REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

PLENARY

JUDGMENT

IN THE APPLICATION OF ŞAHIN ALPAY (2)

(Application Number: 2018/3007)

Date of Judgment: 15 March 2018

PLENARY ASSEMBLY

JUDGMENT

President : Zühtü ARSLAN
Vice President : Burhan ÜSTÜN
Vice President : Engin YILDIRIM
Justices : Serdar ÖZGÜLDÜR
Serruh KALELİ
Osman Alifeyyaz PAKSÜT
Recep KÖMÜRCÜ
Nuri NECİPOĞLU
Hicabi DURSUN
Celal Mümtaz AKINCI
Muammer TOPAL
M. Emin KUZ
Hasan Tahsin GÖKCAN
Kadir ÖZKAYA
Rıdvan GÜLEÇ
Recai AKYEL
Yusuf Şevki HAKYEMEZ
Rapporteur : Aydın ŞİMŞEK
Assistant Rapporteur: Yusuf Enes KAYA
Applicants : Şahin ALPAY
Representative : Aynur TUNCEL YAZGAN, Attorney at Law

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicant alleges that his right to personal liberty and security has been violated due to non-implementation of the Constitutional Court's judgment finding a violation.

II. APPLICATION PROCESS

2. The application was lodged with the Constitutional Court on February 1, 2018.

3. The application was submitted to the Commission after examination of the application form and annexes thereto under administrative procedure.

4. The Commission decided that as the matter was related to the merits of the case, there was no ground to decide on the applicant's request for interim measure.

5. The Commission referred the examination of admissibility of the application to the Section.

6. The Presiding Judge of the Section decided that the examination on the admissibility and merits of the application be made concurrently.

7. One copy of the application was sent to the Ministry of Justice ("the Ministry") in order to receive its observations. The Ministry notified that it would not submit any observation on the application.

8. At the session held on 13 March 2018, the First Section, decided to relinquish jurisdiction in favour of the Plenary, pursuant to Article 28 § 3 of the Internal Regulations of the Court ("Internal Regulations").

III. THE FACTS

9. As stated in the application form and annexes thereto and in accordance with the information and documents available on the National Judiciary Informatics System ("the UYAP"), the facts of the case may be summarized as follows:

10. After the coup attempt of 15 July 2016, within the scope of an investigation conducted against the media structure of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY) —stated to be the organization behind the coup attempt—, the applicant was taken into custody on 27 July 2016, and he was detained on remand by the Istanbul 4th Magistrate Judge's Office on 30 July 2016 for alleged membership of an armed terrorist organization.

11. On 8 September 2016, the applicant lodged an individual application with the Constitutional Court, alleging that his right to personal liberty and security was violated due

to the alleged unlawfulness of his detention and that his freedoms of expression and press were violated due to his detention on account of his journalistic activities which also fall into the scope of freedom of expression.

12. On 10 April 2017, the Istanbul Chief Public Prosecutor's Office indicted the applicant for attempting to overthrow the constitutional order, the Grand National Assembly of Turkey ("the GNAT") or prevent it from performing its duties, attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties and committing crime on behalf of a terrorist organization without being a member of it. The 13th Chamber of the Istanbul Assize Court accepted the bill of indictment, and the prosecution process started over the file no. E.2017/112.

13. On 11 January 2018, the Plenary of the Constitutional Court adjudicated the individual application lodged by the applicant. The Court held that the applicant's right to personal liberty and security safeguarded by Article 19 of the Constitution, as well as his freedoms of expression and press safeguarded by Articles 26 and 28 of the Constitution were violated (see *Şahin Alpay* [PA], no. 2016/16092, 11 January 2018, §§ 111, 147).

14. Regarding the alleged unlawfulness of the applicant's detention on remand, the Court concluded that the investigation authorities could not sufficiently demonstrate a strong indication of guilt on the part of the applicant, which is a prerequisite for detention as set forth in Article 19 of the Constitution. In the judgment finding also violations of the applicant's freedoms of expression and press, the Court mainly relied on its determinations as to the alleged unlawfulness of the applicant's detention on remand.

15. Pursuant to Article 50 of Law no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, in order to redress the violation of the applicant's right to personal liberty and security, as well as, his freedom of expression and press, the judgment was sent to the 13th Chamber of the Istanbul Assize Court where the applicant was tried, and the reasoned judgment, except for dissenting opinions, was made available on the Constitutional Court's website. After the finalization of the dissenting opinions, the judgment was published on the Official Gazette on 19 January 2018.

16. After the judgment was sent to the 13th Chamber of the Istanbul Assize Court and the applicant had requested to be released relying on this judgment of the Constitutional

Court, the Assize Court examined the applicant's detention on remand. However, on 11 January 2018, it dismissed the applicant's request and ordered the continuation of his detention on the ground that the reasoned judgment was not published on the Official Gazette, as well as it was not communicated to it. The applicant's appeal was dismissed by the 14th Chamber of the Istanbul Assize Court on 15 January 2018.

17. The applicant lodged another request with the 13th Chamber of the Istanbul Assize Court for his release, by submitting the reasoned judgment of the Constitutional Court published on its website. On 12 January 2018, the Assize Court held that there was no ground to make a decision on the applicant's detention on remand. The applicant contended this decision, however, on 23 January 2018, the 14th Chamber of the Istanbul Assize Court held that there was no ground to make a further decision on the applicant's request.

18. The assize courts that dismissed the applicant's requests for release and his subsequent objection against his detention mainly stated the following grounds:

> i) The Constitutional Court may not take the place of the trial court and assess the evidence or the merits of the case or the issues to be considered in appellate review, nor may it make a substantive review. In a case where the trial court orders detention by assessing the evidence, the Constitutional Court may not give a judgment finding a violation due to lack of evidence. The Constitutional Court's making an examination as to the merits of the case results in "usurpation of power" and a violation judgment overstepping its legal mandate cannot be considered to be final or binding.
>
> ii) Assuming that the Constitutional Court's judgment would automatically result in the applicant's release would contradict the legal principles concerning the courts' independence and the [constitutional] mandate that no order or instruction could be given to the courts.
>
> iii) Considering the applicant's speeches on TV and his sharing on social media, besides his articles, there existed concrete evidence demonstrating a strong indication of guilt that he acted in accordance with the aims and purposes of the FETÖ/PDY.

iv) In the event that a detailed justification was written about the applicant's detention in accordance with the violation judgment of the Constitutional Court, then "the prohibition of making comments reflecting bias (*ihsas-ı rey yasağı*)" would be violated.

19. The applicant submitted that he was notified of the final judgment of the 14th Chamber of the Istanbul Assize Court, dated 23 January 2018, concerning his appeal against his detention on 29 January 2018.

20. On 1 February 2018, the applicant lodged an individual application with the Constitutional Court, alleging that the Court's judgment finding a violation was not implemented.

21. The case has been pending before the first instance court and the applicant is still detained on remand.

IV. RELEVANT LAW

A. Domestic Law

22. The relevant part of the judgment of the Plenary Assembly of Criminal Chambers of the Court of Cassation, dated 28 April 2015 and numbered E.2013/9-464, K.2015/132 reads as follows:

> *"... According to Article 148 of the Constitution, every person may apply to the Constitutional Court alleging that the public authorities have violated one of her/his fundamental rights and freedoms secured under the Constitution, which also falls into the scope of the European Convention on Human Rights. Like the Constitutional Court's other judgments, the judgments of the Sections dealing with individual applications are also binding on the legislative, executive and judicial bodies, administrative authorities, as well as natural and legal persons. Therefore, in the presence of this precedent judgment of the Constitutional Court, the applicable case-law had to be reviewed."*

23. The relevant part of the judgment of the 2nd Civil Chamber of the Court of Cassation, dated 22 December 2016 and numbered E.2016/19574, K.2016/16369 reads as follows:

> *"... In the presence of a judgment where it was decided that the violation found by the Constitutional Court arouse out of a court decision and it was decided under Article 50 § 2 of the Law on the Establishment and Rules of Procedures of the Constitutional Court that the proceedings would be reopened in order to redress the violation and its consequences, there is no possibility for the*

inferior courts to decide otherwise in the concrete case […]. However, it is clear that in similar cases where an individual application is lodged in this sense, the Supreme Court will again find a violation and the proceedings will be reopened in order to redress the violation and its consequences.

Actually, alleged violations of fundamental rights and freedoms falling into the common protection area of the Constitution, the European Convention on Human Rights and additional Protocols thereto, which Turkey is a party to, must in the first place be resolved through ordinary legal remedies by the general courts. Lodging an individual application with the Constitutional Court is a secondary remedy. This has been stated in many judgments of the Constitutional Court concerning individual application. Therefore, this issue which may lead to reopening of the proceedings must also be taken into account in the cases pending before the first instance courts. As the Constitutional Court rendered a judgment finding a violation in an individual application in this respect, the judgment had to be quashed in order to prevent the violation of any right."

24. The relevant part of the judgment of the Plenary Session of the Tax Law Chambers of the Council of State dated 20 January 2016 and numbered E.2016/23, K.2016/60 reads as follows:

"... Where the Constitutional Court finds a violation in an individual application and decides on the reopening of the proceedings, this judgment of the Court must be abided by. […] [I]n the event that the judgments finding violation of one of the fundamental rights and freedoms safeguarded by the Constitution are not taken into consideration in other cases the parties, subject matter and reasons of which are the same, Article 2 of the Constitution embodying the principle of a state governed by the rule of law and the universal legal rules, which also include the rule pertaining to the supremacy and binding effect of the Constitution will be violated."

B. International Law

25. Article 41 of the European Convention on Human Rights ("the Convention"), titled "*Just satisfaction*", is as follows:

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

26. The relevant part of Article 46 of the Convention, titled "*Binding force and execution of judgments*", is as follows:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

…

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of 26 27 paragraph1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

27. The European Court of Human Rights ("the ECHR") underlines that by virtue of Article 46 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the ECHR in any case to which they are parties (see *Del Rio Prada v. Spain* [GC], no. 42750/09, 21 October 2013, § 137). According to the ECHR, this means that when the ECHR finds a violation, the respondent State is under a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the ECHR and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Del Rio Prada v. Spain*, § 137).

28. The ECHR reiterates that in principle, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in its judgment. However, the ECHR states that in certain particular situations, with a view to assisting the respondent State in fulfilling its obligations under Article 46, it may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation that gave rise to the finding of a violation. The ECHR adds that in other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the

measures required to remedy it and it may decide to indicate only one such measure (see *Del Rio Prada v. Spain*, § 138).

29. In its judgment in the case of *Del Rio Prada v. Spain* where it examined alleged unlawfulness of detention, the ECHR considered that present case belonged to this last-mentioned category and it held that the violation it found would be redressed by releasing the applicant at the earliest possible date (see *Del Rio Prada v. Spain*, § 139; for similar judgments, see *Assanidze v. Georgia* [GC], no. 71503/01, 8 April 2004, § 203; and *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010, § 117).

30. In its judgment of *Hasan Uzun v. Turkey* (no. 10755/13, 30 April 2013), the ECHR concluded that the individual application to the Constitutional Court was a remedy to be exhausted before lodging an application with the Constitutional Court. Here, the ECHR also took into consideration the binding effect of the Constitutional Court's judgments. In this respect, the ECHR referred to Article 153 § 6 of the Constitution, which provided that the judgments of the Constitutional Court are binding on all State bodies, as well as, natural and legal persons, and considered that there would be no problem in abiding by the judgments of the Constitutional Court in terms of individual applications (see *Hasan Uzun v. Turkey*, § 66).

V. EXAMINATION AND GROUNDS

31. The Constitutional Court, at its session of 15 March 2018, examined the application and decided as follows.

A. The Applicant's Allegations

32. The applicant maintained that the inferior courts failed to implement the Constitutional Court's judgment finding a violation and that his appeals against the decisions ordering the continuation of his detention on remand that were rendered after the violation judgment were dismissed on insufficient grounds in the absence of a strong indication of guilt and without relying on new evidence, which were in breach of his rights safeguarded by Articles 13, 14, 17, 19, 26, 28, 36, 40 and 153 of the Constitution.

B. The Constitutional Court's Assessment

33. Article 19 § 1 and the first sentence of Article 19 § 3 of the Constitution, titled "*Personal liberty and security*", reads as follows:

"Everyone has the right to personal liberty and security.

...

Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention."

34. The applicant's allegations that his right to personal liberty and security was violated due to the failure to implement the violation judgment of the Constitutional Court must be examined under Article 19 § 3 of the Constitution.

1. Admissibility

35. The application is not manifestly ill-founded and there exists no ground to declare it inadmissible, therefore it is found admissible.

2. Merits

a. General Principles

36. The relevant part of Article 2 of the Constitution, titled "*Characteristics of the Republic*", is as follows:

"The Republic of Turkey is a ... state governed by rule of law."

37. The second sentence of Article 6 § 3 of the Constitution, titled "*Sovereignty*", is as follows:

"No person or organ shall exercise any state authority that does not emanate from the Constitution."

38. Article 36 § 1 of the Constitution, titled "*Freedom to claim rights*", reads as follows:

"(As amended on October 3, 2001; Article 14 of Act No. 4709) 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"

39. The relevant part of the last paragraph of Article 138 of the Constitution, titled "*Independence of the courts*", provides as follows:

"Legislative and executive organs and the administration shall comply with court decisions..."

40. The relevant part of Article 148 of the Constitution, which regulates the "*duties and powers*" of the Constitutional Court, reads as follows:

> *"(As amended on September 12, 2010; Article 18 of Act No. 5982) The Constitutional Court shall ... decide on individual applications ...*
>
> *...*
>
> *(Paragraph added on September 12, 2010; Article 18 of Act No. 5982) Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.*
>
> *(Paragraph added on September 12, 2010; Article 18 of Act No. 5982) In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies.*
>
> *(Paragraph added on September 12, 2010; Article 18 of Act No. 5982) Procedures and principles concerning the individual application shall be regulated by law.*
>
> *..."*

41. Article 153 §§ 1 and 6 of the Constitution, titled "*Judgments of the Constitutional Court*" is as follows:

> *"The decisions of the Constitutional Court are final. Decisions of annulment shall not be made public without a written justification.*
>
> *...*
>
> *Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies."*

42. The relevant part of Article 3 of Law no. 6216, titled "*Duties and powers of the Court*", reads as follows:

> *"(1) Duties and powers of the Court:*
>
> *...*
>
> *c) To conclude individual applications filed pursuant to Article 148 of the Constitution.*
>
> *..."*

43. Article 45 § 1 of Law no. 6216, titled "*Right of individual application*", provides as follows:

> *"Every person may apply to the Constitutional Court alleging that the public power has violated any one of his/her fundamental rights and freedoms secured under the Constitution which falls into the scope of the European Convention on Human Rights and supplementary protocols thereto, which Turkey is a party to."*

44. The relevant part of Article 49 § 6 of Law no. 6216, titled "*Examination on the merits*", reads as follows:

> *"Examination ... on the applications lodged against a decision of a court shall be limited with determination of existence of a violation against a fundamental right and in what way such a violation can be removed. The chambers may not examine issues that should be dealt with through legal remedies."*

45. Article 50 §§ 1, 2 and 3 of Law no. 6216, titled "*Judgments*", reads as follows:

> *"(1) After examination on the merits, a decision on violation or non-violation of the applicant's right is rendered. In case of a decision on violation, a judgment may be rendered on the actions to be taken in order to abolish the violation and its consequences. However, expediency controls may not be carried out and decisions may not be given in a manner of administrative act and transaction.*
>
> *(2) In case the violation has been caused by a court decision the file is forwarded to the concerned court in order to renew the judicial procedure so that the violation and its results will be cleared up. In cases where any legal interest is not seen with renewal of judicial proceedings, it can be decided payment of compensation in favour of the applicant or the applicant might be directed to general courts to bring lawsuits. The court which is responsible for rendering the retrial procedure renders its decision on file to a possible extent as to remove the violation and its results which have been explained in the Constitutional Court's decision determining the violation.*
>
> *(3) The judgments of the Chambers on the merits together with their reasons are notified to the concerned parties and the Ministry of Justice and published on the website of the Court. The matters concerning the selection of judgments to be promulgated in the Official Gazette are regulated in the Internal Regulation of the Court."*

46. Article 66 § 1 of Law no. 6216, titled "*Court decisions*", reads as follows:

> *"Decisions of the Court are final. Decisions of the Court are binding on the legislative, executive and judicial bodies and administrative authorities of the State as well as real and legal persons."*

47. Article 81 §§ 4 and 5 of the Internal Regulation of the Constitutional Court, titled "*Signing, notification and publication of the decision*" is as follows:

> *"(4) All of the decisions of the Sections and those which bear principal significance from an admissibility point of view from amongst the decisions of the Commissions shall be published on the website of the Court.*
>
> *(5) The decisions which are determined by the President of Section, which bear the quality of being pilot decisions made by the Section or bear principal significance in terms of displaying case law shall be published in the Official Gazette."*

48. By an amendment to Article 148 of the Constitution in 2010, the Constitutional Court has been vested with the authority to adjudicate the individual applications. The justification of this amendment was provided as follows:

> *"Individual application or constitutional complaint is defined as an extraordinary legal remedy resorted to by the individuals whose fundamental rights and freedoms are violated by the public force. Today, the remedy of individual application for the protection of fundamental rights is accepted as an integral part of the constitutional jurisdiction in many civilized countries ...*
>
> *...*
>
> *While examining whether the domestic legal remedies have been exhausted or not, the European Court of Human Rights takes into consideration whether there exists any institution for individual application in the country concerned and considers this as an effective remedy to redress the violations. Therefore, by forming an institution to facilitate individual applications, a significant part of those alleging to have been suffering from violations can be redressed at the individual application stage, namely before lodging an application with the European Court of Human Rights. Thus, the applications to be lodged against Turkey, as well as, violation judgments may also diminish. Therefore, establishing a well-functioning individual application system in Turkey will enhance the standards based on rights and the rule of law.*
>
> *...*
>
> *Adopting the remedy of individual application in Turkey will on the one hand ensure a better protection for the individuals' fundamental rights and freedoms and on the other hand it will force the public authorities to comply with the Constitution and the laws. By such an amendment, with a view to protecting and safeguarding individual rights and freedoms, the citizens are provided with the right to individual application, and the Constitutional Court is granted a duty to review and adjudicate these applications.*
>
> *... By this amendment, the Constitutional Court has also undertaken a mission to protect and develop the freedoms by virtue of the duty imposed on it to review individual applications."*

49. According to Article 148 § 3 of the Constitution and Article 45 § 1 of Law no. 6216, every person may apply to the Constitutional Court alleging that the public authorities have violated any one of her/his fundamental rights and freedoms secured under the Constitution which falls into the scope of the European Convention on Human Rights and supplementary protocols thereto, which Turkey is a party to. Pursuant to Article 148 § 1 of the Constitution, the Constitutional Court has been given authority adjudicate these applications.

50. Pursuant to Article 49 § 6 of Law no. 6216, the Constitutional Court's examination of the individual applications is limited to "whether a fundamental right is violated or not" and to "the determination of how to remedy such a violation".

51. According to Article 148 § 4 of the Constitution and Article 49 § 6 of Law no. 6216, the issues to be considered in appellate review cannot be examined in individual applications. According to Article 50 § 1 of the latter, where a violation judgment is rendered, a substantive review cannot be made while deciding on the actions to be taken in order to redress the violation and its consequences.

52. These provisions must be assessed together with the Constitutional Court's power and duty to adjudicate individual applications, which is regulated in Article 148 §§ 1 and 3 of the Constitution. Within the scope of this duty, the Constitutional Court is obliged to examine and adjudicate the individual applications lodged with the alleged violation of fundamental rights and freedoms falling into the common protection area of the Constitution and the Convention. The Constitutional Court makes this examination in accordance with the safeguards provided by the Constitution regarding fundamental rights and freedoms.

53. Accordingly, the area the examination of which is prohibited in terms of individual application, as set forth in the Constitution and the Law, cannot be considered to be related to the safeguards provided in the Constitution concerning fundamental rights and freedoms. This area relates to the allegations of unlawfulness falling outside the scope of individual applications. In this respect, as also stated in many judgments of the Constitutional Court, unless there is an interference with fundamental rights and freedoms, it falls upon the inferior courts to implement and interpret the legal rules and assess the evidence (see for example, *Ahmet Sağlam*, no. 2013/3351, 18 September 2013, § 42; *Sabahat Beğik and Others* [PA], no. 2014/3738, 21 December 2017, § 23). However, in cases where there is an interference with the fundamental rights and freedoms, it is the Constitutional Court that will

give the final judgment on the effect of the inferior courts' decisions and assessments on the safeguards provided in the Constitution. In this respect, any examination to be made, by taking into account the safeguards provided in the Constitution, as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated or not cannot be regarded as "an assessment of an issue to be considered in appellate review" or "a substantive review".

54. Otherwise, the Constitutional Court's power and duty to adjudicate individual applications would not be functional, and this would not comply with the consideration that the individual application is an effective remedy (see above §§ 40, 48). Considering an examination to be carried out within the scope of the guarantees pertaining to fundamental rights and freedoms enshrined in the Constitution as an appellate review will result in the Constitutional Court's failure to examine and adjudicate the individual applications.

55. In this context, as the existence of "a strong indication of guilt" is considered as a prerequisite for detention in Article 19 § 3 of the Constitution, it is a constitutional requirement for the Constitutional Court to examine whether there is a strong indication of guilt in the individual applications in which the right to personal liberty and security is allegedly violated due to detention, and such an examination cannot be considered as substantive or appellate review.

56. In addition, it is provided in Article 50 § 1 of Law no. 6216 that in conclusion of an examination to be made on the merits of an individual application, it will be decided whether the applicant's right has been violated or not; and if a violation is found, the actions to be taken in order to redress the violation and its consequences will be decided. Accordingly, the Constitutional Court's powers and duties within the scope of individual applications are not limited to the determination of whether the right has been violated or not but also include the determination of the actions to be taken in order to redress the violation and its consequences. As a matter of fact, the Constitutional Court made the following assessment in an action for annulment pertaining to Article 50 of Law no. 6216 (see the Constitutional Court, no. E.2011/59, K.2012/34, 1 March 2012).

> *"...*
>
> *The remedy of individual application provided in Article 148 of the Constitution ... is not only an action for determination of whether a right has been violated or not, it is also an action that will have legal effects such as preventing the violation of the individuals' fundamental rights and*

freedoms by the public force, and where a violation is found, redressing the consequences of the violation or redressing the damage occurred. Therefore, it is clear that by including in the Law the necessary procedural provisions applicable to the individual applications, the legislator has enabled the Constitutional Court not only to determine the violations but also to give judgments that might redress these violations.

Furthermore ... there is no rule in Article 148 of the Constitution which provides that the Constitutional Court's power in terms of individual applications is limited to finding a violation ..."

57. The Law vests the Constitutional Court with a broad discretion in determining the way to redress the violation and its consequences. The only limitation in respect thereof is the provision set out in the first paragraph of Article 50 of Law no. 6216 stating that the Constitutional Court cannot render decisions or judgments in the nature of an administrative act and action. Accordingly, such limitation implies that in determining the way to redress the violation and its consequences, the Constitutional Court cannot perform an act by substituting itself for the administration. Given the nature of the individual application mechanism, this limitation applies not only to the administration but also to the legislative and judicial bodies. The Constitutional Court adjudicates the way by which the violation and its consequences would be redressed and remits its judgment to the relevant authorities for necessary actions.

58. In this regard, the Constitutional Court, in principle, leaves a margin of appreciation to the relevant authorities in respect of the questions as to how and by which means the violation and its consequences would be redressed (see *Savaş Çetinkaya*, no. 2012/1303, 21 November 2013, § 67). Having regard to the nature of the judgment finding a violation, the relevant authority takes necessary actions with a view to redressing the violation and its consequences. In certain circumstances, the Constitutional Court taking into account the nature of the concrete case may point out the principles as to how and by which means the violation and its consequences would be redressed (see *Bizim FM Radyo Yayıncılığı ve Reklamcılık A.Ş.* [Plenary], no. 2014/11028, 18 October 2017, §§ 71 and 72). In such case, the relevant authorities must act in line with these explicated principles. However, in exceptional cases, the relevant authorities may be left, by the very nature of the violation found, with a single choice for the redress of the consequences thereof. In such cases, the Constitutional Court clearly points out the measure required to be taken for redress of the violation and its consequences, and the relevant authority accordingly takes this measure (see *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3 April 2014, § 82).

59. As stated in Article 2 of the Constitution, the Republic of Turkey is a state governed by rule of law. In such state, court decisions concerning the settlement of disputes cannot be considered to be non-binding. Indeed, the last paragraph of Article 138 of the Constitution provides that the legislative and judicial bodies, as well as the administration, are to comply with the court decisions.

60. Moreover, the right to a fair trial is safeguarded by Article 36 of the Constitution. One of the elements inherent in this right is the right to access to a court which also encompasses the right to bring a dispute before a court as well as the right to request implementation of a court decision. Although implementation of court decisions does not fall into the scope of trial, it is a complementing element which ensures materialization of the outcome of the trial. In case of non-implementation of the decision, the trial would make no sense (see the Constitutional Court's judgment no. E.2014/149 K. 2014/151, 2 October 2014; and *Ahmet Yıldırım*, no. 2012/144, 2 October 2013, § 28).

61. Indeed, Article 138 of the Constitution recognizes no exception in favour of neither the legislative and judicial bodies nor the administrative authorities in complying with the court decisions and implementing these decisions without any alteration. In a state where the judicial decisions are not timely [and duly] implemented by the relevant public authorities, individuals cannot be ensured to fully enjoy rights and freedoms [shielded] through judicial decisions. Therefore, the State carries the responsibility to prevent any loss of rights likely to arise to the detriment of individuals by ensuring timely implementation of judicial decisions and to protect individuals' trust and respect for legal system. Therefore, in a state governed by rule of law, failure to timely implement decisions of judicial authorities, which perform an essential duty for the protection of individuals' trust and respect for legal system, and thereby rendering these decisions inconclusive cannot be accepted (see *Ferda Yeşiltepe* [Plenary], no. 2014/7621, 25 July 2017, § 36). The rule of law principle cannot be realized by mere determination of unlawfulness, it also requires elimination of all consequences thereof, as well as implementation of court decisions in a timely manner (see the above-cited judgment no. E.2014/149 K. 2014/151, 2 October 2014).

62. It is explicit that non-implementation of the judgments where the Constitutional Court finds a violation of fundamental rights and freedoms within the scope of the individual application mechanism would further deepen the inconsistency with the rule of law principle within the meaning of the right to access to a court. As a matter of fact, the individual

application mechanism is a means of last resort through which those alleging that their fundamental rights and freedoms have been violated seek a remedy after exhausting all available remedies. Non-implementation of judgments which are rendered through this mechanism impairs the trust of individuals and society in state of law.

63. The constitution-maker specifically sets forth the binding nature of the Constitutional Court's judgments. In Article 153 § 6 of the Constitution, it is prescribed that the Constitutional Court's judgments shall have a binding effect on the legislative, executive and judicial bodies, administrative authorities, as well as on natural and legal persons. The same provision is also set out in Article 66 § 1 of Law no. 6216. As distinct from Article 138 of the Constitution, it is indicated in that provision that the Constitutional Court's judgments shall have a binding effect also on the judicial authorities. In this respect, there is no hesitation in respect of the binding nature of the Constitutional Court's decisions including those rendered through individual application mechanism. Indeed, regard being had to the judgments rendered by the Court of Cassation and the Council of State that emphasize the binding nature of the individual application judgments of the Constitutional Court, it also appears that, in this respect, there is no practical problem in the Turkish legal system (see above §§ 22-24).

64. In addition, the Constitutional Court is empowered, by virtue of Article 148 of the Constitution, to examine the constitutionality of laws, decree laws and the Rules of Procedure of the Grand National Assembly of Turkey ("the GNAT") and, through individual application mechanism, to examine and adjudicate the alleged violation of fundamental rights and freedoms safeguarded by the Constitution only after the exhaustion of all available ordinary legal remedies.

65. In Article 153 § 1 of the Constitution, it is set forth that the Constitutional Court's judgments are final. The same provision is included also in Article 66 § 1 of Law no. 6216. Neither the Constitution nor the above-mentioned Law points out an authority to which an application may be lodged against the Constitutional Court's judgments. Accordingly, the Constitutional Court is exclusively vested with the authority to examine and to adjudicate, in a final and binding manner, the constitutionality of laws, decree laws and the Rules of Procedure of the GNAT as well as acts, actions and omissions of the public authorities.

66. In this regard, no other authority is entitled to review and monitor whether the Constitutional Court's judgment, where it finds a violation of a fundamental right and freedom through individual application mechanism, is constitutional or not. Otherwise, it would be contrary to the second sentence of Article 6 § 3 of the Constitution which reads as follows: *"No person or agency shall exercise any state authority which does not emanate from the Constitution"*.

67. Implementation of a judgment in which the Constitutional Court finds violation of a fundamental right and freedom is a necessity resulting from the Constitutional Court's authority and duty to adjudicate the individual applications. Given the rationale of the relevant constitutional amendment (see above § 48), one of the objectives sought to be achieved by introducing individual application mechanism before the Constitutional Court is to establish an effective domestic remedy for the alleged violation of fundamental rights and freedoms and, thereby, to decrease the number of applications before the ECtHR against Turkey. A judicial remedy incapable of being final and binding cannot be regarded as effective. Indeed, the ECtHR, which concludes in its *Hasan Uzun v. Turkey* judgment that the individual application mechanism introduced by the Constitutional Court is a domestic remedy required to be exhausted before lodging an application with itself, makes a reference to Article 153 § 6 of the Constitution therein and accordingly takes into account the binding effect of the Constitutional Court's judgments over all natural and legal persons, as well as the state organs (see above § 30).

68. Besides, Article 153 § 6 of the Constitution sets forth that *"Constitutional Court's judgments shall be immediately published in the Official Gazette"*. Taken in conjunction with the other constitutional provisions, this provision cannot be interpreted that all judgments of the Constitutional Court are to be published in the Official Gazette and those which are not published in the Official Gazette would not bear any legal consequence. As a matter of fact, the Constitution explicitly indicates which judgments of the Constitutional Court would have legal effect only after being published in the Official Gazette.

69. In this respect, in Article 153 § 3 of the Constitution, it is prescribed that laws, decree laws, or the Rules of Procedure of the GNAT or provisions thereof, shall cease to have effect from the date when the annulment decisions are published in the Official Gazette. Besides, Article 69 § 9 of the Constitution sets forth that the members, including the founders of a political party whose acts or statements have caused the party to be dissolved

permanently shall not be founders, members, directors or supervisors in any other party for a period of five years from the date of publication of the Constitutional Court's final judgment with its justification. Lastly, it is prescribed in Article 152 of the Constitution that no claim of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication, in the Official Gazette, of the judgment of the Constitutional Court dismissing the application on its merits.

70. The constitutional amendment of 2010 —vesting the Constitutional with power and duty to adjudicate the individual applications— includes no provision that these judgments would bear a legal consequence only after being published in the Official Gazette. Indeed, in paragraph 5 added by this amendment to Article 153 of the Constitution, it is set forth that procedures and principles with respect to individual application shall be regulated by law. In Article 50 § 3 of Law no. 6216 enacted after the constitutional amendment and setting out the working principles and procedures of the Constitutional Court, it is primarily set out that the individual application judgments on the merits, along with the justifications thereof, shall be remitted to those concerned and the Ministry of Justice and published on the webpage of the Constitutional Court. It is subsequently set forth that *"Issues pertaining to which of such judgments are to be published in the Official Gazette shall be indicated in the Internal Regulation"*. Accordingly, Article 81 § 5 of the Internal Regulation points out the judgments to be published in the Official Gazette at the Constitutional Court's discretion. In this respect, for the individual application judgments to bear a legal consequence, the law-maker takes as a basis, by virtue of its power vested by the Constitution, not the publishing of the judgments in the Official Gazette but their notification to those concerned.

b. Application of the Principles to the Present Case

71. In its previous judgment on the present case, the Constitutional Court found a violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution, as well as the freedoms of expression and of the press respectively safeguarded by Articles 26 and 28 of the Constitution. It also held that the judgment be sent to the incumbent court in order to redress the violation and its consequences.

72. In his previous individual application, the applicant had maintained that he had been detained on remand without a strong indication of guilt on the part of him, which had been in breach of Article 19 of the Constitution (see *Şahin Alpay*, § 66).

73. The right to personal liberty and security falls into the common protection area of Article 19 of the Constitution and Article 5 of the European Convention on Human Rights. One of the issues encompassed by Article 19 of the Constitution is detention measure (see *Bekir Akkaya*, no. 2014/20387, 14 September 2017, § 32). As a matter of fact, this measure is explicitly prescribed in paragraph 3 of this Article. Therefore, there is no doubt that every person can lodge an individual application with the Constitutional Court for the alleged violation of her/his personal liberty and security due to detention and that the Court must examine and adjudicate on such complaints.

74. In its previous judgment, the Constitutional Court examined the applicant's abovementioned allegation under Article 19 § 3 of the Constitution, which sets forth the safeguards concerning detention measure within the scope of the right to personal liberty and security. It is clearly provided therein, by the phrase "*Individuals against whom there is strong evidence of having committed an offence may be arrested…*", that one of the constitutional safeguards against detention is the existence of "a strong indication of guilt".

75. Therefore, it is a constitutional obligation for the Constitutional Court to examine whether there exists "a strong indication of guilt" concerning detentions subject to individual applications alleging violation of the right to personal liberty and security. The Constitutional Court cannot be expected to make an examination with respect to fundamental rights and freedoms by ignoring a safeguard explicitly enshrined in the Constitution. Otherwise, it would be impossible to examine individual applications complaining of violation of fundamental rights and freedoms within the framework of the criteria prescribed in the Constitution.

76. Essentially, in every concrete case, it falls in the first place upon the incumbent courts deciding detention cases to determine whether the prerequisite for detention, i.e. the strong indication of guilt, exists. This is because those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations (see *Gülser Yıldırım (2)* [Plenary], no. 2016/40170, 16 November 2017, § 123). However, determinations of these authorities are subject to review of the Constitutional Court. This review must be conducted especially over the detention process and the grounds of detention order by having regard to the circumstances of the concrete case (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 79; and *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 76; and *Gülser Yıldırım (2),* cited-above, § 124).

77. Besides, within the meaning of Article 19 § 3 of the Constitution, it is a constitutional obligation for the inferior courts deciding detention cases to demonstrate existence of strong indication of guilt −the prerequisite for detention− on the basis of concrete facts. This cannot be regarded as premature statement of the opinion by a judge concerning the merits of the case (*ihsas-ı rey*). In this respect, it is out of question not to fulfil a constitutional obligation due to the prohibition of such premature statements. Moreover, Article 101 § 2 of the Code of Criminal Procedure no. 5271 and dated 4 December 2004 also sets forth that in detention orders, evidence which demonstrates strong indication of guilt must be explicitly demonstrated, along with the concrete facts supporting such evidence.

78. In its previous judgment, the Constitutional Court reviewed the case with the abovementioned scope and method and concluded that the investigation authorities failed to sufficiently demonstrate "the strong indication of guilt", a prerequisite for detention pursuant to Article 19 of the Constitution. Accordingly, in this judgment, the Constitutional Court made an examination as to the right to personal liberty and security, −one of the fundamental rights and freedoms falling into the scope of the individual application−, under a safeguard explicitly enshrined in Article 19 of the Constitution. Therefore, the Court's review cannot be regarded as "the assessment of the issues to be considered in appellate review" or "a substantive review" (see above §§ 53 and 55). Furthermore, as also expressed in the previous judgment, the Constitutional Court's review in this respect is limited to the assessment of the lawfulness of the applicant's detention on remand, independently of the investigation and prosecution conducted against the applicant as well as the possible results of the proceedings (see *Şahin Alpay*, § 71). Therefore, the judgment in question cannot be considered to have included an assessment as to the merits of the criminal proceedings against the applicant.

79. In addition, in its previous judgment, the Constitutional Court held that the judgment be remitted to the incumbent court in order to redress the previously found violation and its consequences. There is no doubt that the Constitutional Court's judgment finding a violation with respect to the applicant is final and binding. The Constitutional Court's judgments finding a violation cannot be subject to constitutional or legal review by another authority. The contrary assessments of the inferior courts adjudicating on the applicant's requests for release (see above § 18) lack any constitutional or legal basis. Besides, in order for the judgment finding a violation in respect of the applicant to bear a legal consequence, its

publishing in the Official Gazette is not a requisite. In this respect, its notification to the relevant authority would suffice (see above § 70).

80. In circumstances where the Constitutional Court finds a violation and orders redress of this violation and consequences thereof, the relevant authorities must act in a manner that would redress the violation and its consequences by paying due regard to the nature of the judgment finding violation (see above §§ 57 and 58). Accordingly, in the present case, the inferior courts' duty is not to assess the scope of duties and powers of the Constitutional Court but to redress the violation and its consequences. This cannot be construed as an order or instruction directed to courts within the meaning of Article 138 of the Constitution, but rather the materialization of the right of access to a court in a state of law. Indeed, as stated above, Article 153 § 6 of the Constitution, distinctively from Article 138 thereof, explicitly states that the judgments of the Constitutional Courts are binding on judicial authorities as well (see above § 63).

81. In its judgment finding a violation in respect of the applicant, the Court concluded that the investigation authorities could not sufficiently demonstrate a "strong indication" that the applicant committed an offence, which is a prerequisite for detention as set forth in Article 19 of the Constitution.

82. Following the Constitutional Court's such judgments finding a violation, the inferior courts must release the applicant against whom the prerequisite of detention could not be demonstrated. There is no other way to redress the violation and its consequences, save very exceptional cases where "a strong indication of guilt" can be demonstrated on the basis of new facts other than those that had been relied for detention and, therefore, that had not been assessed in the Constitutional Court's judgment finding a violation. It must be also stressed, however, the margin of appreciation afforded to the inferior courts in this respect is very limited compared to the initial detention order. In such cases, final assessment as to whether "a strong indication of guilt" has been demonstrated or not on the basis of new facts and evidence falls upon the Constitutional Court.

83. In the present case, the inferior courts have not released the applicant following the Constitutional Court's judgment finding a violation, nor have they demonstrated the existence of the abovementioned exceptional case.

84. Therefore, it is understood that the inferior courts have failed to redress the violation found by the Constitutional Court with respect to the applicant, as well as its consequences.

85. In this respect, in the absence of a strong indication of guilt on the part of the applicant, continuation of his detention on remand violates the safeguards provided in Article 19 of the Constitution.

86. It is concluded that the applicant's right to personal liberty and security has been violated due to non-implementation of the Constitutional Court's judgment on the applicant's detention on remand, in a manner also contradicting the safeguards inherent in the right to access to a court.

87. Besides, regard being had to the fact that the application in essence concerns the continuation of the applicant's detention on remand in spite of the Court's judgment finding a violation for non-existence of a strong indication of guilt, the Constitutional Court made no further examination on the applicant's allegations that his some other fundamental rights and freedoms were also violated due to continuation of his detention on remand.

3. Article 50 of Law no. 6216

88. The applicant requested discontinuation of his detention on remand and to be awarded 100,000 Turkish Liras ("TRY") as non-pecuniary damage.

89. The applicant is still detained on remand (see above § 21). Considering the nature of the violation found, there is no other way than releasing the applicant in order to redress the violation and its consequences. Therefore, the judgment must be remanded to the trial court for release of the applicant in order to redress the violation and its consequences.

90. A net amount of TRY 20,000 must be awarded to the applicant for non-pecuniary damages that he suffered due to the interference with his right to personal liberty and security and that cannot be redressed by only finding a violation.

91. The court expense of TRY 2,274.70, which includes the court fee of TRY 294.70 and counsel fee of TRY 1,980 and which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

The Constitutional Court unanimously held on 15 March 2018 that

A. The applicant's alleged violation of his right to personal liberty and security be DECLARED ADMISSIBLE.

B. The right to personal liberty and security safeguarded by Article 19 of the Constitution was VIOLATED.

C. One copy of the judgment be REMITTED to the 13th Chamber of the Istanbul Assize Court (E.2017/112) for redress of the violation and its consequences by means of ordering discontinuation of the applicant's detention on remand.

D. A net amount of TRY 20,000 be PAID to the applicant in respect of non-pecuniary damage, and his other compensation claims be REJECTED.

E. The total court expense of TRY 2,274.70 including the court fee of TRY 294.70 and counsel fee of TRY 1,980 be REIMBURSED TO THE APPLICANT.

F. The payment be made within four months as from the date when the applicant applies to the Ministry of Finance following the notification of the judgment. In case of any default in payment, legal INTEREST ACCRUE for the period elapsing from the expiry of four-month time limit to the payment date.

G. One copy of the judgment be SENT to the Ministry of Justice.