REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

PLENARY ASSEMBLY

JUDGMENT

ABDULSELAM TUTAL AND OTHERS

APPLICATION

(Application Number: 2013/2319)

Date of Judgment: 8/4/2015
Official Gazette Date – Issue: 3/7/2015-29405

PLENARY ASSEMBLY

JUDGMENT

Application Number	**: 2013/2319**
Date of Judgment	**: 8/4/2015**
President	**:** Zühtü ARSLAN
Vice President	**:** Serruh KALELİ
Vice President	**:** Alparslan ALTAN
Judges	**:** Serdar ÖZGÜLDÜR Osman Alifeyyaz PAKSÜT Recep KÖMÜRCÜ Burhan ÜSTÜN Engin YILDIRIM Nuri NECİPOĞLU Hicabi DURSUN Erdal TERCAN Muammer TOPAL M. Emin KUZ Hasan Tahsin GÖKCAN Kadir ÖZKAYA
Rapporteur	**:** Muharrem İlhan KOÇ
Applicant	**:** Abdulselam TUTAL Selim AYDIN Emin KOÇHAN
Representative	**:** Att. Mehmet ERBİL

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicants maintained that there had been a breach of Articles 17, 19 and 36 of the Constitution on the grounds that their requests made within the scope of their defence submissions in the course of their detention pending trial were rejected; that they were convicted

on the basis of the statements taken in the course of their custody under physical and psychological duress and in the absence of a defence counsel; and that the execution of imprisonment sentence imposed on them would last for lifelong.

II. APPLICATION PROCESS

2. The application was lodged with the Constitutional Court on 28 March 2013 through the 12th Chamber of Istanbul Civil Court of General Jurisdiction. Upon the preliminary examination of the petitions and annexes thereto under administrative aspect, it was decided that there was no deficiency which would prevent its submission to the Commission.

3. On 30 May 2013, the First Commission of the Second Section decided that the examination on the admissibility be made by the Section, and therefore the case-file be referred to the Section. At the meeting held on 22 November 2013, the Section decided to make the examination on the admissibility and merits concurrently.

4. The facts of the application were notified to the Ministry of Justice on 22 November 2013. The Ministry submitted its observations to the Constitutional Court on 24 January 2014.

5. On 10 February 2014, the observations submitted by the Ministry of Justice to the Constitutional Court were notified to the applicants. On 17 February 2014, the applicants submitted their counter-statements to the Constitutional Court.

III. THE FACTS

A. The circumstances of the Case

6. As stated in the application form and annexes thereto, the facts of the case may be summarized as follows:

7. On 14 May 2004, the applicants were taken into custody by police in Istanbul on suspicion of killing İ.G. and his wife S.G., with a firearm, at their home on 30 April 2004 in connection with an illegal organization, namely the Greatest Eastern Islamic Raiders' Front ("the IBDA/C").

8. The applicants Abdulselam Tutal, Emin and Selim Aydın were respectively at the ages of 22, 20 and 19 at the relevant time when they were taken into police custody.

9. On 16 and 17 May 2004, the applicants' statements were taken, in the absence of their defence counsels, with respect to the criminal charge against them by the Anti-Terror Branch Office of the Istanbul Security Directorate. In the record drawn up, it was explicitly set out that the applicants did not wish to benefit from legal assistance and would like to give their statements concerning the criminal charge in question.

10. In their statements taken in police custody, the applicants provided detailed submissions as to how the decision to kill İ.G., who was considered responsible for torturing of S.M. the leader of the IBDA/C organization through mind control, was taken, the determination of İ.G.'s address; purchasing / obtaining a firearm; how one of the suspects visited the victims' house in courier cloth and killed them while the other suspects were keeping watch outside; and the post-incident process.

11. On 18 May 2004, in their questioning by the public prosecutor at the Istanbul State Security Court subsequent to their custody, the applicants maintained that the records of statements drawn up by the police were signed by them under duress; that they were not enabled to avail themselves of legal assistance; and that their initiatives to interview with a lawyer and have the assistance of a defence counsel were precluded. The applicants stated that they therefore denied the statements he had given to the police.

12. During the questioning process of 18 May 2004, the defence counsel of the applicant, Abdulselam Tutal, informed the public prosecutor conducting the investigation of the fact that he had not been allowed to interview with the suspect in spite of his written request which was referred by the public prosecutor on duty to the police on 16 May 2004. The other applicant, Emin Koçhan, asserted that he had been forced to give statement at the security directorate by means of being strangled and exposed to swears; and that he was told by the polices *"a lawyer has no function at this stage; therefore, you do not need to demand legal assistance"*. The applicant, Selim Aydın, noted in his questioning by the public prosecutor that he had to sign his statement drawn up at the security directorate under psychological duress.

13. Subsequent to their questioning by the judge at the Istanbul State Security Court on 18 May 2004, the applicants were detained on remand, by the decision no. 2004/42, for attempting to forcibly change and abolish the Constitution of the Republic of Turkey and performing an action to that end. During their questionings, the applicants denied their statements taken under police custody and the accusations against them by maintaining that they were precluded from

interviewing with their lawyers during their custody period; that they were caused to be unable to sleep; that they were sworn at; and that they were exposed to duress.

14. In the indictment of 14 June 2004 issued by the Chief Public Prosecutor's Office at the Istanbul State Security Court in respect of the accused persons including the applicants, it is specified that S.M., the leader of IBDA/C organization, implied in the book entitled *"Telegram-Mind Control"* that the methods of torture to which he had been exposed were produced by İ.G. without giving full name of İ.G.; that in a journal introducing this book, İ.G.'s full name was fully written; that the applicants thereupon decided to kill that person; and that they killed İ.G. in the way specified in their statements taken during their police custody.

15. At the proceedings during which they were detained on remand, the applicants denied the contents of the records of statements drawn up in the custody period and maintained that they were made to sign these records through duress and deception. They further indicated that there was no material evidence pertaining to the offence in question other than the records of statements which were taken under police custody and denied by the applicants. They accordingly requested to be released.

16. At the hearing of 18 October 2004, taking into consideration the medical reports issued in respect of the applicants subsequent to police custody, the first instance court did not adjudicate on their allegations of ill-treatment and stated that the applicants may have recourse to relevant authorities in this respect.

17. At the hearing of 28 February 2005, S.A. and İ.K. who had been taken into custody as a suspect at the investigation stage but were subsequently heard as a witness indicated that the applicants had been ill-treated while being in police custody; and that they saw the applicant Abdulselam Tutal had been made to sign a record that he did not demand a lawyer under a meal form.

18. At the hearing of 11 July 2005, it was noted that there had been restoration at certain apartments of the building where the incident had taken place and it was accordingly requested that the workers who had been in the building on that day be identified and heard as a witness. However, the court rejected this request.

19. On 2 June 2009, which had not been previously set as a day of hearing, a hearing was held upon request, and the witness Ç.E. was heard. Indeed, this witness made statements on a previous date in the course of the hearing dated 23 November 2005 where the applicants and

their lawyers were present and stated that he had not witnessed the incident where İ.G. and his wife had been killed.

20. In the course of the proceedings, the Fatih Chief Public Prosecutor's Office rendered a decision of non-prosecution by its decision dated 27 April 2006 and investigation no. 2004/26798 within the scope of the investigation conducted into the complaints of being ill-treated and exposed to duress under custody,.

21. At the end of the proceedings, the 14th Chamber of the Istanbul Assize Court sentenced five accused persons including the applicants to aggravated life imprisonment pursuant to Article 146 § 1 of the Turkish Criminal Code no. 765 for the offence of *forcibly attempting to alter, modify, or abolish, in whole or in part, the Constitution of the Turkish Republic or to overthrow the Grand National Assembly organized by the said law or to prevent the Grand National Assembly from accomplishing its mission* as it was found established that they had performed this act on behalf of the IBDA/C organization.

22. The conclusion of the reasoning part of the conviction decision reads as follows: *"although the accused persons insistently denied their statements taken at the security directorate where they explained the incident in detail at the subsequent stages, having regard to the autopsy records of the victims; their autopsy reports; the expertise reports concerning the bullets extracted from the victims' bodies; the accused persons' statements with respect to the incident which were consistent with each other and supported and verified their previous statements at the security directorate; seizure of the books prepared as a cargo package for İ.G. at the incident scene; consistency of the statements of the witnesses in respect of whom a decision of non-prosecution was rendered but whose statements were taken as a witness at the preliminary stage with the accused persons' statements with respect to the incident at the security directorate; and one of the accused persons A.E.'s statement at the prosecutor's office that B., who was among the accused persons, showed at - A.E.'s home - the news published on the newspaper about killing of the victims and told that they had performed this act, the court disregarded the subsequent changes in the accused persons' statements and concluded that the accused persons had performed this act on behalf of the illegal terrorist organization, namely the IBDA/C"*.

23. The conviction decisions were upheld by the judgment of the 9th Criminal Chamber of the Court of Cassation dated 2 October 2012 and no. E. 2012/7356 and K. 2012/10175.

24. This judgment was served on the applicants on 1 March 2013, 8 March 2013 and 21 March 2013.

25. On 28 March 2013, the applicants lodged an individual application.

B. Relevant Domestic Law

26. Article 135 of the Code of Criminal Procedure (dated 4/4/1929 and no. 1412) which was in force at the relevant time reads as follows:

"In the process of taking statement by the chiefs and officials of police and by the public prosecutor and in the process of interrogation by the judges, it will be acted in accordance with the following requirements:

1- The identity of the person giving statement or being interrogated shall be established. The person giving statement or being interrogated is obliged to give correct answers to the questions asked in relation with his identity.

2- The imputed offence shall be explained to him.

3- He shall be informed that he has a right to appoint a lawyer; that if he cannot afford to appoint a lawyer, he may request the Bar Association to appoint a lawyer on his behalf and he may take benefit from his legal assistance; that if he demands, the lawyer may be present in the statement-taking or questioning process on condition of not causing any delay and without the need for a power of attorney; and that any of his relatives to be designated by him may be informed of his arrest.

4- He shall be reminded of his legal right to remain silent about the imputed offence.

5- He shall be reminded that he may ask the collection of the concrete evidence with a view to reliving himself of the doubts and he shall be provided with the opportunity to eliminate the doubts against him and to assert the issues in favour of him.

6- Information about the personal state of the person giving statement or being interrogated shall be collected.

7- The statement taken or the interrogation held shall be written into a record. This record has to include the following:

a) Date and place of the statement or interrogation process;

b) Names and titles of the persons being present during the statement or interrogation process and the full identifying information of the person giving statement or being interrogated;

c) Whether the above-mentioned actions have been performed during the statement or interrogation process, and if not, the reasons thereof;

d) The fact that the content of the record has been read by the person giving statement or being interrogated and by his lawyer being present during the process;

e) In the event that the person giving statement or being interrogated refrains from signing the record, the reasons thereof."

27. Article 135 / A of the Code no. 1412 reads as follows:

"Statement of the person giving statement or the accused person must be based on his free will. Any physical or psychological interventions which would hinder existence of free will such as ill-treatment, torture, forcibly administering medication, oppressing, deceiving, applying physical coercion and violence and using certain means.

Any unlawful advantage cannot be offered to be afforded.

Statements obtained by means of the above-mentioned forbidden means cannot be accepted as evidence even if the person giving statement or the accused person gives consent."

28. Article 136 of the Code no. 1412 reads as follows:

"*At any and every stage of the proceedings the arrested or the accused person shall have the right to seek the advice of, and be represented by, one or more lawyer. Where the arrested or the accused person is represented by a guardian, this guardian may designate lawyer for the arrested or the accused person.*

During the questionings to be made by the chiefs and officials of police, only a lawyer may be present. The number of lawyers during the processes before the public prosecutor's office cannot exceed three.

At every stage of the investigation including the questioning by the police, the lawyer's right to interview with the arrested or the accused person, accompany him during the

statement taking and questioning processes and provide legal assistance cannot be precluded or restricted."

29. Article 138 of the Code no. 1412 reads as follows:

"If the arrested person or the accused declares that he is unable to retain a lawyer, the bar association shall appoint a lawyer on his behalf upon his request. Where the arrested person or the accused is under the age of eighteen, or if he is deaf or dumb, or if he is mentally or physically disabled to the degree that he is unable to defend himself, and he has not retained a lawyer to represent him, the court may appoint a lawyer for him without the need for his request."

30. Article 146 § 1 of the (abolished) Turkish Criminal Code dated 1/3/1926 and no. 765 is as follows:

"Whoever attempts, by force, to alter, modify, or abolish, in whole or in part, the Constitution of the Turkish Republic or to overthrow the Grand National Assembly organized by the said law or to prevent the Grand National Assembly from accomplishing its mission shall be sentenced to aggravated life imprisonment."

31. Article 148 § 4 of the Code of Criminal Procedure dated 4/12/2004 and no. 5271 provides for:

"Submissions obtained by the police, in the absence of a lawyer, cannot be used as a basis for the decision, unless this submission is verified by the suspect or the accused before the judge or the court."

32. Article 107 § 16 of the Law on the Enforcement and Manner of Implementation of the Turkish Criminal Code dated 4/1/2011 and no. 5237 provides for:

"(1) References made in the legislation to the Turkish Criminal Code which was abolished shall be deemed to be made to the corresponding articles in the Turkish Criminal Code no. 5237.

(2) References made in the legislation to the volume, chapter and section of the abolished Turkish Criminal Code shall be deemed to be made to the relevant articles in the Turkish Criminal Code no. 5237 which correspond to the provisions included in that volume, chapter and section."

33. Article 107 § 16 of the Law on the Execution of Penalties and Security Measures dated 13/12/2004 and no. 5275 reads as follows:

"The provisions of conditional release shall not apply in the event of conviction to aggravated life imprisonment for committing, as part of the activities of an illegal organisation, one of the offences included under Section Four entitled "Offences against the Security of the State", Section Five entitled "Offences against the Constitutional Order and the Functioning of this Order", and Section Six entitled "Offences against National Defence", in Chapter Four, Volume Two of the Turkish Criminal Code."

34. Last paragraph of Article 17 of the Anti-Terror Law dated 12/4/1991 and no. 3713 is as follows:

"Terrorist offenders, whose death penalties have been converted into aggravated life imprisonment by virtue of the Law on Amending Certain Laws dated 3/8/2002 and no. 4771 which was amended by Article 1 of the Law dated 14/7/2004 and no. 5218 and whose death penalties have been converted into aggravated life imprisonment or who have been sentenced to aggravated life imprisonment cannot benefit from conditional release. Aggravated life imprisonment shall be served by them until death.

IV. ASSESSMENT AND GROUNDS

35. At the Constitutional Court's session held on 8 April 2015, the applicants' individual application dated 28 March 2013 and no. 2013/2319 was assessed, and the Constitutional Court accordingly held:

A. Applicants' Allegations

36. The applicants maintained that

i. They were made to sign the records of statements under police custody under duress and with threat; that they were denied legal assistance; that they were not provided with the opportunity to examine their witnesses during the proceedings; that their requests for carrying out researches into the impugned incident were rejected; and that the conviction decisions were rendered on the basis of their statements taken in the absence of their lawyers without taking into consideration the existing evidence in favour of them and at the end of the proceedings during which they were held in detention. They accordingly asserted that there was a breach of the right to a fair trial and the right to liberty and security of person.

ii. As a sentence execution of which would last for lifelong was imposed on them, there was a breach of the right to life and the prohibition of being subject to treatment incompatible with human dignity.

Furthermore, they requested retrial and awarding compensation in favour of them.

B. Assessment

1. Admissibility

a. Alleged Violation of the Right to Liberty and Security of Person

37. Provisional Article 1 § 8 of the Law no. 6216 reads as follows:

"The Court shall examine the individual applications to be lodged in respect of the final acts and decisions which become final subsequent to 23 September 2012."

38. On 14 May 2004, the applicants were taken into custody by the police in Istanbul, and on 18 May 2004, their detention was ordered by the judge at the Istanbul State Security Court.

39. Primary aim of the complaint in the individual applications lodged with the allegation that continuing detention is unlawful is to determine unlawfulness of the detention or non-existence of any ground or grounds justifying the continuation of detention. In case of such a determination, legal grounds which are given as justification for the continuation of the detention of the person concerned would disappear, and thereby the person detained may be released. Therefore, it is possible to lodge an individual application to be made for the above-cited reasons and with a view to rendering a decision which would ensure the release of the person concerned throughout the detention period provided that ordinary legal remedies have been exhausted (see *Korcan Pulatsü,* no. 2012/726, 2 July 2013, § 30).

40. The starting point of the period during which a person is detained *"on the basis of a criminal charge"* is the date of arrest when the applicant is arrested and taken into custody for the first time or the date of his detention on remand when he is directly detained. The end of this period is, in principle, the date when the person is released or the first instance court renders its decision. Accordingly, the question as to whether the period of detention *"on the basis of a criminal charge"* is reasonable or not would be dealt with by taking the period elapsing between the above-mentioned dates as a basis (see *M. Emin Kılıç,* no. 2013/5267, 7 March 2014, § 27).

41. In this respect, in case of *"being detained on remand on the basis of a criminal charge",* an individual application to be made with the allegation that the period of detention is not

reasonable must be lodged at every stage pending the first instance trial upon the exhaustion of the existing remedies when the continuation of detention is ordered and within the prescribed period following the conviction decision by which the detainee status is ultimately removed, except for the situation when the person concerned is released. In the same vein, the European Court of Human Rights ("the ECtHR") notes that an application lodged within the scope of detention "*on the basis of a criminal charge"* but not within six months following the conviction decision was out of time (see *M. Emin Kılıç*, cited-above, § 28).

42. In the present incident, the applicants were sentenced to life imprisonment by the decision of the 14th Chamber of the Istanbul Assize Court dated 25 January 2012.

43. It has been observed that the applicants were deprived of liberty *"on the basis of a criminal charge"* between 14 May 2004 and 25 January 2012 whereas their deprivation of liberty subsequent to the conviction decision is placement in prison *"on account of conviction"*.

44. In the light of this determination, having regard to the fact that the applicants' detention *"on the basis of a criminal charge"* took place before the Constitutional Court was granted the power within the scope of individual application, the Constitutional Court held that the application insofar as it concerns this complaint must be declared inadmissible for "*lack of jurisdiction ratione temporis"*.

b. Alleged Violation of the Right to a Fair Trial

45. Article 36 § 1 of the Constitution reads as follows:

"*Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."*

46. Article 6 §§ 1 and 3 (c) and (d) of the European Convention on Human Rights ("the ECHR") entitled *"the right to a fair trial"* reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

(...)

3. Everyone charged with a criminal offence has the following minimum rights:

(...)

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(...)"

47. In the first paragraph of Article 36 of the Constitution, it is set out that everyone has the right to litigation either as a plaintiff or a defendant and the right to a fair trial. As the Constitution does not set out the scope of the right to a fair trial, the scope and content of this right must be determined within the framework of Article 6 of the ECHR entitled *"the right to a fair trial"* (see *Onurhan Solmaz,* no. 2012/1049, 26 March 2013, § 22).

48. As the applicants' allegations are not manifestly ill-founded and there is not any other ground for declaring the application inadmissible, the application must be declared admissible insofar as it concerns *the right to a fair trial*.

2. Merits

49. The Ministry of Justice notes that it considers that it would be appropriate to interpret and apply the provisions of the Constitution concerning the right to a fair trial in the light of Article 6 of the ECHR and the ECtHR's case-law on this provision and points out that in the application of *Salduz v. Turkey,* the ECtHR dealt with the applicant's right to get legal assistance during the process at the law enforcement unit (see *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008). In its judgment, the ECtHR primarily emphasizes that the right to a fair trial is one of the most fundamental rights including the preliminary investigation; that as the relevant legislation is complex, the person concerned is to have legal assistance at the stage when the evidence is collected for ensuring protection of his rights; and that the right to a fair trial also encompasses the requirement that the investigating authority proves its claim with the evidence obtained without any duress and coercion. As a result, the Ministry of Justice indicates that the ECtHR notes that it is requisite to bestow the right to assistance of a lawyer for the person concerned as from the first interrogation by the law enforcement officers; however, there may be certain restrictions in respect thereof under particular circumstances of each case.

50. The Ministry of Justice indicates that at the hearing of 18 October 2004 held within the scope of the proceedings, the court ordered, by its interlocutory decision no. 5, inquiry of the allegation asserted by Abdulselam Tutal's lawyer that *"... signatures on pages 2 and 6 of the record of statement of my client do not belong to him. I therefore request a forensic examination to be conducted on this matter..."*; that the report of 4 June 2010 which was drawn up by the Forensic Medicine Institute upon this request was notified to the applicants during the hearing of 4 June 2010; and that it was concluded in this report that the signature on the document subject to examination was appended by the applicant Abdulselam Tutal.

51. The applicants reiterated their submissions previously stated in the application form in reply to the observations submitted by the Ministry of Justice.

52. The right to a fair trial enables the individuals to have the fairness of the proceedings and the procedure thereof, not the decision rendered at the end of the proceedings, examined. Therefore, the complaints within the scope of the right to a fair trial in an application may be subject to an examination only when the applicant has submitted information and document indicating that any of his rights were not respected during the proceedings and accordingly indicating that there is a deficiency, omission or explicit arbitrariness in any of the elements constituting the decision rendered by the court such as the applicant's inability to become aware of the evidence and observations submitted by the counter-party during the proceedings or to effectively raise an objection thereto, his inability to assert his own evidence and allegations or the instance court's failure to take into consideration his claims as to the settlement of the conflict in question or the decision lacking in justification (see *Naci Karakoç*, no. 2013/2767, 2 October 2013, § 22).

53. The applicants generally maintain that the proceedings were not conducted on equitable basis and essentially the court rendered its decision by relying on the statements included in the records which had been signed under duress at a time when they were denied access to a lawyer and content of which had not been acknowledged by the applicants.

54. Within the scope of Article 6 § 3 (c) of the ECHR, the suspect has three separate rights in enjoyment of the right to defence. These rights are to defend himself in person, to avail himself of legal assistance of a defence counsel of his own choosing and if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. Therefore, it cannot be requested from the suspect to defend himself in person (see *Pakelli v.*

Germany, no: 8398/78, 25 April 1983; and *Kazım Albayrak,* no: 2014/3836, 17 September 2014, § 28).

55. The right to legal assistance reveals that it is not *per se* sufficient to vest the persons charged with a criminal offence with the right to defend themselves; and that they are also required to have the means to defend themselves. In this respect, the right to legal assistance which ensures effective enjoyment of the right to defend is also a requirement of the principle of *"equality of arms"* which is another element of the right to a fair trial (see *Kazım Albayrak,* cited-above, § 29).

56. This provision of the ECHR encompasses all suspects without any exceptions and applies at every stage of the criminal proceedings. Therefore, this right is secured with respect to the actions performed at the investigation stage. In this scope, the ECtHR has noted that the guarantees of the right to a fair trial must be applied to the pre-trial actions (see *Imbrioscia v. Switzerland*, no: 13972/88, 24 November 1993, § 36-38). Moreover, the ECtHR has pointed out that the right to assistance of a lawyer may be subject to restrictions for good cause; and that the question as to whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing would be dealt with (see *John Murray v. the United Kingdom*, no: 18731/91, 8 February 1996, § 63, *Magee v. the United Kingdom*, 6 June 2000, no: 28135/95, § 41). Accordingly, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol v. France*, no: 14032/88, 23 November 1993, § 34; and *Kazım Albayrak,* cited-above, § 30).

57. Furthermore, the ECtHR has stated that Article 6 of the ECHR concerning the right to a fair trial cannot be interpreted in a manner which would preclude the individuals from waiving the entitlement to the guarantees provided by this right on their own will (see *Aksin and Others v. Turkey*, no: 4447/05, 1 October 2013, § 48).

58. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance, must not be contrary to any public interest and it must be established that outcomes of a waiver may be reasonably foreseen (see *Salduz v. Turkey*, cited-above, § 59; *Talat Tunç v. Turkey,* no. 32432/96, 27/3/2007; and *Aksin and Others v. Turkey*, cited-above*).*

59. The ECtHR has noted that in certain cases, a lawyer is required to be officially appointed free of charge even if the person concerned does not demand. In addition to the person's inability to afford a lawyer, the penalty requiring his deprivation of liberty likely to be imposed on him on account of the charge in question and the complex nature of the case reveal a legal interest which entails granting legal assistance (see *Talat Tunç v. Turkey,* cited-above, § 55, 56; *and Kazım Albayrak,* cited-above, § 31).

60. It has been observed that in the present incident the applicants were arrested on 14 May 2004 and held in police custody until 18 May 2004 when they were questioned by the public prosecutor. The records of statements taken under custody include detailed submissions which would bear responsibility for the applicants and the other suspects in respect of the imputed offence.

61. The legislation which was in force at the material time when the applicants were under custody does not impose a restriction which would result in preclusion of the individuals from benefitting from legal assistance of a lawyer. Nevertheless, the legal assistance is, in principle, based on the individual's request (see §§ 28 and 29 above).

62. In the records of statements given by the applicants, the rules and rights pertaining to statement-taking process and set out in Article 135 of the Code no. 1412 are specified. The fact that the applicants have not demanded benefitting from legal assistance of a lawyer is written on their records of statements.

63. On 18 May 2004, the applicants however maintained during their questioning by the public prosecutor that they had to sign the records of statements at the security directorate under psychological and physical duress; and that they did not acknowledge the content of these records and the imputed offences.

64. The explanation as to the commission of the imputed offence included in the indictment of 14 June 2004, which was drawn up in respect of the applicants by the Chief Public Prosecutor's Office at the Istanbul State Security Court, mainly relies on the applicants' statements taken under police custody. Given the reasoning part of the conviction decision (see § 22 above), it has been observed that these statements were taken as a basis for the decision in a decisive manner.

65. The ECtHR has found established that where the accused denies the confessions obtained during the investigation phase before the judge by maintaining that they were obtained through

ill-treatment and torture, the court's failure to deal with this matter before going on to examine the merits of the case and its taking the confessions as a basis for the decision amounts to a deficiency (see *Hulki Güneş v. Turkey,* no. 28490/95, 19 June 2003, § 91).

66. The ECtHR has indicated that when the confessions, which were obtained during a long period of custody in which the accused was held incommunicado, give rise to doubts, such doubts may contradict with fairness (see *Barbera, Messegue and Jabardo v. Spain,* no. 10590/83, 6 December 1988, § 87; and *Magee v. the United Kingdom,* cited-above, § 43).

67. In this scope, the applicants failed to submit concrete findings substantiating their allegations that they had been ill-treated under custody and had therefore signed the records of statement. Nor did the applicants raise a separate complaint, on the basis of these allegations, that there had been a breach of the prohibition of treatment incompatible with human dignity.

68. However, the failures to raise the allegations of being exposed to duress and coercion as a separate complaint and to adduce concrete facts in respect thereof do not form an obstacle for these circumstances to be taken into consideration during the examination to be carried out within the scope of the right to a fair trial (see *Kolu v. Turkey,* no. 35811/97, 2 August 2005).

69. The applicants were charged with the offences of killing two persons in line with the aim of an illegal organization and thereby attempting to forcibly change the constitutional order and were sentenced, at the end of the proceedings, to aggravated life imprisonment.

70. It appears that the applicants, who maintained throughout the proceedings that they were innocent and there existed no evidence revealing their link with the offence in question, denied their statements, which had been taken by the law enforcement officers, before both the public prosecutor and the judge subsequent to their custody.

71. Their statements in question were taken as a basis for the decision without discussing the applicants' defence arguments, the statements of those who were initially taken into custody as a suspect but in respect of whom a criminal case was not brought and the applicants' other allegations that they had been denied access to a lawyer.

72. Within this framework, given the nature of the charges, the gravity of prescribed penalty and defence arguments and submissions subsequent to custody, it is not beyond any doubt that the applicants accepted to make statements without demanding legal assistance consciously and

knowingly during their custody period of four days. It could not be concretely established that the applicants could reasonably foresee the outcomes of their waiver of legal assistance.

73. It has been observed that the applicants' statements which were subsequently denied by them formed a basis for their conviction; and that the legal assistance provided at the subsequent stage and the other guarantees of the trial procedure could not eliminate the damages taking place in respect of the right to defence at the beginning of the investigation.

74. Although Article 148 § 3 of the Code no. 5271, which entered into force in the course of the proceedings, was capable of ensuring effectiveness of the defence at the prosecution stage, the case was concluded within the framework of the statements taken, and this situation was not examined at the appellate stage.

75. The applicants' inability to avail themselves of legal assistance of a lawyer and therefore the infringement of their right to defence precluded the fairness of the proceedings as a whole. It was not therefore found necessary to examine whether the other guarantees of the right to a fair trial had been fulfilled at the subsequent stages of the proceedings.

76. For these reasons, it must be held that there was a breach of the applicants' right to a fair trial guaranteed under Article 36 § 1 of the Constitution.

77. It was not found necessary to make further examination about the applicants' allegation that the execution of their imprisonment sentence for lifelong was in breach of Article 17 of the Constitution, due to the above-mentioned violation which has been found established. Serruh KALELİ expressed his dissenting opinion in this respect.

3. Under Article 50 of the Law no. 6216

78. Article 50 §§ 1 and 2 of the Law no. 6216 reads as follows:

"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made what is required for the elimination of the violation and the consequences thereof shall be ruled.

2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the

compensation may be adjudged in favour of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

79. It has been concluded in the present application that Article 36 of the Constitution was violated.

80. The basis of the applicants' request for pecuniary compensation was their loss of income likely to be earned by them as they were deprived of liberty within the scope of the proceedings. However, given the fact that the violation in question resulted from the applicants' inability to benefit from legal assistance under custody, the requests for pecuniary damage must be rejected for not being the direct consequence of this violation.

81. It is explicit that the most appropriate means for the elimination of the violation within the scope of the right to a fair trial is retrial in respect of the applicants.

82. It has been held that the court expense of 1,698.35 Turkish Liras ("TRY") in total consisting of the application fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 be paid to the applicants.

V. JUDGMENT

For the above-cited reasons, the Constitutional Court has held on 8 April 2015 **UNANIMOUSLY** that

A. The applicants' allegations that there was a breach of the right to liberty and security of person be **DECLARED INADMISSIBLE** for *"lack of jurisdiction ratione temporis"*.

B. The applicants' allegations that there was a breach of the right to a fair trial be **DECLARED INADMISSIBLE**.

C. The applicants' right to a fair trial set out in Article 36 of the Constitution was **VIOLATED** as they could not benefit from legal assistance of a lawyer under custody.

D. There would be **NO GROUND** for making further examination concerning the other complaints within the scope of the right to a fair trial.

E. One copy of this judgment would be **SENT** to the relevant court for holding re-trial with a view to eliminating the violation and consequences thereof.

F. The applicants' claims for compensation would be **REJECTED**.

G. With the dissenting opinion of Serruh KALELİ and **BY A MAJORITY VOTE**, there would be no ground for making further examination about the applicants' allegations that there was a violation of Article 17 of the Constitution for being sentenced to life imprisonment execution of which would last for lifelong, on the ground that a re-trial would be held within the scope of the violation found established.

H. The court expense of 1,698.35 Turkish Liras ("TRY") in total consisting of the application fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 would be jointly paid to the applicants.

İ. The payment would be made within four months following the date of application to be made to the Ministry of Finance upon the service of this judgment; and in case of any delay in payment, a statutory interest would be charged for the period from the expiration date of the prescribed period to the payment date.

DISSENTING OPINION

It has been revealed that while expressing the impugned actions and acts performed by public force in their petitions, the applicants chronologically mentioned of their arrest, their statements given at the public prosecutor's office and the court and the steps taken during the hearings and they explained that throughout the proceedings they were detained pending trial on the basis of their statements taken through ill-treatment, torment and torture to which they were exposed at the security directorate and that their requests for release were rejected.

The primary complaint of the applicants concerns the personal inviolability of the individual and the right to develop the individual's material and spiritual entity set out in Article 17 of the Constitution and, in conjunction therewith, the right to life and the prohibition of torture which are guaranteed respectively in Articles 2 and 3 of the ECHR. In the second place, they complain of the alleged violation of the right to liberty and security of person set out in Article 19 of the Constitution and the right to litigation before the judicial authorities either as a plaintiff or a defendant set out in Article 36 of the Constitution and within this scope, of the relevant rights vested in a person charged with an offence and set out in Article 6 of the ECHR.

Indeed, the facts submitted by the applicants in the application form and falling into the scope of the above-mentioned provisions of the Constitution and the Convention are as follows:

- Being exposed to threats, defamation, psychological and moral coercion and receiving blows to their heads.
- Being denied legal assistance of a lawyer while being under custody at the security directorate.
- Forced to sign a written document.
- The court's rendering a decision on the basis of the statements illegally obtained.
- The court's failure to take into consideration the requests for examination and collection of the witnesses and documents in favour of the applicants.
- The court's failure to entitle the accused persons and their lawyers to cross-examine the witnesses; and
- Breach of the right to life due to the very nature of the life imprisonment.

Moreover, they claimed compensation to obtain redress for their grievance by means of making reference to the period of their detention in order to demonstrate the amount of income they were deprived of and the period during which they could not work. It must be accepted that they mentioned of their detention period in order to explain their loss of profit or unearned profit with a view to obtaining compensation; and that their primary complaints are not their detention or detention pending trial but unlawful practices leading to their being detained on remand throughout the proceedings and unlawfulness of the proceedings.

In brief, the applicants tried to make a reference to the unlawful practices starting from their statement-taking process rather than asserting allegations under the right to liberty and security of person set out in Article 19 of the Constitution. They alleged that these unlawful practices resulted from their statements taken under torture and torment; and that the *de facto* intervention by the public force consequently resulted in *de jure* unjust damage.

Accordingly, the Constitutional Court should have made the examination as to the admissibility not within the scope of the allegations of being detained on remand and unlawfulness of their detention under the right to liberty and security, which are not the exact subject-matter of the applicants' complaint, but under Article 17 of the Constitution in which the personal inviolability of the individual and the right to protect and develop the individual's material and spiritual entity are set out.

The paragraphs 34-41 included in our reasoned judgment under the heading of the allegations within the scope of the right to liberty and security are accurate by their legal content; however, they do not correspond to the applicants' claims.

The final conclusion reached by the Constitutional Court is directed at the applicants' denial of legal assistance during their interrogation by the police within the scope of the alleged violation of the right to a fair trial (see §§ 45 and 48); however, the allegations concerning the aggravated life imprisonment was not subject to any examination as to the admissibility at this stage. In its examination as to the merits of the application subsequent to this deficient examination as to the admissibility, the Constitutional Court, which found that the trial held without providing legal assistance of a lawyer constituted a right violation, decided to remit the case-file to the relevant court for retrial.

Throughout the retrial to be held by virtue of this judgment, the statements taken in the absence of a lawyer, the applicants' allegations that they were exposed to torment, torture, duress under police custody which had not been taken into consideration and the necessity of taking statements of the applicants' witnesses would be reviewed within the proceedings as a whole.

In this respect, the sole issue which cannot be reviewed by virtue of this judgment would be the applicants' allegations concerning the aggravated life imprisonment sentence which is deemed to fall within the scope of the right to a fair trial. This is because our Court abstained from dealing with this allegation and left this explicit allegation to the possibility that a different conclusion likely to be in favour of the applicants in comparison to the previous sentence imposed on them may be reached during the retrial to be held.

The applicants maintain that a penalty execution of which would last for lifelong constitutes a human rights violation; that they are deemed to be terror offenders and they were sentenced to aggravated life imprisonment which poses an obstacle for the implementation of the provisions of conditional release specified in the law on the execution of penalties; and that execution of their penalty would last for lifelong.

As this allegation under Article 17 of the Constitution and Article 3 of the ECHR was not examined under its substantive aspect, the judgment must contain a justification as to why it was found inadmissible, non-examinable or did not fulfil the inadmissibility criteria. However, it has been observed that there was no justification in this respect in the judgment; and that this allegation was overshadowed by the violation resulting from the applicants' denial of legal assistance which was dealt with under Article 36 of the Constitution. It is not possible for me to agree with this acknowledgement.

Our Court is not bound by the legal qualification of the allegations made by the applicants and is capable of qualifying the allegations by itself and examine them in this scope.

This allegation in the present case was examined as to neither the admissibility nor the merits. The existence of another violation found by our Court within the scope of another allegation maintained in the application and the nature thereof must not take precedence over the examination of this critical allegation which may be deemed to be a violation of the Human Rights Convention system which is essentially based on respect for human dignity and of the fundamental human rights and freedoms, and the Court must not leave the legal assessment of this allegation to the probable outcomes of the retrial.

For instance, in an incident where it was found established that there was torture, in case of acknowledgment of the allegation that there was a lack of an effective investigation, the allegation of torture may be found established within an effective investigation to be conducted. In that case, may it be noted that we have found a violation of Article 13 of the Convention so it is not necessary to make a separate examination under Article 2 of the Convention?

Would the assumption that the applicant would benefit from the provisions of acquittal and conditional release after being subject to a retrial eliminate or remove the grievance suffered by him for being sentenced to a penalty incompatible with human dignity?

A violation or the fact including the allegation constituting the violation concretely took place in the past and has been found established.

This contradiction must be established and take part in its effective sphere in the legal world. Today, given the judgments finding a violation and rendered by the ECtHR under Article 3 of the Convention, compatibility of the arrangements which abolishes the rights of conditional release in the execution of the penalty with the Constitution and the Convention constitutes a clear field of dispute. At this point, role of the legislator and the courts (such as the Constitutional Court) is to establish the violations and to avoid implementation of such arrangements. Therefore, the Constitutional Court must not abstain from examining a concrete allegation in conjunction with finding of another violation, as in the present case, and the examination procedure followed in such a judgment must not be valid *vis-à-vis* the Constitutional Court's duty to deal with effective constitutional complaints in the entirety of the legal order.

As to the assessment of the concrete allegation;

The applicants maintain that there was a violation of their right to life and the prohibition of torture as they were sentenced to a penalty execution of which would last for lifelong.

The Ministry of Justice indicated that the impugned complaint in the present case must be examined under Article 17 of the Constitution and Article 3 of the ECHR. In this respect, according to the well-established case-law of the ECtHR, when Article 3 of the Convention is

interpreted in conjunction with Article 1 thereof which provides for *"the High Contracting States shall secure to everyone within their jurisdiction the rights and freedoms (...) of this Convention"*, the states are required to take measures aiming at preventing individuals within their jurisdiction from being subject, in any way, to torture and inhuman or degrading treatment including ill-treatment by private persons.

In its judgment of *Vinter v. the United Kingdom* dated 9 July 2013 and rendered by the Grand Chamber (no. 66069/09, 130/10, 3896/10), the Court has noted that the imposition of an irreducible life sentence would not *per se* raise an issue under Article 3; and that such an sentence may be compatible with Article 3 of the ECHR in the event that there is possibility of being released and of re-examination thereof.

It has been also indicated that the life imprisonment sentence must be irreducible in law and in practice; otherwise, it would constitute a breach of Article 3 of the Convention; that at the end of a certain period of time following the decision, the authorities must review the sentence imposed, and a system must be established for determining as to whether there are important progresses for rehabilitation of the convict and whether the justifications for imposing a life imprisonment sentence on the person still exist; however such an examination to be made would not amount to release of that person.

In the judgment, the issues such as how long after the date of the conviction decision the convict's imprisonment sentence would be re-examined, the conditions of release, the convict's ability to know how he must behave and what he must do in the prison in order to be released have been discussed, and it has been indicated that in case of non-existence of the mechanisms and facilities specified in the above paragraph, the conviction of the accused to life imprisonment would constitute a violation of Article 3 of the ECHR.

Although the applicants have also maintained that their right to life was violated as they were sentenced to imprisonment sentence execution of which would last for lifelong, such a complaint must be dealt with under Article 17 § 3 of the Constitution and Article 3 of the ECHR within the framework of the prohibition of being subject to a penalty or treatment incompatible with human dignity.

In Article 17 of the Constitution entitled "personal inviolability, material and spiritual entity of the individual", it is set out "everyone has the right to life and the right to protect and improve his/her material and spiritual entity". Accordingly, the individual's right to life and the right to protect his material and spiritual entity are among highly interrelated, inalienable and indispensible fundamental rights. The states are entrusted with a task of eliminating all kinds of obstacles before these rights. In this respect, legal arrangements concerning the individuals'

way of living cannot include rules which would tarnish or eliminate “the right to protect their material and spiritual entity” to a significant extent (see the Constitutional Court’s judgment dated 22 May 2014 and no. E.2013/137, K.2014/94).

Article 17 § 3 of the Constitution provides for “no one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity”. It is thereby envisaged that any individual cannot be subject to a penalty or treatment which degrades the individual before himself or others, which is incompatible with human dignity or is humiliating, and in the judgments of the Constitutional Court, the notion of human dignity is defined as the recognition of and respect for dignity the individual has only for being a human, regardless of the conditions and circumstances under which he is. It is accordingly noted that being subject of an individual to beating, exposure, publicly execution as a penalty and similar physical penalty or treatment for having committed an offence would not be compatible with the human dignity (see the judgment no. E.2013/137, K.2014/94).

Deterrence of the penalty and the offender’s ability to reintegrate with the society, in other words rehabilitation of the offender, constitute one of the basic principles of criminal policy. Nature of the offence and importance attached to it by the society form a basis for the type and amount of the sentence. This issue is determined by the assessment and discretion of the legislator on this matter in accordance with the penalization policy of the state. However, execution of the penalty imposed aims at rehabilitation and reintegration of the offender into the society (see the judgment no.E.1991/18, K.1992/20 and dated 31 March 1992).

In accordance with Article 17 § 3 of the Constitution, it is set forth in paragraph 2 of Article 2 of the Law no. 5275 entitled “the basic principle of execution” that “in the execution of penalties and security measures, there shall be no cruel, inhuman, degrading or humiliating treatment”. Furthermore, Article 6 § 1 (b) of the same Law envisages that “the lack of freedom that is made necessary by the imprisonment sentence shall be suffered under material and moral conditions that ensure respect for human dignity”. Thereby, the obligations envisaging that while the penalties imposed on the convicts held in prisons are executed, the execution thereof must not have cruel, degrading and inhuman impact on the convict; that the penalty must be executed compatible with human dignity; and that due diligence must be shown in the execution of penalties have been established (see the judgment no. E.2013/137, K.2014/94 and dated 22 May 2014).

Psychological effects to be caused by the execution of imprisonment sentence, which is a result of conviction, must also comply with the principle envisaging that the penalty must be

executed compatible with human dignity. In this scope, the execution of a penalty must not be humiliating and must not be of the nature which would destroy material and spiritual entity. It cannot be therefore concluded that the execution of life imprisonment sentence imposed on account of certain offences is compatible with basic principles as it may eliminate the opportunity of reintegration of the offender into the society.

The European law and the international law now explicitly support the principle that all convicts including those who have been sentenced to life imprisonment must be provided with the opportunities of rehabilitation and release if this rehabilitation process is successfully completed (see *Vinter and others v. the United Kingdom*, cited-above § 114).

Throughout the execution process, a practice through which, at the end of a certain period, the penalty imposed would be re-examined and the questions as to whether there are significant progresses for rehabilitation of the convict and whether the grounds justifying the imposition of life imprisonment sentence still exist, cannot be performed. This leads to incarceration of the applicants until their death without hope of release if there is no parole or continuous illness, disability and the state of growing old.

It has been concluded that providing the possibility of re-examination for mitigating or ending the aggravated life imprisonment sentence imposed on account of offences included in the law or for conditional release is requisite in terms of the constitutional principle prohibiting the imposition of a penalty incompatible with human dignity (even if the imprisonment sentence is continued to be executed for good reasons).

For these reasons given above, I consider that there was a breach of the prohibition of imposing a penalty incompatible with human dignity, which is set out in Article 17 § 3 of the Constitution, on the ground that the life imprisonment sentence imposed on the applicants are executed in a static and unreviewable manner.

As a matter of fact, in the ÖCALAN judgment of the Second Section dated 18 March 2014 and nos. 24069/03, 197/04, 6201/06, 10464/07, the ECtHR has indicated the followings:

This complaint was not faced any obstacle in respect of admissibility (contrary to our judgment) and would be examined under Article 3 of the ECHR. The ECtHR would examine whether the convict sentenced to life imprisonment had the chance of being released. Given the ECtHR's case-law on this matter, it has been emphasized that in the event that the national law allows suspension or termination of the execution of life imprisonment sentence or re-examination of this sentence with a view to mitigating the sentence for conditional release of the convict, the requirements of Article 3 would be satisfied (see *Vinter and others* judgment, cited-above, §§ 108 and 109). As noted in the case of BİEBER, the sentencing must include

deterrence, public protection and rehabilitation which must exist even when a life imprisonment sentence is imposed.

Moreover, if a life prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is a risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence will be. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in *Wellington Case* – a poor guarantee of just and proportionate punishment.

The ECtHR would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter.

It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.

Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary both to legal certainty and to the general principles on victim status within the meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be inconsistent to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release.

The ECtHR has consequently found the complaints in question justified and in breach of Article 3 of the Convention.

For the reasons specified above, I am unable to share the majority's opinion reached at the Plenary session dated 8 April 2015 that there is no ground to examine the allegations concerning the breach of Article 17 of the Constitution

Vice President
Serruh KALELİ