dismissed the appeal **on 14 April 2023** (**ANNEX-22**). For this reason, the right to be tried before the court established by law was violated. The request was rejected without examining the arguments put forward by the applicant's lawyers, which would fundamentally affect the outcome of the proceedings, and therefore the right to a reasoned decision was violated.

103. The decision of the 3rd Penal Chamber of the Court of Cassation was based on the reasons below, and the explanations regarding the evaluation errors are highlighted in capital letters:

> "*Taking into account the entirety of the file, the court admission, the reviewed Masak Reports, the CMB Reports, the expert reports, digital data review minutes, ByLock conversation contents and the witness statements,*
> ***a)*** *All of the group companies are under the control of İpek Family and are intertwined in terms of partnership structure. During the process of acquiring new companies and increasing the capital of existing companies, the family* ***transferred big amounts of money with an unknown source*** (THIS IS A COMPLETELY FALSE CLAIM THAT DOES NOT EXIST IN THE CASE FILE.) *As a requirement of commercial life, it is usual for companies to make a profit and to grow with their current profits, adding new companies to their structure and increasing the capitals of existing companies, yet it cannot be explained whether the growth was from its own resources or from certain external sources, and many suspicious transactions and actions related to the operation of companies were identified in the reports* (THE MASAK REPORTS COMPLETELY REFUTED THESE CLAIMS). *Besides, considering the company founder Hamdi Akın İpek's relationship and position with Fethullah Gülen, the ringleader of the FETÖ/PDY armed terrorist organisation, the partnership with Atlantik Eğitim Yayın Taş. Bilgisayar Tic. A.Ş. and the activities of this company's employees to collect donations and put the collected donations into the system, it has been evaluated that the donation money is also used in the capital growth of the companies* (THIS CLAIM HAS NOTHING TO DO WITH THE APPLICANT).
>
> ***b)*** *As explained in the Naksan Holding Decision dated 22.06.2022 and numbered 2021/1375 E., 2022/3727 K. and Boydak Holding decision dated 23.01.2023 and numbered 2021/2528 E., 2023/182 K., it was seen that these companies, which were accepted to provide continuous financing to the organisation, aimed to serve the aims of the FETÖ/PDY armed terrorist organisation in the provinces where they were located by establishing a foundation and a foundation university* (THESE WERE LEGAL ACTIONS WHEN THEY WERE PERFORMED). *The instructions for the establishment of the universities were given directly by the leader of the organisation, Fethullah Gülen, and the foundation of the universities and their*

[22] https://www.yargitay.gov.tr/documents/ek1-1625836450.pdf

funding through companies by means of different businesses and transactions resemble each other, although not exactly the same (THE UNIVERSITY WAS ESTABLISHED IN 2011 BY LAW AND THERE WAS NO ILLEGAL Organisation AT THAT TIME; THE GOVERNMENT SUPPORTED IT). *The fact that all these companies, which are considered to have been allocated to the organisation, established universities that served the purpose of training staff by providing funds through companies with similar methods, shows that this whole organisation was coordinated from a single place. There are similarities in organisational activities in the process after the establishment of universities such as organisational hierarchy in both administrative and academic staff, organisational meetings, and collection of donations to the organisation* (THIS INVOLVES NO CHARGE AGAINST THE APPLICANT). *There is no mistake in accepting that İpek University, which was founded by the İpek family, is also an institution of the organisation in this sense, like Zirve University and Melikşah University.* (THIS IS SIMPLY AN INFERENCE AND ASSUMPTION: JUSTICE IS NOT A BUSINESS OF ASSUMPTIONS; IT IS NOT A BUSINESS OF BELIEVING OR DISBELIEVING, EITHER. RATHER, LEGAL PROCEEDINGS CAN ONLY BE BASED ON CONCRETE EVIDENCE. IN FACT, THE UNIVERSITIES ARE LEGAL BECAUSE THEY ARE ESTABLISHED BY LAW; A LEGAL ACTIVITY CANNOT BE CRIMINAL. IF IT IS A CRIME, THEN IT WAS THE MEMBERS OF THE PARLIAMENT WHO FIRST COMMITTED THIS CRIME.)

c) *The Masak Reports regarding the fact that the staff of Atlantic Eğitim Yayın Taş. Bilgisayar Tic. A.Ş. were engaged in activities of collecting donations and putting them into the system is confirmed by the statements of defendants in other case files. Given the fact that Koza Holding A.Ş. donated its shares in Atlantic Eğitim Yayın Taş. Bilgisayar Tic. A.Ş. to Turgut Özal University, which is an institution belonging to the organisation and considering Hamdi Akın İpek's mention of this fact in his correspondence on the ByLock system, which was used exclusively by the organisation, it has been concluded that the reason why the shares in Atlantic Eğitim Yayın Taş. Bilgisayar Tic. A.Ş. were taken and then donated by Koza Holding A.Ş. was because it was commanded and ordered by the organisation* (THERE WAS NO SUCH Organisation AT THE TIME OF THE DONATION; THESE CLAIMS HAVE NOTHING TO DO WITH THE APPLICANT).

d) *Upon the initiation of the investigations against the companies and the injunction decisions, the leader of the organisation, Fethullah Gülen, defended Hamdi Akın İpek and the companies, which was shared in the media organs of the organisation. The content of his statements reveals the importance of the company for the organisation.* (THIS THE CLAIM HAS NOTHING TO DO WITH THE APPLICANT; THE PRINCIPLE OF INDIVIDUAL CRIMINAL RESPONSIBILITY WAS DISREGARDED WHEN THE DECISION WAS MADE.)

e) *There is no mistake in accepting that the publicly held companies transferred disguised profit, since the CMB Reports and independent expert reports on the transfer of disguised profits from publicly held companies do not contradict each other, the other evidence in the file, which contains detailed concrete findings, supports these findings, and there is no convincing evidence to refute the findings in the reports.*

f) *Considering the purchasing process of the media organisations and their organised and one-sided broadcasting policies according to the witness statements and reports, it is accepted that media organisations owned by Koza Group carried out their activities in line with the orders and instructions of the organisation.* (ACCORDING TO THE PRESS LAW, THE APPLICANT CANNOT BE HELD RESPONSIBLE FOR PUBLICATIONS/BROADCASTS, WHICH ARE WITHIN THE SCOPE OF FREEDOM OF THE PRESS; NO INVESTIGATION WAS STARTED. ACCORDING TO THE MASAK REPORT NO. 10, NO ILLEGALITY WAS FOUND DURING THE PURCHASE OF KANALTÜRK.) *It has been concluded that the media companies committed illegalities in the operational actions taken by the organisation and displayed the crimes committed in this context in a way that caused a completely different perception in the public and in an organisational manner that aligned with the purpose of their establishment, which cannot be considered within the scope of freedom of expression and press* (NO INVESTIGATIONS WERE STARTED WITHIN 4 MONTHS; ALSO, THE APPLICANT WAS NOT RESPONSIBLE FOR THE PUBLICATIONS/BROADCASTS). *In addition, since the news made by media companies are not evaluated only in terms of content but it is accepted* (BY WHOM?) *that companies followed a publishing policy in line with the orders and instructions of the organisation, there is no fault in the non-implementation of the provisions of the Press Law* (THIS REASON VIOLATES FREEDOM OF EXPRESSION AND THE PRESS. ALSO, THERE IS NO CONCRETE EVIDENCE TO SUPPORT THE ALLEGATION THAT THE PUBLICATIONS WERE MADE UPON THE INSTRUCTIONS OF THE ORGANISATION. THIS REASON IS SIMPLY AN ASSUMPTION.)

g) *It is understood that the disguised profit transfers were used to fund İpek University, which was obviously established with the order of the organisation* (IT WAS ESTABLISHED BY LAW; THIS IS AN ASSUMPTION), *Koza İpek Education Foundation* (WHICH WAS ESTABLISHED IN 2009, WHEN THERE WAS NO ORGANISATION) *and other organisations affiliated with the organisation and to finance the construction of Ipek University and the continuity of media companies* (THIS IS AN ASSUMPTION; THEY WERE SEIZED ON 26 OCTOBER 2015; THERE WAS NO ORGANISATION DECLARED AT THAT TIME). *Apart from providing funds to these institutions that directly served the purpose of the organisation, it has been determined that the disguised profit transfers were also used for illegal overseas capital transfer* (ACCORDING TO THE MASAK REPORT, KOZA LTD WAS INCORPORATED ACCORDING TO THE LAW, AND THE ALLEGATION OF ILLEGAL OVERSEAS CAPITAL TRANSFER IS FALSE; ALSO, THIS CLAIM IS NOT INCLUDED IN THE DECISION OF THE COURT OF FIRST INSTANCE.)

h) *Financing the organisation through disguised profit transfers* (ACCORDING TO THE MASAK REPORT NO. 6, NOT EVEN A PENNY WAS FOUND TO HAVE BEEN TRANSFERRED TO ANY TERRORIST ORGANISATION. p. 79) *both provided financial support for the continuity of the terrorist organisation and infringed the rights of investors who invested in the publicly traded companies in the stock market by relying on the capital market. In this regard, the disguised profit transfer both financed terrorism (ALL THE DONATIONS WERE MADE TO LEGAL INSTITUTIONS LONG BEFORE THE COUP ATTEMPT) and created a situation that shook the confidence in the capital markets and worried the investors. Undoubtedly, there is a*

risk that this action will have serious consequences for the economic and public order in the Republic of Turkey.

i) Confiscation of a company as a whole is legally possible and necessary provided that it is understood that the company is affiliated with a terrorist organisation; it has transferred money (TO WHOM?); it is allocated specifically to the goal of the organisation; **it sent money to the overseas arms of the organisation** (THIS CLAIM WAS FABRICATED BY THE 3RD PENAL CHAMBER OF THE COURT OF CASSATION; THERE IS NO SUCH CLAIM IN THE CASE FILE); *it systematically carried out money transfers that served the goal of the organisation* (NO SUCH CHARGE WAS LEVELLED AGAINST THE APPLICANT); it became one of the major sources of finance for the armed terrorist organisation in Türkiye and abroad (THIS CLAIM IS NOT INCLUDED IN THE REASONED DECISION EITHER); it acted in line with its goals and activities of the organisation; it became a hub in this way; it tried to support the organisation financially to ensure its continuity; and it came under the control of the organisation. When the sources of income of FETÖ/PDY are evaluated in terms of the concrete case file and the defendants who are determined to be affiliated with the organisation, it should not be wrong to say that the defendants assigned the economic assets they had to the activity of the organisation, put them to use in the committing of crime (THE MASAK REPORTS PROVED THE EXACT OPPOSITE OF THESE CLAIMS), and became a CENTRE in the financing of the organisation.

j) *In the light of the legal explanations and determinations made above and considering the financing resources of the FETÖ/PDY armed terrorist organisation* (DONATIONS WERE MADE ONLY TO LEGAL INSTITUTIONS AND ESPECIALLY THE FAMILY FOUNDATION AND THE UNIVERSITY BEFORE 26 OCTOBER 2015, WHEN THERE WAS NO ORGANISATION CALLED FETÖ/PDY, AND EVERYTHING WAS LEGAL WHEN THEY WERE MADE), *the provisions regarding the goods allocated to crime and the provisions regarding the confiscation of profits are intertwined in the concrete file.* ***Considering that the companies were allocated to crime, a ruling should be made for the confiscation of the companies in accordance with the provisions regarding the goods allocated to crime*** (VIOLATION OF THE RIGHT TO PROPERTY).

k) It must be decided that the companies *Koza İpek Holding Anonim Şirketi İpek Doğal Enerji Kaynakları Araştırma ve Üretim Anonim Şirketi, Koza Anadolu Metal Anonim Şirketi, ATP İnşaat ve Ticaret Anonim Şirketi, ATP Havacılık ve Ticaret Anonim Şirketi, ATP Koza Turizm Seyahat ve Ticaret Anonim Şirketi, Koza İpek Basın ve Basım Sanayi Ticaret Anonim Şirketi, Yaşam Televizyon Yayın Hizmetleri Anonim Şirketi, Rek-Tur Reklam Pazarlama ve Ticaret Limited Şirketi, Koza Prodüksiyon ve Ticaret Anonim Şirketi, İpek Online Bilişim Hizmetleri Limited Şirketi, Bugün Televizyon ve Radyo Prodüksiyon Anonim Şirketi, Koza Altın İşletmeleri Anonim Şirketi, Özdemir Antimuan Madenleri Anonim Şirketi, Koza İpek Tedarik Danışmanlık ve Araç Kiralama Ticaret Anonim Şirketi, İK Akademi Anonim Şirketi – which financed the FETÖ/PDY armed terrorist organisation and which are accepted to have been appropriated for the goals and activities of the organisation shall all be confiscated , pursuant to the first paragraph of Article 54 of the Law No. 5237, without prejudice to the rights of bona fide shareholders and third parties* (SO, THE ASSETS OF SHAREHOLDERS SUCH AS HAMDİ AKIN İPEK AND PELİN ZENGİNER, ABOUT WHOM

THERE ARE NO JUDICIAL DECISIONS BECAUSE THEY LIVE ABROAD, HAVE BEEN CONFISCATED WITHOUT PERFORMING A TRIAL AND WITHOUT TAKING THEIR STATEMENTS, AND THEIR RIGHT TO PROPERTY WAS THUS VIOLATED.

l) *In terms of the verdicts regarding the defendants Cafer Tekin İpek and Melek İpek on the charge of being a member of an armed terrorist organisation, it has been concluded that the defendants were involved in the intense and continuous financing of the FETÖ/PDY armed terrorist organisation through companies allocated to the organisation's goals and activities* (ALL THE DONATIONS WERE LEGAL WHEN THEY WERE MADE, AND THE COURT DEFINES LEGAL ACTIVITIES AS CRIMINAL EVIDENCE, INTERPRETS AND APPLIES PENAL LAWS ARBITRARILY AND BROADLY AND VIOLATES OF THE PRINCIPLE NO PUNISHMENT WITHOUT LAW) *and they played an active role in their contribution. Therefore, no fault has been found in their convictions for being a member of an armed terrorist organisation.*

m) *It has been concluded that the procedures in the proceedings were carried out in accordance with the law; all the evidence taken as a basis for the decision were obtained in accordance with the law* (THE DECISION WAS BASED ON BYLOCK, AND THE EVIDENCE WAS OBTAINED ILLEGALLY; THE WITNESSES WERE NOT HEARED.); the claims and defences put forward during stages of the proceedings were fully exhibited in a way to ensure the cassation review; and the defences put forward in the cassation petition were discussed without a change in their essence (NONE OF THE TENS OF ARGUMENTS MADE AT THE HEARINGS AND IN THE APPEAL AND CASSATION APPLICATIONS WERE ANSWERED IN ANY WAY); *the conscientious opinion was based on the precise, consistent and non-contradictory data; the conviction agrees with the type of crime set out in the law; the sanctions were applied by personalising them in the legal context, taking into account the way the crime was committed, the position of the defendants in the organisation, the intensity of their actions and the intent of the crime. Accordingly, no illegality has been found in the verdict.*"

n) *As the cassation requests of the representatives of the participants are deemed appropriate for the reasons explained in the reasons section, the 4th Penal Chamber of the Ankara Regional Court of Justice's decision dated 27.04.2021 is REVERSED in accordance with the second paragraph of Article 302 of the Law No. 5271;* ***Since this issue does not require retrial,*** *paragraph J-1 in the verdict, which concerns* ***confiscation****, should be removed completely and replaced with the phrase "confiscation of Koza İpek Holding Anonim Şirketi, İpek Doğal Enerji Kaynakları Araştırma ve Üretim Anonim Şirketi, Koza Anadolu Metal Anonim Şirketi, ATP İnşaat ve Ticaret Anonim Şirketi, ATP Havacılık ve Ticaret Anonim Şirketi, ATP Koza Turizm Seyehat ve Ticaret Anonim Şirketi,* ***Koza İpek Basın ve Basım Sanayi Ticaret Anonim Şirketi, Yaşam Televizyon Yayın Hizmetleri Anonim Şirketi, Rek-Tur Reklam Pazarlama ve Ticaret Limited Şirketi****, Koza Prodüksiyon ve Ticaret Anonim Şirketi, İpek Online Bilişim Hizmetleri Limited Şirketi,* ***Bugün Televizyon ve Radyo Prodüksiyon Anonim Şirketi****, Özdemir Antimuan Madenleri Anonim Şirketi, Koza İpek Tedarik Danışmanlık ve Araç Kiralama Ticaret Anonim Şirketi, and İK Akademi Anonim Şirketi, which financed FETÖ/PDY armed terrorist organisation and which are accepted to have been appropriated to the goals and activities of the organisation, without prejudice to the rights of bona fide shareholders and third*

parties and pursuant to the first paragraph of Article 54 of the Law No. 5237" pursuant to Article 303 of the same Law; the cassation request, contrary to the Communiqué, is unanimously rejected on the merits; and the verdict shall be corrected and approved." (**ANNEX-22**)

104. The decision of the Court of Cassation dated 14/4/2023 was learned on the same day through UYAP, and this application was hand-delivered to the Constitutional Court on 12 May 2023, within 30 days.

II. COMPLAINTS

A. VIOLATIONS OF THE RIGHT TO A FAIR TRIAL (Article 6 of the ECHR)

1. Violation of the right to a trial before an independent and impartial tribunal established by law (Art. 6 § 1 of the ECHR)

105. According to the ECHR, "*In the light of the principle of the rule of law inherent in the Convention system, the Court considers that a* ***"tribunal" must always be established by law****, failing which it would lack the legitimacy required in a democratic society to hear the cause of individuals.*" (***Lavents v. Latvia****,* § 81). The principle of established court by law includes the right to be tried before a court established before the alleged crime was committed, as well as the right to continue and complete the proceedings in accordance with "laws previously adopted by the Parliament" (criminal procedure rules). In this respect, there should be procedural laws that have been accepted beforehand, and the trial should be conducted and completed in accordance with the procedural rules set out in the procedural laws (***Coëme and others v. Belgium***).

106. As a rule, judges can be removed from the court of which they are members before their term of office expires only in the event of their election to a higher court, reorganisation of the courts, or the expiration of their term of office, or at their own request. If members of a court are dismissed outside of these circumstances, this practice undermines the independence of the courts. The assurance of serving until the expiry of a judge's appointment in the court to which he or she is appointed is one of the conditions of independence (***Campbell and Fell v. The United Kingdom***, § 78). As for suspension or dismissal through disciplinary proceedings, "*Judges can be suspended or dismissed from the profession only after a fair trial and only because of their faulty or criminal behaviour or inadequacies based on very serious reasons and concrete findings*."[23]

107. The Ankara 24th Assize Court, the Ankara Regional Court of Justice's specially authorised 4th Penal Chamber, and the 3rd Penal Chamber of the Court of Cassation, which rendered decisions on the applicant, lack the qualities of an independent and

[23] @UNHumanRights – 27/7/16 – 09.00

impartial court established by law and therefore Article 6 § 1 of the ECHR was violated. **a)** The specially authorised assize courts were appointed across Turkey with the HSK decision dated 12 February 2015. 7 days before the establishment of specially authorised assize courts, 173 judges who were members and presidents of the 2nd Assize court across Turkey were dismissed and new judges were appointed in their place with the HSYK 1st Chamber's decision dated 5 February 2015 and numbered 170. 7 days later, all 2nd assize courts across Turkey – and the assize court in a jurisdiction where there are no others – were authorised as specially authorised assize courts with the HSYK 1st Chamber's administrative decision numbered 224. **b)** In the concrete case, the Ankara 24th Assize Court and Ankara 4th Penal Chamber, which tried the applicant, are courts similarly established, with their members specially elected and appointed, after the applicant was prosecuted (**ANNEX-1**, §§ 55-57, 94-96). **c)** After being reviewed, the applicant's cassation appeal was rejected by the 3rd Penal Chamber of the Court of Cassation, which was authorised after his appeal (**ANNEX-1**, § 102). Thus, the courts of first and second instance that tried and convicted the applicant and the 3rd Penal Chamber of the Court of Cassation, which rejected the appeal, lack the characteristic of a court established by law. **d)** During the trial before the court of first instance, which lasted 2 years and 4 months, the members of the court changed many times, and a total of 11 different members served in 22 sessions. The proceedings on the merits were repeated in the presence of the newly appointed members. Between 15 January 2014 and 31 May 2019, more than 25,000 members of the judiciary were appointed to other provinces and courts before the expiry of their terms of office and many were appointed without their request. **e)** The members of the Ankara 4th Penal Chamber were also changed many times before the expiration of the four-year term (**ANNEX-1**, §§ 94-95). **f)** Dozens of judges were dismissed from the court they worked at and assigned to other provinces and/or courts immediately after some of their decisions, which includes the courts of appeal. In Turkey, first and second instance judges working under the authority of the HSK are not guaranteed to work in a certain court for a certain period of time. A judge of a court of appeal can be taken from a court where he has only worked for 9 months and be appointed to a court of first instance with the decision of the HSK. **g)** The guarantees for judges in Article 139 of the Constitution was suspended under Article 3 of Decree Law No. 667. The HSK and the First Presidency Board of the Court of Cassation were able to dismiss judges and members of the Court of Cassation at any time without any investigation or trial. In this way, around 5,000 members of the judiciary were dismissed from the profession, and the dismissal proceedings continued until 31 July 2022.[24] For this reason, the judges in the first and second instance courts who tried the applicant gave their decisions without the guarantees for judges at the time of their decisions. **h)** The memberships of the Court of Cassation were terminated by law on 23.7.2016, and Türkiye remained without a

[24] https://www.resmigazete.gov.tr/eskiler/2022/06/20220609-6.pdf

Court of Cassation for two days until a new Court of Cassation was established on 25.7.2016. This includes the 3rd Penal Chamber, and the decision-making body of five people in the 21-member 3rd Penal Chamber (*le siège de cinq juges*) is determined each time by a judge [not in advance by law]. The president of the chamber can form a decision-making body of thousands of different 5 people, provided that he remains constant, and there is no guarantee that any member will serve as a member in a particular file from the beginning to the end of the trial. The president can change any member in the same file at any time. **i-)** Since all the memberships of the Court of Cassation and the 3rd Penal Chamber were terminated with the law dated 23 July 2016 and 267 new members were elected to the Court of Cassation on 25 July 2016, the court of cassation also lost its independence.

j) Since the 1st Presidency Board of the Court of Cassation can change the office of the members working in the departments at any time, there is no guarantee that any member will work in a chamber for a certain period of time. **k)** Nor are there any safeguards to protect judges from outside pressure. Judges can be prosecuted and dismissed from the court where they work immediately after letters from the General Directorate of Security and some governorships or news articles of some journalists. **l)** The court of first instance, which sentenced the applicant, refused to rely on the official documents in favour of the applicant (MASAK 1-12 Reports) for unfounded reasons, and relied on the allegations in the MASAK preliminary report dated 2014, which were refuted by the MASAK final reports. By fabricating new allegations that were not in the indictment, that were not discussed at the hearings and that were not included in the opinion of the prosecutor's office on the merits, the court accused the applicant of these allegations on the one hand (prosecutor), and assuming the role of a judge, ruled that these allegations were proven (judge) on the other hand, and convicted the applicant based on the charges it fabricated. The court clearly lost his impartiality by ruling for the confiscation of all the applicant's assets based on these fabricated allegations. (**ANNEX-1**, §§ 71-72, 88-91). **m)** The 3rd Penal Chamber of the Court of Cassation followed the practice, and even though the MASAK reports were definitively proven and there was no evidence in the case file, the court fabricated new claims that are not even in the decision of the court of first instance such as "*that there are large amounts of money transfers in companies of unknown origin*, […] *that it sends money to foreign arms of the organisation*" (**ANNEX-1**, § 103). The court charged the applicant with new accusations as if it was the prosecution, then based on these allegations, upheld the conviction and extended the confiscation decision to all companies, ruling for the confiscation of all Koza-İpek Group companies, and lost its impartiality (ECHR, ***… Russia***). **n-)** The composition of the Court of Cassation was changed with the Decree-Law No. 696 (Constitutional Article 142), and 100 members of the Court of Cassation, who were to be elected within 6 months, were elected in 20 days, and 3 of these members who were appointed to the 3rd Penal Chamber of the Court of Cassation

made a judgment about the applicant's cassation appeal (**ANNEX-1**, §§ 100-101) and therefore the principle of a court established by law is also violated (***Volkov v. Ukraine***). **o)** Without any judicial proceedings, all the courts considered past donations made to and the investments made in the universities, the foundations and the media organisations that were declared to belong to a terrorist organisation (affiliation, membership) with the provisions of Decree Law No. 667 and 668 as financing of terrorism; complied with this description of the executive organ in an absolute sense without questioning it; considered it as criminal evidence and based the confiscation decision on it. Accordingly, the courts violated the principle of an independent court. For all these reasons, the courts that tried the applicant were not established by law, they lacked independence and impartiality, and they did not appear to be independent and impartial.

108. In addition, there are specially authorised courts for the crimes of opposition to the CML and tax legislation. Since the actions alleged to be contrary to these laws were tried by the Assize Court, which convicted the applicant, instead of the specially authorised courts, the right to be tried before a court established by law was violated.

2. Violations of adversarial proceedings, equality of arms and the principle of an independent court (Article 6 § 1 of the ECHR)

109. a) Although it has been proven by the expert reports that the applicant did not use ByLock, the correspondence of the other defendants over ByLock was made a basis for the applicant's conviction, although it had nothing to do with him. The ByLock raw data and the hard disk and flash memory sent by the MIT to the Chief Prosecutor's Office and the General Directorate of Security were not requested from the Office of the Chief Public Prosecutor and placed in the file; the applicant's statement was not taken; and independent expert examination was not performed: the ByLock correspondence based on dubious data and the letters of the MIT, the police, the prosecutor's office and/or the Information and Communication Technologies Authority, which followed the instructions of the executive organ, were used in the proceedings and were made a basis for the conviction. Therefore, the principles of adversarial proceedings, equality of arms and an independent court were violated. **b)** As explained above, these are allegations and accusations put forward for the first time in the decisions of the court of first instance and the 3rd Penal Chamber of the Court of Cassation (**ANNEX-1**, §§ 71- 72, 88-91, 103), and although they formed the basis of the conviction, the decision was made without notifying the applicant, without giving him sufficient time, opportunity and convenience, and without taking his defence. Therefore, the principle of adversarial proceedings was violated.

3. Violation of the right to a fair trial due to conflicting decisions on the same issue (Article 6 § 1 of the ECHR)

110. The 16th Penal Chamber of the Court of Cassation, in dozens of decisions made in 2018 in completely similar proceedings, decided that activities before 17-25 December 2013 could not be evidence of membership of the organisation and these decisions were finalised (Y 16. C.D., 29.5.2018 dated 2018/106:E – Decision No. 2018/1709:K, 16th Penal Chamber of the Court of Cassation 2017/3267 E., 2018/769 K.; 2017/3985 E., 2018/770 K.; 2017/3644 E., 2018/821 K.; 2017 /3284 E., 2018/897 K.; 2017/4041 E., 2018/930 K. ; 2017/4047 E. , 2018/932 K. ; 2017/4240 E. , 2018/1056 K.; 2017/4156 E. , 2018/1131 K. ; 2017/3773 E. , 2018/1172 K. ; 2017/3683 E., 2018/1246 K., 2017/1862 E., 2017/5796 K., 2018/103E., 2018/474 K. , 2017/1861 E. , 2018/294 K. , 2017/3335 E. , 2018/361 K., 2017/4046 E., 2018/931 K.; 2018/4 M., 2018/ 1470 K., 2017/4240 E. , 2018/1056 K.). However, in the concrete case, many claims against the applicant in the reasoned decision and the Court of Cassation decision are concerning the years 2003-2006, and the foundation was established in 2009 and the university in 2011. The cassation authority rejected the cassation appeal without giving any convincing reasons, without explaining why it departed from its previous decisions, and by relying on allegations especially regarding the years 2003-2006 (about which the judicial verdict had become final in favour of the applicant) and considered the legal activities before 2013 as a crime. Therefore, the court made completely contradictory decisions on the same issue and the right to a fair trial was violated (***Beian v. Romania***, § 39). In fact, one of the main duties of the high courts is to ensure the unity of jurisprudence (***Zielinski and Pradal & Gonzalez and others v. France*** [GC], § 59). This is a requirement of ensuring the trust of people in the courts and of the principle of legal security.

4. Violation of the right to a reasoned decision (Article 6 § 1 of the ECHR)

111. The right to a reasoned decision was violated, especially since dozens of arguments clearly expressed in the appeal and cassation petitions which would fundamentally affect the outcome of the trial, many regarding human rights, were rejected without being specified and answered in the decisions. (***Van de Hurk v. The Netherlands***, § 61; ***Hiro Balani v. Spain***, § 28; ***Higgins and others v. France***, § 43).

5. Violation of the right to a fair trial due to an arbitrary conviction based on unlawful evidence and evidence fabricated by the courts (Article 6 § 1 of the ECHR)

112. a) Although it was determined in the proceedings before the court of first instance that the applicant did not use the ByLock application, the 3rd Penal Chamber of the Court of Cassation issued a conviction decision based on the contents of the correspondence with ByLock, which had nothing to do with the applicant. The ByLock data were obtained, examined and used without any prior court order, which is in violation of Article 6§2 of the MIT Law and Article 135 and even Article 134 of the CPC. According to Article 38§6 of the Constitution, illegal evidence may not be used in any

proceedings. Making a decision based on ByLock data by ignoring this explicit provision of the MIT Law, the CPC and the Constitution is an example of arbitrary trial. **b)** The Court of First Instance and the 3rd Penal Chamber of the Court of Cassation, as explained above, issued a conviction decision based on allegations and evidence that were not available in the indictment or the case file, that were not discussed in the hearings, and that were fabricated by these courts themselves, so the court clearly evaluated the evidence arbitrarily. The right to a fair trial was violated due to arbitrary trial as well (***De Tommaso v. Italy*** [GC], § 170).

113. It should be noted that if the courts consider that the nature of a crime will change, they must hold a trial with a hearing on the new charge by having the applicant face the new charge, and giving the defendant sufficient time, convenience and opportunity to make his defence about this new charge (ECHR Article 6 §3 b), and they have to make a decision after performing a new trial that complies with all the guarantees of the right to a fair trial; otherwise they violate the right to a fair trial. In case of re-characterisation of the charge, the defendant has the right to be given sufficient time [especially as set out in ECHR art. 6 § 3) and to exercise his right to defend himself fully and effectively (***Pélissier and Sassi v. France***[GC], 1999, § 62; ***Block v. Hungary***, 2011, § 24; ***Pilgrimage v. Albania***, 2013, §§ 137-138; ***Pereira Cruz and others v. Portugal***, 2018, § 198). In the concrete case, the exact opposite of this situation occurred, and the applicant was faced with allegations and accusations made for the first time in the reasoned decision of the court of first instance and the reasons of the Court of Cassation decision, and he was not given the right to defend himself in a trial with a hearing against these allegations. Moreover, the said violation was not remedied in the second instance stage, since the decision was made, despite the demand, based on the file without holding a hearing. In fact, the applicant could not use all his rights recognised in art. 6 of the ECHR. For example, he could not have the facts checked or get a legality audit regarding many claims taken as the basis for the verdict in a trial with a hearing, and none of the arguments that he put forward in the petition of appeal that would affect the outcome of the proceedings were examined or answered in any way by the court. The request of appeal was reviewed on the file and rejected with an unreasoned decision. Thus, the accusations brought up for the first time were not even made the subject of any proceedings. (On this issue, see *a contrario*, ***Dallos v. Hungary***, 2001, §§ 49-52; ***Sipavičius v. Latvia***, 2002, §§ 30-33; ***Zhupnik v. Ukraine***, 2010, §§ 39-43; ***I.H. and others v. Austria***, 2006, §§ 36-38; ***Gelenidze v. Georgia*****,** 2019, § 30). Even if it were hypothesised that the violations could have been remedied with the petition of appeal, then the right to a trial with a hearing would still have been violated. In any case, since the court of appeal lacks the qualifications of a “court” for the reasons explained above, it cannot remedy any of the violations experienced at the first instance. Since the Court of Cassation made the same

mistake, it led to the same violations and it is not possible to rectify the violations at the first instance.

6. Article 6§2 of the ECHR

114. The presumption of innocence has also been violated, as the foundations, universities and media companies in which the applicant was among the founders or shareholders and which were closed down with the Decree Laws No. 667 and 668 were declared members of a terrorist organisation (belonging) without trial (as stated in the aforementioned Decree Laws: "*[…] the listed press organisations, foundations and associations and foundation higher education institutions […] determined to belong to or be connected to or to be in contact with the Fethullahist Terror Organisation (FETÖ/ PDY) have been closed down*").

7. Violation of Article 6 § 3 c) of the ECHR

115. The right to benefit from the legal assistance of a lawyer is among the most basic rights of the defence, and any restrictive practice towards this right must be absolutely necessary (***Van Mechelen and others v. The Netherlands***, § 58). As explained in the section on events, the essence of the right of access to a lawyer was abolished, since the meetings between the applicant and his lawyer in the prison were carried out systematically in the company of a guard and camera recording, the documents that the lawyer wanted to convey to the applicant were subject to examination and control by the prison administration, hence the confidentiality between the lawyer and the client was eliminated, and the meetings were not allowed without a third eye and ear (***Can v. Austria*****,** § 52; ***Brennan v. The United Kingdom****;* ***S. v. Switzerland,*** § 48). Exchange of documents was also possible after the inspection and permission of the prison administration, and for all these reasons, art. 6 § 3 c of the ECHR was violated.

8. Violation of Article 6 § 3 d) of the ECHR

116. Although it was stated on page 2 of the second hearing record dated 09/12/2017 regarding the witnesses [headmen] Hasan Hüseyin Ataş, Sezai Akbulut, Halil Güngör and Safa Eşit that answers were received to the instructions, only the witness Hasan Hüseyin Ataş was heard at the Bergama Assize Court without the applicant being present, and the statements of the other witnesses were taken by the private security coordinator of the company under the trustee management. These witnesses were not heard in the presence of the applicant at the hearing and the applicant was denied the right to ask questions to the witnesses. Despite these facts, the headmen's statements were used by the court of first instance as a reason for the liberty binding punishment, and Article 6 § 3 (d) of the ECHR was thus violated.

B. VIOLATIONS OF RIGHT TO PROPERTY

117. a) The donations and the investments that were legal when they were all made were considered as evidence of crime, and a general confiscation decision was made for all companies without showing the smallest material fact that the legal conditions were met. This decision was based on the legal donations made to some foundations, associations and universities before 2015 and the legitimate investments made in the media companies. This is in violation of Article 7 of the ECHR and Constitution §§ 38 §§ 1 and 9, and the confiscation decision in question has no legal basis. Except for the allegations fabricated by the court of first instance and the Court of Cassation, the actions on which the confiscation is based and included in the MASAK Reports are nothing other than the legal donations and the legal investments made before 26 October 2015. Apart from these, there is no concrete evidence of crime. Since a confiscate decision was issued against all the companies based on activities that were legal at the time they were made and that were within the scope of a fundamental human right (Articles 10 and 11 of the ECHR), the right to property was violated due to this decision, which interfered with the right to property without any legal basis. **b)** Although general confiscation is prohibited by the Constitution (Article 38 § 9)[25], the court of first Instance and the 3rd Penal Chamber of the Court of Cassation confiscated all of the companies in which the applicant was a shareholder (his only assets) without any proceedings based on the allegations fabricated by the courts. Since this intervention [general confiscation] with the right to property is prohibited by the Constitution and since a decision was issued for the confiscation of all the companies, the decision lacks legal basis and the right to property was violated due to this intervention. **c)** Confiscation is a punishment in the sense of criminal law, but it may be issued only after a trial complying with the requirements of the right to a fair trial. It should be noted that the confiscated companies had a real value of more than 25 billion dollars in gold reserves and resources in 2015, and they generate more than 1 million euros a day. The group had $600 million in cash in its bank accounts and had no loan debt. The İpek Family, on the other hand, had more than $500 million receivables in dividends from the companies. Considering that 7.5 years have passed, 3 billion dollars of income must have been obtained from the gold production alone. In any event, the guarantees set out in Article 6 of the ECHR apply to the proceedings regarding the confiscation of companies worth a minimum of $28 billion. Although the amount demanded to be confiscated in the indictment was 1.5 billion Turkish Liras (75 million euros), the Court of First Instance and the 3rd Penal Chamber of the Court of Cassation decided that all companies should be confiscated. The principle of "*no trial without prosecution*" in criminal procedure law was violated when the court of first instance assumed the role of prosecutor, fabricated allegations that were not in the file

[25] Constitution art. 38 § 9: "Neither death penalty nor general confiscation shall be imposed as punishment."

and that were not discussed in the hearings, and based the confiscation decision on these allegations in the reasoned decision (**I 1**, §§ 88-92).

118. The Ankara 24th Assize Court decided to confiscate the applicant's shares in all the companies based on the allegation that he "*allocated the companies [as a whole] to the goals of FETÖ/PDY,"* which is not included in the prosecution's charges or requests (**ANNEX-17**, p. 495). By basing its decision on fabricated evidence that is not even in the file, the court therefore violated not only the principle of an impartial court and the principle of adversarial proceedings but also the right to a fair trial due to expressly arbitrary proceedings in terms of the reason for the confiscation. In addition to the above violations set out in art. 6 of the ECHR, the right to property was violated because all these judicial guarantees were violated and then all the assets were confiscated, which was not even requested.

119. Like the first instance court, the 3rd Penal Chamber of the Court of Cassation first assumed the role of prosecution and claimed (accused) like a plaintiff that all the companies (properties) should be confiscated (hence lost its impartiality), fabricated events and facts and characterised them, and violated the law by overstepping its authority and making a review of the facts and events when in fact it was only authorised to do a legal review according to the laws. A body that is only authorised to carry out legal reviews, the court also assumed the role of a court of first instance and made factual claims and accusations, and then decided to confiscate all the companies, not the shares in the companies owned by the applicant, who was convicted, without informing the applicant of the claims and accusations, without taking his defence, without holding a trial, and without respecting any guarantee of the right to a fair trial, including the principles of adversarial proceedings and equality of arms. A decision of confiscation was issued without complying with any *procedural guarantees* regarding the right to property and the right to property was violated. The 3rd Penal Chamber of the Court of Cassation lost its characteristic as an impartial court by taking on the role of "the claimant" and then "the court". In addition to all the violations listed under Article 6 of the ECHR above, the court made this decision in violation of all judicial guarantees such as trial with a hearing, adversarial proceedings and equality of arms, thereby violating all the judicial guarantees required by the right to property. **d)** With its indictment dated **09.06.2017** and numbered 2014/119687 Investigation-2017/19777 Merits, the Ankara Chief Public Prosecutor's Office requested the confiscation of 1.5 billion TL pursuant to Article 55/2 of the TPC, starting from the partnership shares of the company shareholders, and on the said date this amount corresponded to an amount below 10% of the assets of all companies. As of 9 June 2017, i.e., the date of the indictment, there was no charge regarding 90% of Koza-İpek Holding Group companies' assets, yet the trustee measure was continued for approximately 6 years

until 14 April 2023 without any charge or court decision, and the applicant was illegally denied premiums and dividends, use of 90% of his assets and his right of disposition for 6 years: his right to property was therefore violated. **e)** The applicant is one of the shareholders of the companies in question, and although he had the right to receive "*premiums and dividends"* until the confiscation decision was finalised, he did not receive them for approximately 7 years and 6 months, namely from 26 October 2015 up until 14 April 2023, when the confiscation decision became final, and there was no legal basis for this non-payment. Therefore, the right to property was violated for this reason as well. It should be noted that the decision to appoint a trustee is only a temporary measure, and the applicant was the legally valid shareholder and owner of the said commercial companies during the implementation of this decision.

C. VIOLATION OF THE PRINCIPLE OF NO PUNISHMENT WITHOUT LAW (ARTICLE 7 OF THE ECHR)

120. As explained in the section on the facts, all of the activities ascribed to the applicant are related to before 26 October 2015, and there is no act, accusation or activity against after this date.

121. The existence of acts of violence that terrorise the society is among the integral qualities of a terrorist organisation. This rule is set out in Article 314 of the TPC and Articles 1 and 7 of the Anti-Terror Law (See *Parmak and Bakır v. Türkiye*, §§ 71-75) as well as in the 1999 resolution of the Parliamentary Assembly of the Council of Europe: *«**Violence or threat of use violence are essential components of a terrorist organisation**.»*[26] If there is a final judicial decision about an organisation that it is not a terrorist or a criminal organisation, the said organisation cannot be qualified as a terrorist organisation until a new judicial decision to the contrary is finalised or [at least] until the date when a terrorising act of violence (terrorist attack) is committed that is known to all or the majority of the society, nor can individuals be accused of membership of a terrorist organisation because of their relations with this organisation in one way or another. This is a requirement of the rule of law, the legality of crime and punishment, the principle of non-retroactivity of penal laws, and the principles of legal security, foreseeability of penal laws, and the effect of the final judgment.

122. Although the applicant insisted that he was in no way a member of the organisation called "community" [cemaat] before 2014 and "FETÖ/PDY" after 15 July 2016 and that all the accusations against him were legal activities, he was still charged with being a member of the organisation and punished for being a member of it. The first act of violence attributed to this organisation is the coup attempt on 15 July 2016 and there is no finalised conviction against it before this date. In fact, the General Assembly of the Penal Chambers of the Court of Cassation's decision dated **24 June**

[26] The Recommendation 1426 (1999) of the Parliamentary Assembly of the Council of Europe, '*European democracies facing up to terrorism*', 23 September 1999, § 5 (http://assembly.coe.int/nw/xml/XRef/Xref XML2HTML-EN.asp?fileid=16752&lang=en).

2008 definitively determined that this organisation was not a terrorist or criminal organisation. The first finalised judicial decision declaring the organisation in question as a terrorist organisation is the General Assembly of the Penal Chambers of the Court of Cassation's decision dated **26 September 2017**.

123. As a matter of fact, all of the activities attributed to the applicant **are about 26 October 2015 and before**. The activities essentially attributed to the applicant, with the exception of the allegations fabricated by the courts and not discussed at the hearings, are the donations he made **between 2009 and 2015** *to the universities, the foundations and the associations closed down by decree laws* ***after 23 July 2016,*** *amounting to a total of 214,117,590.05 TL,* namely "*183,953,822.33 TL to Ipek University; 29,791,767.72 TL to Koza-İpek Eğitim Sağlık Hizmet Yardım Vakfı; 300,000 TL to Kimse Yok Mu Association; 37,000.00 TL to Halidiye Eğitim Foundation; 35,000.00 TL to Media Association.*" In addition, **before 26 October 2016** these are the commercial investments made in the loss-making media companies of Koza-İpek Media Group to help them make profits and to increase their brand value. The only evidence in all the MASAK Reports and the case file is these donations and the investment activities, and there is no terrorist organisation named "FETO/PDY," which was determined by a court decision on the date of the donations and the investments (***Ilıcak v. Türkiye (no. 2),*** §§ 139, 141; ***Yasin Özdemir v. Türkiye***, § 40; ***Atilla Taş v. Türkiye,*** § 134). In other words, when the activitiess attributed to the applicant were done they were completely legal, and because the conviction was based on legal activities, the principle of no punishment without law was violated.

124. Moreover, the applicant was also accused and punished for allegations related to **the years 2003-2006.** As it was determined by the final judgment dated **24 June 2008** that the organisation of which the applicant is allegedly a member was not a criminal organisation, and the lawsuit filed **in 2009** for the aforementioned activities was also declared null and void and this decision also became final. Despite these facts, the principle of no punishment without law was violated, since the alleged crime was based on the allegations regarding the years 2003-2006.

125. In the concrete case, it is unreasonable to accuse the applicant of membership in an organisation whose existence was not yet declared on the dates of the donations and the investments, and membership in a terrorist organisation is a crime that can only be committed knowingly and willingly and with a special intent. It is also not possible for the mental element of the crime to occur in terms of membership in an organisation [non-existent] at the time of the donations and the investments. In fact, before 15 July 2016, individuals did not have the opportunity to know that this organisation was a terrorist organisation and then act willingly. This conclusion is dictated by the absence of any acts of terror committed before this date and the existence of the final verdict dated 24 June 2008. As long as the final verdict of 2008

remained in force, individuals had the right to act upon this verdict. Therefore, the principle of no punishment without law was also violated because it is a violation of «*the principle of legality*» to use the legal activities, events and facts from before October 2015 as evidence of and conviction for the charge of membership of a terrorist organisation. As a matter of fact, the crime of membership of a terrorist organisation does not occur without special intent (acting knowingly and willingly that an organisation is a terrorist organisation) or without a mental element. In addition, the activities (which were legal when done) that were made the basis of the conviction do not constitute the material element of the crime of membership in a terrorist organisation. In short, the principle of no punishment without law was violated in the concrete case because the applicant was convicted for a crime whose material and mental elements did not exist and which was not committed.

126. The activities attributed to the applicant have nothing to do with acts of terrorism, nor do they even constitute a petty crime. Since Article 314 § 2 of the Turkish Penal Code, on which the applicant's conviction was based, was interpreted and applied in a broad, arbitrary and unpredictable way, it does not qualify as a "law" in the meaning of Article 7 [and even 10 and 11] of the ECHR (*Demirtaş v. Turkey*, nº2), and the applicant was punished "unlawfully," violating the principle of no punishment without law. As a result, Article 7 of the ECHR was clearly violated since the activities that were completely legal at the time of their execution (i.e., establishing and managing a foundation, donations to foundations, associations and universities, and investment in media companies, etc.) were used as evidence of the conviction and the verdict was issued before the material and mental elements of the alleged crime occurred.

127. When the Court of Cassation decision is examined, it can be seen that the decision involves allegations about Hamdi Akın İpek, the client's brother (**ANNEX-22,** p. 139 and 140), but not even the smallest allegations regarding the applicant. Despite this, the principle of individual criminal responsibility was violated when the applicant was punished based on these allegations, which are not related to the applicant, and the principle of no punishment without law was also violated for this reason.

128. As for the allegation regarding the CML, although it was proven by all the audits that there was no violation of the CML and the tax legislation when the "general administrative expenses" were recorded on the company balance sheet as "expense", this matter was shown as evidence of crime and the punishment was based on the relevant legal regulations that were interpreted arbitrarily and broadly by the courts (in violation of a "law" within the meaning of Article 7 of the ECHR). Therefore, the principle of no punishment without law was further violated when the punishment was based on the broad, arbitrary interpretation.

129. Considering the legal regulations in force in terms of the donations made between 01.01.2009 and 30.09.2015, there is no regulation regarding this issue in the Capital Markets Law No. 2499, which was in effect between 01.01.2009 and 30.12.2012. Therefore, it cannot be claimed that the donations made until the end of 2012 are against this law, and the crime of disguised profit transfer does not occur. Despite this, it was ruled based on the donations during the time period that the alleged crime was committed, and therefore the principle of no punishment without law was violated.

130. Pursuant to Article 19 of the Capital Markets Law No. 6362, there must be a clause in the articles of association in order for donations to be made by publicly held companies.

131. When the articles of association of the publicly traded Koza Altın İşletmeleri A.Ş. are examined, it can be seen that there have been clauses regarding donations in the articles of association since the company's incorporation. With the amendments made on 20.05.2013 in the articles of association of other publicly traded companies, namely İpek Doğal Enerji Kaynakları Araştırma ve Üretim A.Ş. (İpek Enerji) and Koza Anadolu Metal Madencilik İşletmeleri A.Ş., clauses were added to the articles of association regarding donations in compliance with the Capital Markets Law No. 6362. Moreover, when the donations are examined, it is seen that the first donation was made by both companies on 19.12.2011 and these donations were submitted for the 2011 ordinary general assembly's information and approved, and no action for annulment was filed against the general assembly decisions taken in this regard. In addition, in accordance with "TMS 24 Related Party Disclosure", the members of the Board of Directors were acquitted at the end of the annual financial audits. The donations were made in a very transparent and open manner, recorded in the commercial books of the companies and reflected in their financial statements, presented to the general assembly, approved by the general assembly, reported to the Public Disclosure Platform, published on the websites of the companies, and announced in the Trade Registry Gazette. Since the donations were made to the foundation and the university established for educational purposes, it is also clear that they were not "agreements with different prices, fees, considerations or conditions" as mentioned in Article 21 of the CML or "commercial activities." As a matter of fact, it is also stated in the audit report that donations made by publicly traded companies are not considered as a disguised profit transfer in the practices and decisions of the CMB. In short, the legality of the donations is proven by the fact that they were made in accordance with the TCC, CML and CMB Dividend Communiqué and with the knowledge and approval of the General Assembly; they were subject to the constant supervision and control of the CMB Board, which was mentioned in the previous sections; they were announced to the public by making an announcement on the Public Disclosure Platform; and no objections or charges were filed against them. Despite

these facts, legal donations were made a basis for punishment due to the broad and arbitrary interpretation of the laws and through subjective interpretations and the Article 7 of the ECHR was violated.

132. The donations made were spent by İpek University, and they were subject to the supervision of the Higher Education Council, the Ministry of Finance and the General Directorate of Foundations. No irregularities were detected in the audits made by these institutions, and the fact that the expenditures related to the donations were made in accordance with their purpose was reported by the relevant institutions. Yet, all these facts were disregarded, and the donations made to a university established by law and used in accordance with their purpose were considered as disguised profit transfer, the company management was asked to compensate for them, which is in violation of Article 21/4 of the CML, and a punishment was issued pursuant to Article 110/1 of the CML. Therefore, Article 7 of the ECHR was violated.

133. Following the audit carried out by an independent audit firm, the construction work of Himmetdede Gold Mine Facility was tendered to İK Akademi İnşaat Proje ve Taahhüt A.Ş., which gave the most appropriate bid for a price of 130,500,000 USD and a contract was signed between the parties on 10.08.2012. Since the necessary permits could not be obtained for the part called HLP Phase II, the construction of the facility was never started.

134. Koza Altın İşletmeleri A.Ş. not only presented all the developments in the process from the decision on the establishment of the facility to its operation to the General Assembly of the company, but it also made the necessary notifications and declarations to the CMB Board and the PDP in accordance with the CML legislation duly and in a timely manner. There were no objections to these notifications or the PDP statements, no claim was made about any irregularity, the transactions were found to be in compliance with the legislation, and no action for warning or annulment was filed. In the audit report prepared by the CMB on the subject, it was stated – without reviewing the arm's length prices – that the Himmetdede Gold Mine Facility construction work price was very high compared to its precedents, and a transaction that was completed in accordance with the laws and approved by the relevant institutions became the criminal evidence for conviction due to broad and arbitrary interpretation of the laws (Reasoned decision, p. 415-416). Therefore, the principle of no punishment without law was also violated.

135. ATP İnşaat A.Ş. is a subsidiary of publicly traded Koza Anadolu AŞ and publicly traded İpek Enerji AŞ. İpek media group companies hold 99.9%-100% shareholding and ownership of ATP İnşaat A.Ş. Transfer of capital to these companies, which were incorporated by TP İnşaat A.Ş., through legal means is a perfectly standard commercial transaction, and these transactions cannot be considered as disguised profit transfer. During the incorporation and capital increase stages of these companies, necessary

notifications were made to the company's general assemblies in accordance with the TCC and to the CMB Board in accordance with the CML, and it was seen that the said transactions were carried out in an open and transparent manner. These legal issues were also used as evidence for the crime of disguised profit transfer, and therefore the Article 7 of the ECHR was violated.

D. VIOLATION OF THE PRINCIPLE *NON BIS IN IDEM* (Additional Protocol No. 7 to the Article 4 of the ECHR)

136. The allegation of "*making stock manipulations*" in 2001 was also used as the basis for the decision of conviction, and the proceedings regarding this claim had been completed earlier and resulted in the final verdict on 2 December 2009 (**ANNEX-18**). Although an action that has resulted in a final verdict cannot be the subject of a retrial, the allegation in 2001 was made the subject of a retrial and used as the basis for the decisions of conviction and confiscation. Therefore, the ***non bis in idem*** principle was violated.

E. VIOLATION OF ARTICLES 10 AND/OR 14 OF THE ECHR

137. a) The media companies in which the applicant is a shareholder were also confiscated following judicial procedures that, as explained above, violated the right to property and flouted the judicial guarantees. The court ruled for confiscation of all the companies including the media companies: This essentially meant general confiscation [although general confiscation is prohibited pursuant to Constitutional Article § 38 § 9], which was not requested in the indictment, and the decision was based on the allegations the court fabricated (for the first time). Therefore, the freedom of expression and press was violated. Pursuant to Article 225 of the CPC, when the nature of the charge changes, a decision can be made after notifying the defendant and receiving his defence. Even the Court of Cassation did not comply with this provision: although the prosecutor's office evaluated these donations and investments within the scope of "financing of terrorism" and demanded confiscation only in proportion to the donations and the investments made before 2015, which amounted to around 1.5 billion TL, and although the applicant only had the opportunity to defend himself against these charges because he was not charged with anything else, both the Court of Cassation and the court of first instance fabricated new allegations (**ANNEX-1**, §§ 71-72, 88- 91, 103/(j) and (n)) and ruled for the general confiscation of all the companies without notifying the applicant of these allegations, without taking his defence, and without performing any legal procedure. The court ignored almost all the guarantees of the right to a fair trial, acted particularly in violation of the principle of adversarial proceedings, and assumed the role of prosecutor (by making allegations). The court therefore lost its impartiality and violated Article 10 of the ECHR.

138. b) One of the main allegations against the applicant is the fact that he invested in the media companies even though they suffered losses. The investments were commercial investments to increase the commercial value of the media organisations in question, and commercial activities cannot be a crime on their own: they were completely legal when made. Investments in the media companies to make them profitable were used as a basis for punishment, which violated the freedom of the press as well as the principle of no punishment without law.

139. c) If investing in a loss-making media company from group companies is a crime, it should be a crime for everyone; if not, it should not be a crime for anyone. According to the news that appeared in the media, although some media organisations within the Uzan Group, Doğan Group and Karamehmet Group sustained losses in the past, investments and other money transfers were made from other companies within the group, and these media organisations thus continued to exist. No criminal investigation has been started against the managers of this group to date, whereas an investigation was started against the applicant based on the same activities, which were used as the basis for punishment. Because this constitutes discrimination vis-à-vis the principle of no punishment without law and enjoyment of freedom of the media, Articles 7 and 10 of the ECHR along with Article 14 were violated.

140. d) Among the criminal evidence was also a donation of 35,000 TL to the association named *Media Association.* Inclusion of donations to an association operating in the media sector as evidence of a crime is a violation of Article 10 of the ECHR.

A. ARTICLE 11 OF THE ECHR

141. One of the facts on which the applicant's conviction was based was establishing a [family] foundation, taking part in the management of this foundation, and making donations. Being involved in the establishment and management of a foundation is within the scope and protection of the freedom of association, and the applicant's freedom of association was also violated because only an activity within the scope of exercising a fundamental right was shown as evidence of a crime and the applicant was convicted accordingly without any other evidence. The donation of 35,000 TL to the association named "*Media Association"* was also included in the criminal evidence, which was also a violation of Article 11 of the ECHR.

F. ARTICLES 5 §§ 1 AND 4 OF THE ECHR

142. Following the court of first instance's decision, the applicant was deprived of his liberty on the basis of a decision of a "court" within the meaning of Article 5 § 1 (a) of the ECHR. The most important characteristic of such a court is that it is "established by law, independent and impartial" (*D. N. v. Switzerland; Lavents v. Latvia*). The courts

that rendered the conviction for the reasons explained above and rejected the appeals and cassation appeals do not have these characteristics. Not only did the courts violate the principles of adversarial proceedings and equality of arms and deny the applicant's access to a lawyer and his right to a reasoned decision, but they have also deprived him of his liberty to this day following arbitrary proceedings based on activities that were legal when they were done. This is a violation of Article 5 § 1 of the ECHR. The court of appeal and the court of cassation, which rejected the requests for having the illegal deprivation of liberty reviewed, lacked the necessary characteristics and flouted the requirements of the right to a fair trial. This is a violation of Article 5 § 4 of the ECHR.