THE CONSTITUTIONAL COURT OF TURKEY

SELECTED JUDGMENTS

2017

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FOREWORD

The individual application remedy provided individuals with a domestic safeguard at the highest level against public actions or omissions intruding fundamental rights and freedoms. Individuals have gained direct access to the Turkish Constitutional Court, and that in turn increased the human rights awareness among the mass public. The individual application also prompted the development of the human rights jurisprudence within the Turkish legal system.

The individual application proved to be an effective remedy in protecting rights and freedoms thanks to the rights-based approach adopted by the Constitutional Court. In the course of individual application, the Constitutional Court has addressed many legal issues arising in the context of human rights law as well as certain chronicle problems such as lengthy trials.

Despite the relatively short time period, the Constitutional Court has built considerable case-law since the individual application started to operate in 2012. This volume of the book includes selected admissibility decisions and judgments rendered by the Constitutional Court in 2017 within the scope of individual application. These judgments, many of which attracted high public attention as well, bear significance with regards to the development of case-law.

Sincerely wishing that this book will contribute to upholding the rule of law and protecting rights and liberties of individuals.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional Court

INTRODUCTION

This book covers selected inadmissibility decisions and judgments which are capable of providing an insight into the case-law established in 2017 by the Plenary and Sections of the Turkish Constitutional Court through the individual application mechanism. In the selection of the decisions and judgments, several factors such as their contribution to the development of the Court's case-law, their capacity to serve as a precedent judgment in similar cases as well as the public interest that they attract are taken into consideration.

The book includes two chapters: chapter one is comprised of inadmissibility decisions and chapter two is of judgments where the Constitutional Court deals with the merits of the case following its examination on the admissibility. The inadmissibility decisions are outlined in chronological order whereas the judgments are primarily classified relying on the sequence of the Constitutional provisions where relevant fundamental rights and freedoms are enshrined. Subsequently, the judgments on each fundamental right or freedom are given chronologically.

As concerns the translation process, it should be noted that the whole text has not been translated. First, an introductory section where the facts of the relevant case are summarized is provided. In this section, the range of paragraph numbers in square brackets are representing the original paragraph numbers of the judgment. Following general information as to the facts of the case, a full translation of the remaining text with the same paragraph numbers of the original judgment is provided. This fully-translated section where the Constitutional Court's assessments and conclusions are laid down begins with the title "Examination and Grounds".

By adopting such method whereby not the full text but mainly the legal limb of the judgment is translated, it is intended to present and introduce the Constitutional Court's case-law and assessments in a much focused and practical manner. The decisions and judgments included herein are the ones which particularly embody the unprecedented case-law of the Constitutional Court.

Judgements rendered through individual application mechanism may contain assessments as to complaints raised under several rights and freedoms (assessments, in the same judgments, as to the complaints of alleged violations of the right to a fair trial as well as the freedom of expression and dissemination of thought and etc.). In this sense, the main issue discussed in the judgment is focalized while selecting the fundamental right title under which the judgment would be classified, and the judgment is presented under a title related to only one fundamental right.

Besides, short abstracts of the judgments are presented in the table of contents for a better understanding as to the classification of the judgments by the fundamental rights and freedoms as well as for providing a general idea of their contents.

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ADMISSIBILITY DECISIONS

proceedings which lasted approximately nine years, due regard was not paid to the fact that the administration failed to take the necessary measures for the people in need of protection, and that the supervision failure of the applicant's family did not eliminate the responsibility of the administration to do so, and therefore the applicant was found to be at complete fault due to his careless conduct. Such a conclusion did not comply with the principle of providing an effective judicial protection against a real risk to the life. Consequently, the Court found a violation of the right to life safeguarded by Article 17 of the Constitution.

which was considered to pose a danger to the public security if carried out in Hakkari– to Isparta, about 1,500 kilometers away from Hakkari, without any justification. Consequently, the Court found a violation of the procedural aspect of the right to life concerning the obligation to conduct an effective investigation.

RIGHT TO PROTECT AND IMPROVE ONE'S CORPOREAL AND SPIRITUAL EXISTENCE (ARTICLE 17 § 1)

7. T. A. A., no. 2014/19081, 1 February 2017 185

Alleged violations of the protection and improvement of corporeal and spiritual existence, right to respect for private life and the principle of equality due to termination of the applicant's employment contract for his being HIV positive:

Alleged violation of the right to respect for private life and the right to protect and improve corporeal and spiritual existence assessed in conjunction with the principle of equality due to the dismissal of the action brought for seeking compensation for discrimination: In their decisions, the Court of Cassation and the Labour Court focused on the "contagious" nature of the applicant's disease and therefore considered that the only solution to prevent this risk from occurring was to suspend the applicant from work. However, in the relevant decisions, it was not taken into consideration whether the employer had the obligation to assess the opportunity to allow the applicant to work in another position that would not pose a risk to the other workers. Their decisions included no assessment as to the obligation to look for alternative positions at the workplace and therefore no fair balance was struck between the conflicting interest of the employer and the employee. Consequently, the Court found violations of the applicant's right to protect his corporeal and spiritual existence as well as his right to respect for private life, which are respectively safeguarded by Articles 17 and 20 of the Constitution.

Alleged violation of the right to respect for private life due to rejection of the request for holding of his trial closed to third parties: Considering that people with HIV infection are a weak group that has been exposed to prejudice and condemnation for a long time and that in case of being subject to exclusion, stigmatization and prejudice especially in the business life, its effects on people may be much more devastating, the applicant's request for confidentiality is of reasonable and defensible nature within the scope of the right to respect for private life. Although it is stated by the Labour Court that the request for confidentiality is denied due to the nature of the complaint petition, the relevant statement is ambiguous and is far from explaining the concrete reasons why the confidentiality decision was not given. It appears that although same allegations were put forth at the appellate stage, any justification on these matters was not included in the appellate judgment. Consequently, the Court found a violation of the applicant's right to protection of personal data, which is one of the elements of the right to respect for private life safeguarded by Article 20 of the Constitution.

PROHIBITION OF TORTURE AND ILL-TREATMENT (ARTICLE 17 § 3)

Alleged violation of the prohibition of ill-treatment due to imposition of degrading treatment systematically by certain military officers and students with a view to forcing to drop out of the Air Force Academy: Some students had to drop out of the Military Academy as they had been subject to physical and psychological ill-treatment systematically, which was incompatible with the training requirements, and that however, the Military Prosecutor's Office failed to investigate whether or not the actions against the applicant had also been carried out against the other students within an organizational structure and in a prevalent way. The failure to investigate such allegations in due course and in a detailed manner also prevents the

structures likely to organize within the Turkish Armed Forces from being revealed. This situation may lead to the continued violation of the individuals' fundamental rights and freedoms implicitly and systematically and also to problems in respect of national security due to the fact that the actions were carried out at a military training institution. Consequently, the Court concluded that Article 17 § 3 of the Constitution was violated under its procedural aspect, since the allegations in the concrete case were not carefully and diligently discussed at the investigation stage even if the applicant had a defensible allegation of torture and ill-treatment together with the other evidence in the investigation.

9. Azizjon Hikmatov, no. 2015/18582, 10 May 2017 231

*Alleged violation of the prohibition of ill-treatment due to the order to deport the applicant to the country where he would face the risk of being killed or ill-*treated: Regard being had to the information and documents submitted by the applicant, the ECHR's assessments as to the conditions of the country where the applicant was deported, that fact that the applicant had entered into Turkey and had requested to be granted international protection at a date before the clashes took place in Syria (2009) and that the UNHCR granted the applicant temporary refugee status in 2010, it was observed that the applicant's allegations that he might be exposed to ill-treatment in his country were worth of being investigated. The administrative court indicated that the applicant was among the persons posing a threat to public safety; that he was banned from entering into Turkey; and that his request for granting international protection was dismissed. It accordingly held that the applicant's deportation was not unlawful. However, the allegations which had been consistently put forth by the applicant since 2009 primarily before the UNHCR and the Immigration Authority and subsequently during the proceedings before the Administrative Court were not taken into consideration. In the course of the proceedings, no investigation was conducted

into the accurateness applicant's allegations which have also been discussed in the ECHR's judgments and in the reports of the non-governmental organizations carrying out researches in the field of human rights. Nor did the administrative court's decision included an assessment as to why these allegations were not relied on. Accordingly, the obligation to conduct an investigation into and make an assessment as to the risk likely to be faced by the applicant in case of being deported to Uzbekistan was not fulfilled in the course of the administrative proceedings. Consequently, the Court found a violation of the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

10. Aydın Yavuz and Others [Plenary], no. 2016/22169, 20 June 2017 247

Alleged violation of the right to personal liberty and security due to unlawfulness of detention effected within the scope of an investigation conducted in relation to the coup attempt, continuation of detention beyond a reasonable period, denial of access to investigation file and judicial review of detention without a hearing:

As regards the alleged unlawfulness of detention: The Court found the complaint inadmissible for being manifestly ill-founded on the grounds that the applicants, Burhan Güneş and Aydın Yavuz, were users of the "ByLock" application (app), which was the digital platform through which the FETÖ/PDY members maintained secure communication among themselves; that taking into account the technical features of this app, it was comprehensible that the fact that the applicants had and used this app was considered by authorities as a strong indication for their connection with the FETÖ/PDY; that as a matter of course, the degree of this indication may vary by concrete incidents, depending on the factors such as whether this app had been actually used by the individual concerned, the manner and frequency of its use, the position of

and importance attached to the contacts within the FETÖ/PDY, and the content of messages communicated via this app; that moreover, the competent authorities' assessment that the use of ByLock or having it in electronic/mobile devices constituted a strong indication of having committed an offence could not be considered as unfounded or arbitrary; that therefore, it must be concluded that there was, also in this respect, a strong suspicion that the applicants Burhan Güneş and Aydın Yavuz, users of this app, had committed the imputed offences; and that considering the general circumstances in which the applicants were detained and the particular circumstances of the present case together, it was understood that the legal grounds for the applicants' detention, the risk of tampering with evidence and suspicion of fleeing had sufficient factual basis.

As regards the alleged judicial review of detention without a hearing: The Court found no violation of the right to personal liberty and security taken together with Article 15 of the Constitution on the ground that the applicants' continued detention for 8 months and 18 days through judicial reviews over the case-file without a hearing was a proportionate measure which was required by the exigency of the state of emergency having regard to the severe workload of unforeseeable nature to which the investigation authorities and judicial organs were exposed after the coup attempt, the suspension and dismissal of a significant part of the judges and prosecutors who would tackle with this workload and ensure proper functioning of the legal system within the country (about 1/3 of all members of the judiciary) by the HCJP for being in relation and connection with the FETÖ/PDY, and the dismissal of a significant part of the assistant courthouse personnel and law enforcement officers from public office who would take part in the investigations and prosecutions including those concerning the coup attempt or the FETÖ/PDY.

FREEDOMS OF EXPRESSION, THE ARTS AND THE PRESS (ARTICLES 26, 27 AND 28)

in terms of ordinary defamation cases as in the present application, inevitably had a chilling effect on these freedoms; and that his being subject to a probation period subsequent to the suspension of the pronouncement of his verdict caused the fear of being sanctioned, which would have a suspensive effect on him; and that such a suspensive effect may restrain disclosure of his thoughts or his press activities.

15. Hakan Yiğit, no. 2015/3378, 5 July 2017 367

Alleged violation of the freedoms of expression and the press due to the news director's conviction to imprisonment as the video included in his news breached the privacy of communication: The applicant was convicted of having disclosed the contents of communication –which were published on the internet– of Fetullah Gülen, known by the public as a retired preacher. These contents enabled individuals to learn ideas and conducts of the complainant, Fetullah Gülen, -who is indisputably a notable person both at the relevant time and subsequent to the coup attempt of 15 July 2016- as well as activities of the group led by the complainant in the political, social and economic fields and to form an opinion on these matters. Therefore, publication of the contents undoubtedly contributed to a debate of high public interest, which was at the top of the public agenda. Besides, the complainant did not claim that the applicant had made unreal news by altering the content or making any addition thereto. Nor did the first instance court take into consideration the fact that it was not the applicant who had published the said communication contents for the first time. Consequently, the inferior courts' intent to protect the complainant's freedom of communication was not sufficient for justifying the restrictions imposed on the applicant's freedoms of expression and the press enshrined in Articles 26 and 28 of the Constitution. The inferior courts failed to strike a fair balance between the protection of freedom of the press as well as freedom of communication, which is an aspect of the private life. The applicant's being

and the press guaranteed under Articles 26 and 28 of the Constitution -caused by the blocking of access decision giving rise to the complaint- did not correspond to a more pressing social need; that the impugned blocking of access decision was not necessary in a democratic society for the protection of the complainant's reputation; that the pieces of news and articles at issue seemed to have been blocked for an indefinite duration; and that therefore, even if it was argued that the disputed restriction concerned certain specific articles and had limited effects, the significance of the interference was not any less; and that it could not be considered as proportionate under the circumstances of the instant case that a decision taken as a measure without establishing relevant and sufficient grounds would stay in effect indefinitely.

18. İrfan Sancı, no. 2014/20168, 26 October 2017 421

Alleged violation of the freedoms of expression and the press due to suspension of prosecution and imposing a three-year-long probation without considering whether the impugned works have any scientific, artistic or literary value as well as whether any measure must be taken for the protection of minors: The Court found violations of the freedoms of expression, the arts and the press safeguarded respectively by Articles 26, 27 and 28 of the Constitution on the grounds that in disputes regarding works in which obscene elements were found and which were alleged to be of scientific, artistic or literary nature, primarily the authorities exercising public power and then the inferior courts must determine whether the impugned works had any scientific, artistic or literary value; that if these works were deemed to have such qualifications, it must be then considered whether the measures for the protection of minors were taken during the presentation, publication, dissemination, and handing over of artistic and literary works (excluding the scientific ones), and if taken, whether these measures were proportionate; that however, in the present case, it was not assessed whether the impugned book was a literary work as well as whether it was

necessary for achievement of the legitimate aims provided in Article 34 § 2 of the Constitution and the applicant's rights enshrined in Article 34 § 1. Dispersing the demonstration by the use of police force, taking the applicant into custody, and placing the applicant under a three-year probation period by suspending the prosecution against her was not necessary for achieving the legitimate aim of maintaining the public order envisaged in Article 34 § 2 of the Constitution. Consequently, the Court found a violation of the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

RIGHT TO PROPERTY (ARTICLE 35)

Alleged violation of the right to property due to the decrease in rental income for closure of the street, where the applicants' immovable is, to vehicles or pedestrians: The Court found a violation of the right to property safeguarded by Article 35 of the Constitution on the grounds that the trial court sought the condition of finding of a fault on the part of the administration in order to hold an examination as to the existence of a damage and a causal link in the action for compensation brought by the applicants wishing to claim redress for the damage allegedly incurred due to the street's closure to pedestrians and vehicles, which led the applicants to be deprived of the possibility of receiving compensation as well as balancing the burden imposed on them by proving the existence of the damage and the causality between the administration's act and the damage; and that the applicants' being forced to bear the burden arising from this measure taken for the benefit of the whole society resulted in the disturbance, to the detriment of the owner, of the reasonable balance needed to be struck between the aim of public interest and the owner's right to property, which rendered the interference with the right to property disproportionate.

any compensation; that the inferior courts' strict approach involving a disregard for the public authorities' attitude and behaviour in the course of events imposed a personally excessive and extraordinary burden on the applicant; and that the fair balance needed to be struck between public interest and the applicant's right to property was upset to the detriment of the applicant and that the interference was not proportionate.

RIGHT TO EDUCATION (ARTICLE 42)

Alleged violation of the right to education due to failure to redress the damage sustained by the applicant who had been given disciplinary punishment for his opinions in the petition that he had submitted to the administration of the university he had been attending and had been unable to attend the school for the disciplinary punishment in question: The applicant was dismissed from the university as he had exercised his freedom of expression. In the light of the circumstances of the case, such a disciplinary sanction could not be regarded as necessary in the democratic order of the society. As a matter of fact, also the administrative court considered the applicant's act within the scope of the freedom of expression and found the said sanction unlawful and therefore lifted it. The applicant's claims for compensation was also rejected by the school administration and the courts on the ground that there had not been a serious legal error or gross fault which would result in the administration's liability for paying compensation. Accordingly, even though the applicant could subsequently return to his school, pecuniary and non-pecuniary damages sustained by him could not be redressed and therefore his grievances continued. Consequently, the Court found a violation of the applicant's right to education safeguarded by Article 42 of the Constitution.

RIGHT TO UNION (ARTICLE 51)

that the banners, which did not include any criminal element, deteriorated the public order or posed a danger in this respect, was not necessary in a democratic society. In this respect, the administrative fine imposed on the applicants might create a deterrent factor in terms of carrying out labour union activities. Consequently, the Constitutional Court found a violation of the right to union safeguarded by Article 51 of the Constitution.

CHAPTER ONE
ADMISSIBILITY DECISIONS

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

DECISION

K. V.

(Application no. 2014/2293)

1 December 2016

On 1 December 2016, the Plenary of the Constitutional Court declared inadmissible the individual application lodged by *K.V.* (no. 2014/2293) for being devoid of constitutional and personal significance without making any further examination as to the other admissibility criteria.

THE FACTS

[8-35] The applicant being a self-employed lawyer brought a full remedy action before the Supreme Military Administrative Court ("the SMAC") for being insulted by his superior while he was fulfilling his military duty. The Second Chamber of the SMAC decided through its decision of 9 October 2002 that the claim for compensation was partially accepted and partially rejected. The applicant requested rectification of the decision of partial rejection; the Second Chamber of the SMAC rejected this request by its decision of 26 February 2003, and the applicant was imposed a fine of 54.55 Turkish Liras ("TRY") regarding rectification of the decision.

The Presidency of the High Military Administrative Court issued a writ to the Tax Office on 3 March 2003 to ensure the collection of the fine; and the Tax Office transmitted the payment order to the applicant's address on 4 May 2007, intended to make a notification through an officer on 22 July 2008 but upon the failure to make the notification, it publicly notified the payment order on 29 December 2008.

After a letter requesting a meeting on payment of the debt had been sent by the Tax Office to another address of the applicant, the applicant made a cancellation request (*terkin talebi*) on 31 December 2011 alleging that the mentioned fine was time-barred. His request was rejected by the act of 27 January 2012. The aforesaid debt was collected on 29 February 2012 as TRY 184, plus the interest.

The applicant brought an action for the cancellation of the notice by publication and of the act regarding rejection of the cancellation request, stating that he had been a tax payer in the capacity of a self-employed

lawyer since 2004, that he submitted a declaration every month, that the addresses indicated in the tax declarations were deemed to be as among the well-known addresses, that there was an effort to notify the payment order to an address other than the known address and without making any sufficient research. He accordingly alleged that this notification is contrary to law, and that the collection of time-barred debt is at issue.

The 6th Chamber of the Ankara Administrative Court dismissed the action on the grounds that the procedure of notice by publication cannot be actionable since it is not a certain procedure to be carried out on a compulsory basis, and that the fine in question had not time-barred.. The Administrative Court also awarded the attorney's fee as TRY 660 in favour of the respondent administration (the defendant).

The applicant raised an objection to the mentioned decision alleging that his claims regarding the illegality of the notice by publication was not examined and that the attorney's fee was awarded even though the respondent administration (the defendant) was not represented by an attorney. The 1st Chamber of the Ankara District Administrative Court rejected the objection by it decision of 18 December 2003 with reference to the decision rendered by the first instance court.

V. EXAMINATION AND GROUNDS

36. The Constitutional Court, at its session of 1 December 2016, examined the application and decided as follows:

A. Alleged Violation of the Right to a Fair Trial Due to the Imposition of a Fine on Account of Dismissal of the Rectification Request

1. The Applicant's Allegations

37. The applicant alleged that there had been a violation of the right to a fair trial enshrined in Article 36 of the Constitution by maintaining that his freedom to claim rights had been restricted because of the imposition of a fine on him upon the dismissal of his request for rectification of the

decision by the 2nd Chamber of the Supreme Military Administrative Court ("the SMAC") in its decision of 26 February 2003.

2. The Court's Assessment

38. Provisional Article 1 § 8 of the Law on the Establishment and Rules of Procedures of the Constitutional Court (Law no. 6216, dated 30 March 2011) reads as follows:

> *"The court shall examine individual applications to be lodged against the acts and decisions that became final after 23 September 2012."*

39. Pursuant to this legal provision, the Court's compatibility *ratione temporis* runs from 23 September 2012, which means that it is authorised to examine only the individual applications lodged against the acts and decisions that became final after the said date. It is not possible to expand the Court's temporal jurisdiction to include the final acts and decisions that became final prior to the above-mentioned date (see *Hasan Taşlıyurt*, no. 2012/947, 12 February 2013, § 16).

40. The fact that a definite date is determined for the Constitutional Court's temporal jurisdiction and that it is not applied retrospectively is a requirement of the principle of legal security (see *Zafer Öztürk*, no. 2012/51, 25 December 2012, § 18).

41. In the case giving rise to the present application, although the applicant claims a breach of his right of access to a court due to the fine imposed on him upon the dismissal of his rectification request, the fine in question was imposed as with final effect on 26 February 2003 by the 2nd Chamber of the SMAC.

42. In this case, since the applicant's complaint concerning a breach of the right of access to a court relies on a court decision that became final before 23 September 2012, it falls outside the scope of the Court's temporal jurisdiction.

43. For these reasons, seeing that the alleged violation concerns a date prior to 23 September 2012, the Court considers that this part of the application must be declared inadmissible, without examining it from

the standpoint of the remaining admissibility criteria, for *incompatibility ratione temporis*.

B. Alleged Violation of the Right to a Fair Trial in the Proceedings Brought against the Procedure Conducted for Collection of the Fine

1. The Applicant's Allegations

44. Stating that the inferior court did not respond to his allegation concerning the expiry of the statutory limitation period in respect of the fine of 54.55 Turkish liras (TRY) -imposed on him upon dismissal of his rectification request ("the rectification fine")- due to the failure to duly notify him of the payment order regarding the collection of this fine, the applicant complained of a violation of his right to a reasoned decision. The applicant further alleged that there had been violation of his right of access to a court due to the fact that he had been ordered to pay TRY 660 as attorney's fee (of the opposing party).

2. The Court's Assessment

45. Article 48 § 2 of Law no. 6216, titled "*Conditions for and examination of the admissibility of individual applications*", reads as follows:

> *"The Court can decide that applications which bear no importance as to the application and interpretation of the Constitution or regarding the definition of the limits of fundamental rights and freedoms and whereby the applicant has incurred no significant damages and the applications that are manifestly ill-founded are inadmissible."*

46. In the present case, the applicant maintained that he paid TRY 184 for the rectification fine that had been ruled as TRY 54.55; he was ordered to pay TRY 660 for the attorney's fee of the respondent party in the action he brought against the collection procedure; and he also paid TRY 114.85 of court fee and TRY 100 of postage cost for the proceedings in question. Hence, the amount of pecuniary damage incurred by the applicant due to the alleged violations reached TRY 1,058.85 in total. The Court will now examine whether the application lacks constitutional and personal significance, which is part of the admissibility criteria.

a. General Principles on the Criterion of Lack of Constitutional and Personal Significance

i. Origin and Purpose of the Criterion

47. Article 148 § 3 of the Constitution safeguards everyone's right to lodge an individual application. On the other hand, the aforementioned legal provision stipulates that the applications of little to no constitutional and personal significance may be dismissed without an examination on the merits. The origin of the said provision stems from the ever-present principle of *De minimis non curat praetor*, which states that the judge should not deal with minor/insignificant issues. One of the ideas behind this principle is to ensure that courts focus on their main functions and to prevent insignificant cases and applications from becoming an obstruction before that purpose by creating a heavy workload.

48. In comparative law, courts have been implementing the deep-rooted principle of *De minimis non curat praetor* with regard to disputes arising in various fields of law. The said principle is being applied in the field of human rights law as well due to the heavy workload faced by the international courts and the constitutional courts entrusted with the duty of reviewing individual applications or constitutional complaints and due to the difficulty they have in carrying out their main functions. Thus, such regulations were made in the laws setting out the functions and powers of the Federal Constitutional Court of Germany and the Constitutional Court of Spain as well as in the European Convention on Human Rights.

49. In our law, as well, there have been such long-standing regulations that do not allow pursuit of legal remedies in respect of certain disputes of little significance. These regulations were also made the subject of the Court's rulings. In this connection, the Court has not found it unconstitutional that there is a rule which disallows pursuit of legal remedies against the imposition of judicial fines under a certain limit. In reaching this conclusion, the Court drew attention to the said rule's aim of reducing the workload of appellate authorities. Having held that the right to a fair trial guaranteed by Article 36 of the Constitution could be limited with reference to Article 141 of the Constitution which requires proceedings to be concluded as quickly as possible, the Court arrived at

the conclusion that the unavailability of pursuing legal remedies in respect of "offences of little significance" would not prejudice the principle of State of law and the right to a fair trial (see the Court's judgment no. E.2011/64, K.2012/168, 1 November 2012).

50. Eventually, the Court has been authorised via Article 48 § 2 of the Law no. 6216 to declare inadmissible the applications that lack constitutional and personal significance with a view to ensuring that the Constitutional Court focuses on its main functions and preventing constitutionally and personally insignificant applications from creating a workload that would hinder the Court's achievement of its main functions. In the lower Committee meetings on the Law no. 6216, in fact, it was indicated that similar regulations were in place in the international law and comparative law and they were aimed at relieving the courts of a workload.

51. In interpreting the conditions for applying the criterion of "lack of constitutional and personal significance", the Court should take account of the purpose of this rule and, in that connection, the functions of the Constitutional Court with regard to individual applications should be set forth.

52. In the context of individual applications, the Court has two fundamental functions: objective and subjective. The Court's objective function is to interpret the Constitution's provisions that regulate the fundamental rights and freedoms and to supervise the implementation thereof. Its subjective role is to examine whether there has been a violation of the said provisions in the cases brought before it through individual applications and, where necessary, to award redress in favour of the applicant.

53. It must be acknowledged that the Court's objective function, which involves interpreting and applying the law, is more at the forefront than its subjective function. Indeed, in view of the subsidiary nature of the individual application mechanism -one of its basic principles- and its reflection in Article 148 § 3 of the Constitution which sets out the requirement of exhaustion of all remedies before lodging an individual application, public authorities and inferior courts (i.e. courts of instance)

play the primary role in terms of the protection of the fundamental rights and freedoms while the Court has a secondary role.

Therefore, the fundamental rights and freedoms should be protected at first hand by public authorities and inferior courts. If there is an allegation that these authorities have failed to offer a protection in line with the Constitution on a particular matter, then it will be possible to lodge an individual application. In such a case, the Court shall interpret the Constitution with regard to that matter and deliver a ruling. Thereafter the public authorities and the inferior courts shall be expected to shape their practices on the same matter within the framework of this interpretation. Otherwise, all disputes regarding the same matter would consequently be brought before the Court. It would be impossible to sustain an individual application mechanism functioning in such manner. The Court's interpretation of the Constitution plays a crucial role in the continuity of the above-mentioned mechanism's functionality. Its ability to fulfil its function in the best way possible depends on the Court concentrating its focus on matters in respect of which it has not previously interpreted the Constitution, rather than securing justice in each and every application.

ii. Conditions for Application of the Criterion

(1) In General

54. Pursuant to Article 48 § 2 of Law no. 6216, the Court may declare inadmissible the applications that do not bear significance with regard to the interpretation and the implementation of the Constitution or determination of the scope and the limits of fundamental rights and where the applicant has not incurred a significant damage.

55. The above-mentioned provision has introduced an additional admissibility criterion that allows for non-examination of applications on their merits if they lack constitutional and personal significance. Thus, even if it meets all the other admissibility criteria and is capable of leading to finding of a violation at the stage of assessment on the merits, such an application as described in the Law may be declared inadmissible.

56. Besides, none of the fundamental rights or freedoms have been left out of the scope of this admissibility criterion. Accordingly, it is possible for applications concerning an alleged violation of any of the fundamental rights and freedoms to be declared inadmissible under this criterion. On the other hand, the nature of the allegedly-violated right or freedom must be taken into consideration when deliberating upon the conditions for application of the said criterion.

57. The Law lays down two conditions for declaration of inadmissibility with respect to applications devoid of constitutional and personal significance: the first condition that can be called as "constitutional significance" implies that "the application is not significant in terms of implementation and interpretation of the Constitution or the determination of the scope and limits of fundamental rights"; and the second condition that can be called as "personal significance" implies that "the applicant has not suffered a significant damage".

58. The fact that the wording of the Law uses the conjunction "and" means that both conditions must be present for an individual application to be declared inadmissible through the application of the criterion of lack of constitutional and personal significance.

59. What the terms "constitutional significance" and "personal significance" imply has not been explicitly regulated in the Law but this issue has been left to the discretion of the Court. Therefore, the Court shall determine the principles surrounding the said conditions in its decisions where it applies the criterion of lack of constitutional and personal significance. In fact, during the lower Committee meetings of the Law no. 6216, it was indicated that the conditions in question were "vaguely" regulated in the text of the Law and that it would become concrete via the case-law of the Court as it had been in the examples taken from the international law and the comparative law.

60. While it is left to the Court's discretion to determine whether the conditions to apply this criterion are present in every particular case, the due diligence to be displayed by the applicants in terms of proving the existence of constitutional and personal significance shall have a bearing on the Court's assessment in this regard.

(2) Constitutional Significance

61. As regards the application of the condition of constitutional significance, the legislator defined three elements: (i) "being significant in terms of implementation of the Constitution", (ii) "being significant in terms of interpretation of the Constitution", and (iii) "being significant in terms of determination of the scope and limits of fundamental rights". On the other hand, the interpretation of constitutional provisions related to fundamental rights and freedoms naturally involves the determination of the scope and the limits of fundamental rights and freedoms. For this reason, it should be acknowledged that the constitutional significance contains two basic elements, which can be described as being significant with regard to the "interpretation" and the "implementation" of the provisions in the Constitution concerning the fundamental rights and freedoms.

62. Given the nature of the work and the text of the law, the Court considers that it will be sufficient for an application to be significant in terms of one of these two elements.

63. There is no doubt that the element of being significant in terms of interpretation of constitutional provisions primarily encompasses the matters which have not yet been interpreted by the Constitutional Court through the individual application mechanism. Besides, even if the Court has previously interpreted the relevant provisions of the Constitution regarding a certain matter, it can feel the need to reinterpret them, taking into account the changing situations. In that case, an application concerning that matter should be considered as constitutionally significant. Changes in the social and economic circumstances, amendments to the legislation on fundamental rights and freedoms, or emergence of a discrepancy among the Court's interpretations on a certain matter capable of leading to uncertainty with regard to the implementation of the Constitution may give rise to the need for re-interpreting the Constitution.

64. As for the element of being significant in terms of implementation of the Constitution, it reveals itself particularly in the discrepancy between the Court's interpretation of constitutional provisions and implementation thereof carried out by public authorities and instance

courts. However, each discrepancy in implementation does not imply that the application is "significant" in terms of implementation of the Constitution. For an application to be considered as significant in terms of implementation of the constitutional provisions concerning fundamental rights and freedoms, regard being had to the aim behind the introduction of the criterion of "lack of constitutional and personal significance", the practices of public authorities and inferior courts on a certain matter must be different than the Court's interpretation and that this discrepancy must be significant. In other words, since this criterion is in direct relation with the respect for the Constitution, only the discrepancies that would prejudice the respect for the Constitution must be deemed significant rather than any kind of discrepancy arising between the interpretation of the Court and the practices of public authorities and inferior courts.

65. In this scope, the fact that an application concerns a widespread practice that is different than the Court's interpretations means that it is significant in terms of implementation of the Constitution. On the other hand, even if a practice that is different than the Court's interpretations is not widespread, an application concerning thereof that is manifestly incompatible with the principle of respect for the Constitution should be considered as significant in terms of interpretation of the Constitution. In such cases, there might be a clear avoidance or, in some cases, even defiance of implementing the Constitution.

(3) Personal Significance

66. The condition of personal significance implies that the applicant has not suffered a major damage. This condition is related to the degree of the negative effect of the case at hand on the applicant's personal situation.

67. Whether the arising personal damage is significant or not shall not be determined by the applicant's subjective perception. This issue shall be considered by the Court by taking into account the particular circumstances of each case, including the applicant's circumstances, and by acting on the basis of objective data.

68. Whether the damage may be measured in money shall not be determinative for the assessment of its significance. It is possible to apply

the criterion of "lack of constitutional and personal significance" in respect of the damages which cannot be measured in money, as well. As regards the damages that can be measured in money, on the other hand, it is not possible to fix a certain amount to be taken as reference in respect of every applicant in the determination of the condition of personal significance. Such a certain amount may have varying degrees of significance for the applicants depending on the prevailing circumstances.

b. Application of Principles to the Present Case

i. As regards the Constitutional Significance

69. The applicant maintained that the inferior court had not responded to his allegations concerning the expiry of the statutory limitation period in respect of the rectification fine due to his inability to be duly notified of the payment order regarding this fine. This allegation concerns the right to a reasoned decision, which is an aspect of the right to a fair trial.

70. In many applications it has handled, the Court has determined the scope and content of the right to a reasoned decision. The Court has underlined in its case-law that, in order to achieve a practical and effective fulfilment of the guarantees regarding human rights rather than leaving them in an abstract and theoretical manner, the inferior courts should not confine themselves to giving responses to allegations and defences merely in appearance and form; the responses given to allegations and defences must be well-founded, coherent and reasonable. The Court drew attention to the fact, especially where the expressly and concretely-raised allegations and defences have an effect on the outcome of the proceedings, i.e. capable of changing the result of the trial, courts are required to respond with reasonable grounds to such matters that are in a direct relation with the proceedings (see *Muhittin Kaya and Muhittin Kaya İnşaat Taahhüt Madencilik Gıda Turizm Pazarlama Sanayi ve Ticaret Ltd. Şti.*, no. 2013/1213, 4 December 2013, §§ 25, 26; *Vesim Parlak,* no. 2012/1034, 20 March 2014, §§ 33, 34; *Yasemin Ekşi*, no. 2013/5486, 4 December 2013, §§ 56, 57; *Sencer Başat and Others* [Plenary], no. 2013/7800, 18 June 2014, §§ 31-39; *Münür Ata,* no. 2014/4958, 22 January 2015, §§ 37-43; *Hikmet Çelik and Others,* no. 2013/4894, 15 December 2015, §§ 54-59; and *Şah Tarım İnş. Tur. Ltd. Şti.*, no. 2013/7847, 9 March 2016, §§ 36-48).

71. The applicant further complained about the violation of his right of access to a court due to the award of an attorney's fee in favour of the respondent party. In many applications it has handled, the Court has determined the scope and content of the right of access to a court. Having held that the attorney's fee constituted an interference with the right of access to a court, the Court stressed that the fee imposed must have a legal basis (see *Yahya Özay*, no. 2014/11141, 22 September 2016), pursue a legitimate aim, be proportionate and not impose a heavy burden on the applicant (see *Serkan Acar*, no. 2013/1613, 2 October 2013, §§ 38, 39; *Özkan Şen*, no. 2012/791, 7 November 2013, §§ 52-54, 58, 61-67; and *Murat Daş*, no. 2013/3063, 26 June 2014, §§ 43, 51-54). In the case of *Ahmet Türko* (no. 2013/5949, 12 March 2015), the Court found a breach of the applicant's right of access to a court on the grounds that the attempts for notification of the payment order had been made to an address other than the known address and without having conducted sufficient research; the applicant had been prevented from using his right to bring an action against the notification as a result of the eventual recourse to the method of notification by way of announcement; and the applicant had had a limited right to bring an action against the payment order issued.

72. In the light of these explanations, it is understood that such complaints that are similar to the ones lodged under the present application have been previously examined by the Court and the relevant rules of the Constitution have been interpreted.

73. Although it may be asserted that the impugned practice of the inferior court -giving rise to both of the applicant's complaints- differed from the interpretations adopted by the Court in its above-mentioned case-law, the Court considers that this difference does not point at a general problem.

74. Accordingly, the Court concludes that the present application concerning the alleged violations of the right to a reasoned decision and the right of access to a court, with respect to which it has a clear and frequently-applied case-law, does not point to a general problem. It also arrives at the conclusion that the present application has not been proven to carry any significance in terms of implementation and interpretation

of the Constitution or determination of the scope and the limits of fundamental rights.

ii. As regards the Personal Significance

75. The items of damage allegedly incurred by the applicant in the instant case are the rectification fine, for which he paid TRY 184, and the attorney's fee of TRY 660, which he has not yet paid according to his assertions. The applicant also claimed that he had spent TRY 114.85 in court fees and TRY 100 in postal costs for this set of proceedings.

76. The applicant did not mention any non-pecuniary damage or claim any non-pecuniary compensation. He only requested the Court to rule on a retrial and the individual application costs and the attorney's fee for the individual application process be covered by the Treasury.

77. The issue that was of main importance for the applicant is the fact that he had failed to timely pay the rectification fine of TRY 54.55, to which there had been no impediment upon the notification of the final decision of the SMAC; upon which the debt was taken under a pursuit for collection by the tax office but the applicant was not duly notified over the course of that pursuit and, therefore, had to pay TRY 184 for this fine; and he had to bear a litigation cost of TRY 874.85 in the action he brought to challenge this matter.

78. In sum, the total amount of the pecuniary damage suffered by the applicant in the present case shall be acknowledged as TRY 1,058.85 by the Court. Having regard to the fact that the applicant, who was working as a self-employed lawyer, failed to make an explanation to indicate that such an amount seriously damaged his financial situation and how significant it was for him, the Court has concluded that this does not amount to a significant damage for the applicant.

iii. Conclusion

79. In the light of the above, the Court has reached the conclusion that the application is not of significance in terms of implementation and interpretation of the Constitution and also that the applicant has not suffered a significant damage.

80. For these reasons, the Court must declare this part of the application, which is understood to be lacking of constitutional and personal significance, inadmissible without holding any examination in respect of the remaining admissibility criteria.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 1 December 2016 that

A. The applicant's request for anonymity in public documents be ACCEPTED;

B. 1. The allegation concerning the imposition of a fine as a result of the dismissal of a rectification request be DECLARED INADMISSIBLE for *incompatibility ratione temporis*;

2. The allegations concerning the action brought against the collection procedure of the fine be DECLARED INADMISSIBLE for *lack of constitutional and personal significance*;

C. The court expenses be COVERED by the applicant;

D. A copy of the judgment be SENT to the Ministry of Justice.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

DECISION

B. T.

(Application no. 2014/15769)

30 November 2017

On 30 November 2017, the Plenary of the Constitutional Court declared inadmissible the individual application lodged by *B.T.* (no. 2014/15769) for non-exhaustion of available remedies insofar as it concerned the alleged violation of the prohibition of treatment incompatible with human dignity due to unlawfulness of administrative detention, inhuman and degrading conditions of detention and non-existence of an effective remedy to challenge detention.

THE FACTS

[9-38] The applicant, an Uzbek national who stated that he had left his country for being subject to oppression on account of his religious and political opinions, was arrested at the Sabiha Gökçen Airport on 26 June 2014 while attempting to go abroad with a false passport. He was imposed an administrative fine for misrepresentation of his identity and his illegal entry into Turkey. A criminal investigation was also initiated against him for forgery of an official document.

He was then placed in the detention room of the Sabiha Gökçen Airport for 6 days until 28 June 2014. It is evident from the "Interview Report" issued by the law enforcement officers on 23 June 2014 following their interview with the public prosecutor by phone that there was no instruction for taking him in custody for the offence of forgery. The applicant was then transferred to the Kumkapı Foreigners' Removal Centre for being placed under administrative detention.

The applicant's appeal against the administrative detention order was dismissed by the İstanbul 7th Magistrate Judge by its decision of 17 July 2014 with a final effect. This decision was notified to the applicant's lawyer on 4 August 2014.

Pending his detention at the Kumkapı Centre, the applicant sought international protection from the İstanbul Governor's Office on 22 July 2014. By the letter of the Directorate General of Immigration Authority, he was released from the Kumkapı Centre on 21 August 2014.

He was placed under detention for 60 days, in the detention room of the Sabiha Gökçen Airport for 6 days between 23 June and 28 June 2014 and subsequently in the Kumkapı Foreigners' Removal Centre for 54 days between 28 June and 21 August 2014.

V. EXAMINATION AND GROUNDS

39. The Constitutional Court, at its session of 30 November 2017, examined the application and decided as follows:

A. Alleged Violation of the Prohibition of Treatment Incompatible with Human Dignity

40. The applicant maintained that he had to leave Uzbekistan of which he was a citizen for having being subject to oppression and persecution due to his religious and political thoughts and arrived in Turkey where he was arrested at the airport while leaving the country; that he was then placed in a detention room for 6 days with no daylight and outdoor activities; and that after being released from detention, he was placed in the Kumkapı Foreigners' Removal Centre ("Kumkapı Centre") for 54 days. He further indicated that cells of the Kumkapı Centre was unfit for accommodation –overcrowded (occasionally up to 500 inmates) and a smoker place with bad food, dirty toilet and bathroom facilities and limited living space and recreation facilities–; that he could enjoy fresh air for only ten minutes once a week; that he had very limited access to health-care services and he was to stay in the same place with persons with infectious diseases; that his psychological balance was disturbed for being placed there; and that he had no effective remedy whereby he could challenge the conditions of his detention. He accordingly alleged that the prohibition of treatment incompatible with human dignity, the rights to a fair trial as well as to an effective remedy had been violated.

41. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). As the actions concerning the foreigners' entry into the country, their residence

and deportation from the country are not related to "civil rights and obligations" or to an adjudication on the merits of "a criminal charge", no separate examination as to the right to a fair trial was carried out.

42. The Court, in its previous judgments, examined the detention conditions of the foreigners who were placed in administrative detention within the ambit of the prohibition of treatment incompatible with human dignity (see *Rıda Boudraa,* no. 2013/9673, 21 January 2015; *K.A.* [Plenary], no. 2014/13044, 11 November 2015; *F.A. and M.A.*, no. 2013/655, 20 January 2016; *A.V. and Others*, no. 2013/1649, 20 January 2016; *F.K. and Others,* no. 2013/8735, 17 February 2016; *T.T.* no. 2013/8810, 18 February 2016; *A.S.,* no. 2014/2841, 9 June 2016; and *I.S. and Others*; no. 2014/15824, 22 September 2016).

43. Article 148 § 3 *in fine* of the Constitution reads as follows:

> *"In order to make an application, ordinary legal remedies must be exhausted".*

44. Article 45 § 2, titled *"Right to individual application"*, of the Code on Establishment and Rules of Procedures of the Constitutional Court, no. 6216 and dated 30 March 2011, provides for:

> *"All of the administrative and judicial remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application".*

45. Respect for fundamental rights and freedoms is a constitutional duty incumbent on all organs of the state, and in case of any breach of this duty, the alleged violation must be primarily brought before the competent administrative authorities and instant courts. As required by the subsidiarity nature of the individual application mechanism, the ordinary legal remedies must be exhausted in order to lodge an application with the Constitutional Court. Pursuant to this principle, the applicant is to duly inform the relevant administrative and judicial authorities of his complaint primarily and on time and to present, in a timely manner, all relevant information and evidence at his hand

to the authorities as well as to show due diligence to pursue his case and application. Only when it is not possible to redress the alleged violations through this ordinary review mechanism, an individual application may be lodged (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17; and *Bayram Gök*, no. 2012/946, 26 March 2013, § 18).

46. For the requirement of the exhaustion of domestic remedies, the legal system must primarily afford an administrative or judicial remedy to which an individual who alleged any of rights has been violated may have recourse. Besides, this legal remedy must be effective and capable of providing redress in respect of the complaints and offering reasonable prospects of success as well as must be available not only in theory but also in practice (see *Fatma Yıldırım*, no. 2014/6577, 16 February 2017, § 39). However, the doubt as to the fact that any remedy which is capable of offering a reasonable prospect of success in theory would not accomplish in practice does not justify the failure to exhaust that remedy (see *Sait Orçan*, no. 2016/29085, 19 July 2017, § 36). Furthermore, the failure to actually resort to or use any legal remedy which has been introduced through a legal arrangement and which arouses no hesitation as to its existence given the objective meaning of the law will not suffice to reach a conclusion that this remedy is not effective or does not exist.

47. The question as to whether the applicant can be considered to have done everything which could be reasonably expected of him must be examined in the light of the particular circumstances of each case (see *S.S.A.*, no. 2013/2355, 7 November 2013, §§ 27 and 28). However, in cases where it appears that exhaustion of available remedies would not serve the purpose or is not effective, an application lodged without these remedies being exhausted may be examined (see *Şehap Korkmaz*, no. 2013/8975, 23 July 2014, § 33).

48. Given the absolute nature of the prohibition of treatment incompatible with human dignity, which is safeguarded by Article 17 of the Constitution, a legal remedy may be said to be effective only when it is capable of preventing the alleged violation -and in certain circumstances must be punitive as well- and, if necessary,

of providing reasonable redress for any violation that has already occurred as a complementary element. Otherwise, merely providing a redress for such kind of violations would (partially/implicitly) justify those suffered by persons subject to such treatments as well as diminish, to an unacceptable degree, the State's liability to ensure the detention conditions corresponding to the standards enshrined by the Constitution. Therefore, as in the present case where what is complained of is "detention under conditions incompatible with human dignity", a remedy which is capable of ensuring improvement/enhancement in detention conditions as well as offering redress for damage resulting therefrom may be said to be effective. Besides, in addition to a compensatory legal remedy, the State must also establish an effective mechanism which would promptly halt such treatment (see *K.A.*, §§ 72 and 73).

49. However, if the person concerned is no longer placed in the place giving rise to the alleged violation, "his placement" will be discontinued. Therefore, the violation resulting from such placement can be said to no longer exist. Besides, the person leaving the removal centre and thereby gaining his freedom would have no legal interest in seeking proactive improvement of the placement conditions. In this sense, for foreigners released from the removal centre, it is unreasonable to resort to legal remedies capable of preventing the violation or ensuring proactive improvement of the placement conditions, in which case there must be mechanisms capable of redressing the damage sustained. It may be accordingly concluded that with respect to the complaints raised by those placed in the removal centres about their detention conditions, the effective legal remedy is the compensatory remedy.

50. In the present case, the applicant was released from the Kumkapı Centre on 21 August 2014 upon the letter of the Directorate General of Immigration Authority. Following his release, the applicant directly lodged an individual application on 22 September 2014. It is therefore necessary to examine whether a mechanism offering a redress for pecuniary and non-pecuniary damage sustained by the applicant on

account of his detention conditions until his release had been available in the Turkish legal system prior to the introduction of the individual application mechanism.

51. In its *K.A.* judgment (see §§ 80 and 81), the Court concluded that there was no effective administrative and judicial remedy capable of offering redress for the damage sustained due to placement in unfavourable conditions. In reaching this conclusion, the Court took into consideration the absence of any judicial or administrative decision which indicates that the applicant was awarded compensation for his suffering on account of the unfavourable conditions of his detention.

52. However, the Court has currently reached the conclusion that this case-law must be reviewed. One of the factors leading the Court to adopt such consideration is the fact that pursuant to Article 125 of the Constitution and Article 2 of Law no. 2577 on Administrative Jurisdiction Procedure, absence of a decision indicating an award of compensation must not be *per se* decisive in concluding that there is no effective remedy whereby the damage sustained on account of unfavourable detention conditions could be redressed. As a matter of fact, it may be erroneous to consider that there is no effective compensatory remedy without discussing whether such a remedy exists in theory but by merely relying on the absence of any court decision demonstrating that no such action has been so far brought and no compensation has been awarded. In this respect, in order to conclude that there is no available remedy, the national legal system must be primarily examined so that it would be ascertained whether a compensatory remedy whereby a foreigner may resort is available in theory. In addition, the failure to operate a remedy -which appears to exist in theory- in practice merely due to lack of information must not be construed to the effect that it is ineffective. In this case, what is indeed important is the existence of any decision indicating that no compensation could be awarded rather than a decision indicating an award of compensation. The conclusion that a remedy which is in theory capable of offering redress is nevertheless ineffective in practice may be reached only when the courts find it incapable of

offering redress for the damage sustained on account of the detention conditions.

53. Administrative detention is based on a decision of administrative nature. Besides, the detention room where foreigners are placed under administrative detention and the Foreigners' Removal Centres are run, inspected and operated by the Ministry of Internal Affairs as a public service. Therefore, it is incumbent on this Ministry to ensure compliance of the conditions of these detention rooms and centres with the standards specified in the national and international law.

54. Article 2 of Law no. 2577 provides for that those whose individual rights have been infringed directly on account of an administrative act or action are entitled to bring an action for compensation before administrative tribunals. Accordingly, an action for compensation may be brought in administrative jurisdiction in case of any damage resulting from the administration's acts and actions. As the said provision does not make any distinction as to the kinds of administrative acts or actions, it is possible to seek compensation, through an action for compensation to be brought in administrative jurisdiction, for damage resulting from any kind of acts or actions in the form of an administrative function. It accordingly appears that Article 2 of Law no. 2577 forms a sufficient legal ground for litigating, before administrative tribunals, any kind of damage resulting from an administrative act. It has been therefore concluded that it is possible to bring an action for compensation, before administrative tribunals pursuant to Article 2 of Law no. 2577, due to the damages resulting from the alleged unlawfulness of the detention conditions at detention rooms and foreigners' removal centres.

55. In this regard, there is no doubt that the administrative court is, through an action for compensation to be brought in administrative jurisdiction, entitled to examine whether the detention conditions are compatible with the relevant national and international law as well as to award compensation if detention conditions are found to be unlawful -provided that this has caused damage and there is a casual link between the damage and the detention conditions-.

56. In addition, the administrative judicial authorities are in a better position than the Constitutional Court to make an assessment as to physical conditions of detention rooms and removal centres where foreigners are detained. In assessing the compatibility of physical conditions of detention rooms and foreigners' removal centres with national and international standards, the Constitutional Court makes an assessment over the case file whereas the inferior courts have several opportunities such as conducting an on-site examination, obtaining an expert report and etc.. It is therefore undisputed that making an assessment as to the physical conditions of foreigners' removal centres primarily by administrative judicial authorities is not only an approach compatible with the subsidiarity principle but also would be advantageous to the applicant.

57. In the light of Article 2 of Law no. 2577, it has been concluded that it would be incompatible with the "subsidiarity nature" of the individual application mechanism to examine this application lodged without the exhaustion of the remedy of "action for compensation" which appears to be accessible as well as be capable of having a prospect of success and offering sufficient redress for pecuniary and non-pecuniary damage arising from the incompatible conditions of detention.

58. For these reasons, the Court declared this part of the application inadmissible for *non-exhaustion of available remedies* without making any further examination as to the other admissibility criteria.

59. However, the Court has found it necessary to clarify an issue as to the duration of administrative actions likely to be brought, following this judgment, in case of impugned incidents like in the present application as well as those which are of the same nature with the present one and pending before the Court. It must be primarily stressed that it is in the discretion of the administrative tribunals to assess the conditions as to the duration of the proceedings and to determine whether the administrative actions have been brought in due time. It is therefore undisputed that the inferior courts are vested also with the power to assess whether the administrative

actions -which are likely to be brought, after this judgment becomes public, with respect to incidents which are directly brought before the Constitutional Court in line with the case-law specified in the case of *K.A.* where it was concluded that there had been no effective administrative and judicial remedy capable of offering redress for the damage sustained on account of unfavourable conditions of detention- have been filed in due time. However, in respect of the foreigners who have had recourse to administrative jurisdiction following "the inadmissibility decisions rendered due to non-exhaustion of available remedies" pursuant to the change of the case-law concerning the present application and those which are of the same nature and pending before the Court, terms of litigation must be considered in a way that would not lead to a violation of their right to access to court.

60. As the alleged violation of the prohibition of treatment incompatible with human dignity was found inadmissible for non-exhaustion of available remedies, the alleged violation of the right to an effective remedy set forth in Article 40 of the Constitution, in conjunction with the said prohibition, was not examined by the Court at this stage.

Mr. Serruh KALELİ did not agree with this conclusion.

B. Complaints as to the Right to Personal Liberty and Security

1. Alleged Violation of the Right to Personal Liberty and Security due to Non-compliance with the Principle of Being Brought Promptly before a Judge

61. The applicant maintained that the police officers in charge had consulted with the public prosecutor two hours after he had been taken into custody for allegedly using a false Greek passport at the Sabiha Gökçen Airport; that he had been taken into custody despite no instruction had been issued by the prosecutor; and that he had not been brought before a judge within forty-eight hours as specified in Article 19 § 5 of the Constitution.

62. The safeguards of being brought promptly before a judge, being entitled to trial within a reasonable time or of being released pending trial, which are enshrined in Article 5 § 3 of the Convention, have been introduced for individuals against whom there is reasonable suspicion of having committed an offence or there are reasonable grounds leading to the necessity to prevent their committing an offence or fleeing after having done so. In other words, these safeguards are applicable to individuals against whom a criminal investigation has been initiated or who are still being investigated.

63. Pursuant to Articles 47 § 3 and 48 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court (Code no. 6216) and relevant paragraphs of Article 59 of the Internal Regulations of the Constitutional Court, the applicants are obliged to explain their allegations as to the impugned incidents, to substantiate their legal claims on the violation of the constitutional provision invoked as well as to indicate which rights within the scope of the individual application mechanism have been violated, the reasons and evidence thereof (see *S.S.A.*, § 38; and *Veli Özdemir*, no. 2013/276, 9 January 2014, §§ 19 and 20).

64. If the specified conditions are not satisfied, the Court may find the application inadmissible for being manifestly ill-founded.

65. In maintaining that *"he had not been brought promptly before a judge or other officer authorised by law to exercise judicial power in conjunction with Article 5 § 1 (c) of the Convention"*, the applicant failed to submit any explanation or evidence to prove that his particular case fell within the ambit of *"Article 5 § 1 (c) of the Convention"*, in other words he failed to demonstrate that his placement in a detention room was based on the suspicion of his guilt or the necessity to prevent his fleeing after having committed an offence. It has been observed that during the interview of the police officers with the public prosecutor following his arrest with a false passport, the latter did not give any instruction ordering the applicant's custody; and that the applicant continued to be detained in spite of the expiry of the forty-eight-hour period specified in Article 19 § 5 of the Constitution as well as Article

91 § 1 of the Code of Criminal Procedures no. 5271. The applicant did not submit any proof or convincing explanation that his detention until 30 June 2014 when his administrative detention was ordered for his being a foreigner fell within the scope of a criminal investigation.

66. For these reasons, as the applicant failed to substantiate the alleged violation, the Court declared this part of the application inadmissible *for being manifestly ill-founded* without making any further examination as to the other admissibility criteria.

2. Alleged Unlawfulness of Detention, Failure to Duly Inform the Reasons for Arrest and Non-existence of an Effective Remedy against Detention and Opportunity to Offer Redress

a. The Applicant's Allegations

67. He maintained that he had been placed in the detention room and in the foreigners' removal centre for 6 days and 54 days respectively in spite of the non-existence of any public prosecutor's instruction and any deportation order issued in respect of him pursuant to Article 54 of the Law no. 6458 on Foreigners and International Protection -even if such an order existed, it had been notified neither to him nor to his lawyer- ; that he had not been promptly informed, in a language which he understood, of the accusation against him and his legal rights; and that his relatives had not been notified of his custody. He further asserted that his detention lacked a legal ground; that his challenge to administrative detention had been dismissed by the Magistrate Judge; that the Governor's Office issued an order for his administrative detention on 30 June 2014, eight days after his arrest; that prior to the issuance of administrative detention order, the procedure of "Summons to leave Turkey" set out in Article 56 of Law no. 6458 had not been implemented; that his administrative detention had not been reviewed on monthly basis; and that his request for release had not been subject to an effective judicial review. He also indicated that even after his request for international protection from the Governor's Office on 22 July 2014, his administrative detention continued in breach of Article 68 of the said Law; and that there was no

remedy available in the Turkish law to which he could have recourse against the alleged violations. He accordingly alleged that there had been violations of his right to personal liberty and security as well as right to an effective remedy.

b. The Court's Assessment

68. Relevant part of Article 19 of the Constitution reads as follows:

"Personal liberty and security

Everyone has the right to personal liberty and security.

No one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law:

Execution of sentences restricting liberty and the implementation of security measures decided by courts; arrest or detention of an individual in line with a court ruling or an obligation upon him designated by law; execution of an order for the purpose of the educational supervision of a minor, or for bringing him/her before the competent authority; execution of measures taken in conformity with the relevant provisions of law for the treatment, education or rehabilitation of a person of unsound mind, an alcoholic, drug addict, vagrant, or a person spreading contagious diseases to be carried out in institutions when such persons constitute a danger to the public; arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued.

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. Arrest of a person without a decision by a judge may be executed only when a person is caught in flagrante delicto or in cases where delay is likely to thwart the course of justice; the conditions for such acts shall be defined by law. Individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offences

committed collectively this notification shall be made, at the latest, before the individual is brought before a judge.

(As amended on April 16, 2017; Act No. 6771) The person arrested or detained shall be brought before a judge within at latest forty-eight hours and in case of offences committed collectively within at most four days, excluding the time required to send the individual to the court nearest to the place of arrest. No one can be deprived of his/her liberty without the decision of a judge after the expiry of the 9 above specified periods. These periods may be extended during a state of emergency or in time of war.

(As amended on October 3, 2001; Act No. 4709) The next of kin shall be notified immediately when a person has been arrested or detained. Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence. Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful.

(As amended on October 3, 2001; Act No. 4709) Damage suffered by persons subjected to treatment other than these provisions shall be compensated by the State in accordance with the general principles of the compensation law."

69. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). As the right to effectively apply to the competent judicial authority, which is safeguarded by Article 19 § 8 of the Constitution for those who are deprived of liberty, is a *lex specialis* in relation to Article 40 thereof, the Court has not found it necessary, in the present case, to make a further examination under Article 40 of the Constitution.

i. Admissibility

70. Pursuant to Article 57 § 6 of Law no. 6458, a challenge may be brought against the decision ordering administrative detention before

magistrate judges which thereby review the lawfulness of the decision. The legislator has assigned the magistrate judges as the appeal authority in respect of the decisions ordering administrative detention in spite of its nature as an administrative action. In envisaging that lawfulness of the decisions ordering administrative detention shall be reviewed by magistrate judges instead of administrative courts which have general jurisdiction over administrative acts, the legislator has taken into consideration the nature of such decision which deprives the foreigner of his liberty. In this sense, administrative courts are not entitled to review the lawfulness of the administrative detention order.

71. On the other hand, as there is no separate provision of law which sets out that claims for compensation of damages sustained on account of the unlawfulness administrative detention order will be dealt with by the judicial authorities, there is no obstacle to bringing such claims before administrative authorities pursuant to Article 2 of Law no. 2577which is a general rule. However, in case of an action for compensation, the jurisdiction of the administrative courts is limited to the determination as to whether any damage has occurred due to the administrative detention order as well as, if any, determination of the amount of compensation, and they are not vested with the authority to review the lawfulness of an administrative detention order pursuant to Law no. 6458. As a matter of fact, the legislator has vested the power to review the lawfulness of the administrative detention order solely in magistrate judges. It has been therefore concluded that no action for compensation may be brought against an administrative detention order without lodging an appeal before the magistrate judge and awaiting for the outcome of the decision to be rendered by the magistrate judge.

72. In addition, if the magistrate judge finds the administrative detention order lawful -given the fact that the administrative judicial authority is not entitled to review the lawfulness of the administrative detention order-, the action for compensation enshrined in Article 2 of Law no. 2577 would become ineffective in respect of compensation claims due to alleged unlawfulness of the administrative detention

order. In such cases, an individual application may be directly lodged with the Constitutional Court in the prescribed period upon finalization of the magistrate judge's decision on lawfulness of the administrative detention order.

73. However, if the magistrate judge finds the administrative detention order unlawful, it is possible to bring an action for compensation, upon finalization of the magistrate judge's decision, before the administrative court within the period prescribed in Law no. 2577 for redress of any damage resulting therefrom. In that case, an individual application cannot be lodged with the Constitutional Court without exhausting the compensatory remedy in administrative jurisdiction.

74. Besides, it is undisputed that those who have been deprived of their liberty in the absence of any administrative detention order may directly bring an action for compensation before the administrative courts for damages sustained for being placed under administrative detention.

75. In the present case, the applicant's appeal against the administrative detention order was dismissed by the İstanbul 7th Magistrate Judge by its decision of 17 July 2014. It therefore appears that the applicant was not required to exhaust the remedy of a compensatory action before the administrative courts.

76. This part of the application was declared admissible for not being manifestly ill-founded and there being no ground declaring it inadmissible.

ii. Merits

(1) Alleged Unlawfulness of Administrative Detention

(a) General Principles

77. The right to personal liberty and security is a fundamental right which provides safeguards to protect the individuals against arbitrary interference by the State with their liberty (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 62).

78. The Court has defined the notion of deprivation of liberty within the scope of Article 19 of the Constitution. Accordingly, deprivation of liberty encompasses two elements -detention of an individual in a restricted space for a significant period of time and no consent given by that person to such detention- (see *Cüneyt Kartal*, no. 2013/6572, 20 March 2014, § 17).

79. Phrase of "liberty" specified in the first paragraph of the provision means freedom and independence as well as freeness. In this sense, it may be concluded that there has been an interference with the individual's liberty only when an individual's freedom of action is physically restricted. Such restriction on the freedom of action is much stricter than the interference with the freedom of movement safeguarded by Article 23 of the Constitution. For an interference with the right to personal liberty and security, the individual must be physically detained in a restricted space at least for a disturbing period of time (see *Galip Öğüt* [Plenary], no. 2014/5863, 1 March 2017, § 34).

80. Regard being had to the wording of Article 19 of the Constitution as a whole, the reasons for restriction set forth in its second and third paragraphs are related to the physical liberty of individuals, and the safeguards contemplated in the subsequent paragraphs are intended for those who are physically deprived of their liberty. Therefore, what is safeguarded by the right to personal liberty and security is merely physical liberty of individuals (see *Galip Öğüt*, § 35).

81. It is set forth in Article 13 of the Constitution that fundamental rights and freedoms may be restricted only by law. Besides, Article 19 of the Constitution provides for that the conditions under which the right to personal liberty and security may be restricted must be prescribed by law. It appears that the condition of "lawfulness" introduced by Article 13 of the Constitution with respect to any restriction of all fundamental rights and freedoms is specified also in Article 19 thereof in relation to the right to personal liberty and security. Accordingly, pursuant to Articles 13 and 19 of the Constitution which are in harmony with one another, detention as an interference with

the personal liberty must have a legal basis (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 43).

82. The subsequent paragraphs provide safeguards for those who are deprived of their liberty. In this sense, the right to be informed of the reasons for arrest or detention as well as the accusations is safeguarded in paragraph 4; the term of custody is specified in paragraph 5; the necessity that the relatives must be notified of the arrest or detention of the suspect in paragraph 6; the right to be tried within a reasonable time as well as to be released during investigation and prosecution in paragraph 7; the right to apply to a judicial authority in paragraph 8; and the right to compensation in paragraph 9.

83. An interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53 and 54).

84. As per Article 16 of the Constitution, the fundamental rights and freedoms of foreigners may be restricted by law compatible with international law. Accordingly, the administrative detention giving rise to deprivation of liberty is to be prescribed by law, and its principles and procedures prescribed by law are to comply with international law (see *Rıda Boudra*, § 76).

85. The authority to place in administrative detention is an exceptional power introduced by Article 19 of the Constitution and Article 5 of the Convention. It is accordingly possible to arrest or detain a foreigner, pending his deportation or extradition, in compliance with the procedure terms and conditions of which are indicated by law (see *Rıza Bodraa*, § 73). In such cases, administrative detention may be ordered merely for the purpose of conducting deportation or extradition processes, without the need for existence of any ground such as prevention of his committing an offence or his fleeing. However, unless deportation or extradition processes are conducted "with due diligence" pursuant to Article 19 of the Convention, the

deprivation of his liberty can no longer be said to be legitimate (see *K.A.*, § 123).

86. As an exceptional practice leading to deprivation of liberty, administrative detention must be lawful and must not amount to an arbitrary treatment. This measure must be subject to review to a reasonable extent required by a democratic state of law; its conditions must comply with generally recognized standards and must not amount to a humiliating, degrading and inhuman treatment; and those placed under administrative detention must be provided with basic procedural rights and safeguards. The said provisions of the Constitution and Convention intend to secure a legal position with more safeguards in respect of personal liberty by seeking the condition that terms and conditions of certain circumstances whereby the individual is deprived of his liberty must be prescribed by law (see *Rıza Boudra*, § 74).

87. A legal arrangement to be made with a view to satisfying the requirements of Article 19 of the Constitution must explicitly set forth the procedural safeguards such as conditions of detention pending deportation, its term, extension of term, its notification to the person concerned, available remedies against the administrative detention, access to lawyer and providing assistance of an interpreter for the person placed under administrative detention. Otherwise, it cannot be said that individuals are sufficiently protected against an arbitrary and unlawful deprivation of liberty (see *K.A.*, § 125).

(b) Application of General Principles to the Present Case

88. Pursuant to Law no. 6458, the Governor's Office may issue an order for administrative detention of the foreigners -out of those whose deportation has been ordered- "who bear the risk of absconding or disappearing; have breached the terms and conditions of legal entry and exit; used false documents; failed to leave Turkey within the prescribed period in the absence of any acceptable excuse; and pose a threat to public order, public security or public health". The duration of administrative detention in removal centres shall not exceed six months. The need to continue the administrative detention shall be

regularly reviewed by the governor's office on monthly basis. It is not necessary to wait for 30 days in order to make an assessment as to the continued detention. For those foreigners whose administrative detention is no longer considered necessary, the administrative detention shall be immediately ended. They may be required to comply with administrative obligations such as to reside at a given address and report to the authorities in the manner and periods to be determined. The administrative detention order, the extension of its duration and outcomes of the monthly regular reviews as well as the reasons thereof shall be notified to the foreigner, or to his legal representative or lawyer. The person placed under administrative detention or his legal representative or lawyer may appeal against the detention order before the magistrate judge who is to conclude the assessment within five days. The decision of the magistrate judge shall be final. The person placed under administrative detention or his legal representative or lawyer may further appeal to the magistrate judge for a review, alleging that the administrative detention conditions no longer apply or have changed.

89. It appears that the legal arrangement set out in the said Law clearly introduces a procedure which must be complied with in conducting deportation process and is capable of preventing any arbitrariness. In the present case, it must be ascertained whether the procedure set out in the Law was conducted with due diligence (see *K.A.*, § 127).

90. The applicant was arrested at the Sabiha Gökçen Airport on 26 June 2014 while attempting to go abroad with a false passport. He was imposed an administrative fine for misrepresentation of his identity and his illegal entry into Turkey. A criminal investigation was also initiated against him for forgery of an official document. The file contains no information as to the outcome of the criminal investigation.

91. The applicant, who was illegally in Turkey and arrested while attempting to leave Turkey with a false passport, was among the persons who might be deported pursuant to Articles 53, 54 and 57 of

Law no. 6458. Accordingly, immediately after an individual's arrest by law enforcement officers, the governor's office is to be notified of the situation in order to issue a deportation order. There is no imperative provision which entails that an order for deportation will be issued following the assessment to be made by the governor's office within forty-eight hours.

92. Pursuant to Article 57 § 2, titled "*Administrative detention for deportation purposes and its duration*", of Law no. 6458, out of individuals for whom an deportation order has been issued, the governor's office shall issue an administrative detention order for those who bear the risk of absconding or disappearing, breached the rules of entry into and exit from to Turkey, have used false or fabricated documents, have not left Turkey after the expiry of the period granted them to leave, without an acceptable excuse, or pose a threat to public order, public security or public health. Foreigners in respect of whom an administrative detention order has been ordered shall be taken, within forty-eight hours, to the foreigners' removal centres by the law enforcement units arresting them.

93. As per Articles 16 and 19 § 2 of the Constitution, the foreigners' right to personal liberty and security may be restricted by law in compliance with the international law. According to Law no. 6458, it is not possible to put in administrative detention the foreigners in respect of whom no deportation order has been issued. As inferred from the applicant's file, there is no decision ordering his deportation or administrative detention. Upon his arrest with false documents, the Governor's Office was not immediately informed of the situation. Therefore, it did not issue any deportation order and thereby an administrative detention order in respect of the applicant. Without being subject to such a procedure and in the absence of a prosecutor's instruction for his custody within the scope of the investigation into the forgery of official document, the applicant had been placed in custody until 3 June 2014 when his administrative detention was ordered, which was contrary to Law no. 6458. Although the applicant could be placed in detention room only for 2 days until the issuance of a deportation order, his continued placement in detention room and

the foreigners' removal centre, in the absence of a deportation order and -in conjunction therewith- an administrative detention order issued against him, lacked a legal basis.

94. Nor could it be ascertained whether the deficiency in the lawfulness condition which was not satisfied at the initial stage of deprivation of the applicant's liberty has been subsequently eliminated. Although a deportation order could have been issued, pursuant to Article 54 of Law no. 6458, against the applicant for being arrested while attempting to leave Turkey with false documents, the order subsequently issued by the Governor's Office was submitted neither by the relevant Security Directorate nor the applicant. As the applicant indicated in his application form that he had not been notified with any deportation order, it has been concluded that he was put in administrative detention for sixty days without any legal ground.

95. It has been accordingly observed that the measure of administrative detention required to be applied pending deportation had no legal basis; and that nor was a deportation order issued in the subsequent period in order to ensure lawfulness of the relevant process. Given the failure to monthly review the administration detention as well as the magistrate judge's failure to identify alleged unlawfulness, the Court has concluded that the administrative detention process was not conducted with due diligence.

96. For these reasons, the Court has found a violation of Article 19 § 2 of the Constitution as the applicant's detention was unlawful.

(2) Alleged Failure to Duly Notify the Reason for Placement under AdministrativeDetention

97. In Article 19 § 4 of the Constitution, it is prescribed that individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them.

98. The requirement that legal and factual facts forming a basis for the arrest and detention of an individual must be explained in

simple and non-technical language which could be easily understood would ensure the person whose restriction has been restricted to have recourse to a competent judicial authority with a view to ensuring that a decision be rendered in respect of him within a short time and, if the restriction is unlawful, he be immediately released under Article 19 § 8 of the Constitution. In this sense, the right to be informed set out in Article 19 § 4 of the Constitution, in some way, embodies the other safeguards inherent in this article (see *A.V. and Others*, § 137).

99. The applicant who is a foreigner was arrested and taken into custody on 23 June 2014 while attempting to leave the country with false documents. He was reminded of certain legal rights -such as the rights to remain silence, to legal assistance, to inform his relatives of his arrest and etc.- in the "Arrest and Custody Report, Form of Suspect's and Accused's Rights" which was notified to him at 00:05 a.m.. However, it appears that the applicant was reminded of these rights in his capacity as the suspect of the forgery of official documents. Despite the absence of the prosecutor's instruction for the applicant's custody for forgery as well as any administrative detention order, the applicant continued to be kept in custody. As there was no judicial or administrative decision ordering his custody, it was not therefore actually possible to inform him of the reasons for his detention. The fact that the administrative detention order was issued on 30 June 2014 -eight days after 23 June 2014 the date when he was initially deprived of his liberty- is also a significant and sufficient indication for this conclusion.

100. Article 57 of Law no. 6458 sets forth that the administrative detention order, extension of such order and the results of the monthly regular assessments by the Governor's Office along with the grounds thereof shall be notified to the foreigner, or his legal representative or lawyer, and that the person under administrative detention or his legal representative or lawyer may challenge these orders before the magistrate judge.

101. According to the decision of 17 July 2014, which was issued by the 7th Chamber of the İstanbul Criminal Court, it appears that a

decision ordering the applicant's administrative detention was taken by the Governor's Office on 30 June 2014. However, it appears from the minutes and documents included in the application form and its annexes that there is no information indicating that this decision and the other decisions on monthly assessments, if any, were notified to the applicant; and that neither the Ministry of Justice nor the Ministry of Internal Affairs provided such information to be included in the application file, which indicates that there is no information demonstrating that the applicant was informed of the reasons for his detention in the Kumkapı Foreigner's Removal Centre.

102. In the present case, it has been concluded that neither the decision ordering his administrative detention as well as continuation of this measure nor any related information was notified to him in due time, which has therefore impaired his opportunities to request a decision to be issued in respect of him and to request his immediate release if this restriction is unlawful.

103. For these reasons, the Court has found a violation of Article 19 § 4 of the Constitution.

(3) Alleged Absence of an Effective Remedy to Challenge the Administrative Detention

104. Article 19 § 8 of the Constitution and Article 5 § 4 of the European Convention on Human Rights ("the Convention") entitle a person whose freedom is restricted for whatsoever reason to apply to a court which can speedily decide on the lawfulness of his detention and order his release if his detention is unlawful. These provisions essentially constitute a guarantee for review of the requests for release or of the decisions ordering extension of detention through the cases brought before courts upon a challenge as to the unlawfulness of detention (see *Firas Aslan and Hebat Aslan*, no. 2012/1158, 21 November 2013, § 30).

105. Given the particular circumstances of the present case, Article 19 § 8 of the Constitution entitles a person who is deprived of his liberty by way of arrest or detention to apply to a competent judicial

authority as to the procedural and substantive conditions underlying the lawfulness of the deprivation of his liberty. The examination to be made by the competent judicial authority concerning the complaints raised by the person deprived of his liberty must be of judicial nature as well as afford safeguards appropriate for the challenges raised by this person.

106. Such judicial review must ensure release of the person concerned when necessary so that such a legal remedy would offer sufficient prospects of success not only in theory but also in practice. Otherwise, such remedy cannot be said to be accessible and effective (see *K.A.*, § 152).

107. As explained in detail in the section where compliance of the applicant's administrative custody with Article 19 § 2 of the Constitution is discussed, Law no. 6458 provides for a procedure which would be followed and capable of preventing arbitrariness likely to occur during the enforcement of deportation orders. The applicant asserted that this procedure did not effectively operate in the present case.

108. The alleged unlawfulness of the applicant's detention -as he was detained in the absence of a deportation order to be issued in respect of him at the initial and subsequent stages of his detention as well as of an administrative detention order required to be issued in relation therewith- is also discussed in the relevant section.

109. Law no. 6458 includes no legal arrangement which would cease the actual practice leading to the applicant's detention without the existence of any decision in this respect. Therefore, he could not request any judicial or administrative authority to review his detention until 30 June 2014 when his administrative detention was ordered.

110. Absence of a deportation order which is the basic legal pre-requisite for the applicant's detention at the stage when his challenge to the administrative detention order was examined before the criminal court -which thereby led to the failure to consider the unlawfulness of the detention in conducting the review- made it impossible to reach

the conclusion that the appeal examination had been conducted "with due diligence" in a way that would provide a safeguard for the applicant.

111. As there is no information indicating whether monthly review specified in Article 57 of Law no. 6458 was conducted, in addition to the unlawfulness of the administrative custody at the initial stage, and if such review was conducted, whether the result thereof and its grounds were notified to the applicant or his lawyer, it cannot be concluded that the administrative custody order was enforced in compliance with the requirement of "due diligence" also at the stage when this order was enforced.

112. As explained above, it has been observed that available remedies prescribed in Law no. 6458 and capable of ensuring his release following a re-assessment to be made on the basis of the changes in applicant's legal status were not effectively operated in the present case.

113. Consequently, the Court has found a violation of the applicant's right to apply to an effective judicial authority, which is safeguarded by Article 19 of the Constitution, in relation to the substantive and procedural conditions underlying the lawfulness of his deprivation of liberty.

(4) Alleged Violation of the Right to Compensation due to Wrongful Detention

114. In Article 19 § 9 of the Constitution, it is set forth that damages sustained by persons detained contrary to the preceding paragraphs of the same article shall be compensated by the State. This arrangement entails the State to establish a mechanism which provides the opportunity to claim compensation if any of the rights specified in this article has been violated. Therefore, in cases where there has been a violation of one paragraph or several paragraphs preceding Article 19 § 9 of the Constitution, the absence of any compensatory remedy in the domestic law would be also in breach of Article 19 § 9 of the Constitution.

115. As per Article 125 of the Constitution, acts and actions of the administration are subject to judicial review, and the State is liable to offer redress for damages resulting from such acts and actions. In Articles 141-144 of Code no. 5271, the suspects or accused who have been wrongfully deprived of their liberty during a criminal investigation or prosecution and whose legal rights have not been respected as well as not been reminded to them are entitled to bring an action for compensation before criminal courts for the damages sustained by them. However, the foreigners who are under administrative detention cannot avail themselves of this legal arrangement specified in Code no. 5271 as they have not been deprived of their liberty for any reason as a criminal suspect or accused.

116. As explained in detail in the section where the prohibition of treatment incompatible with human dignity is dealt with, those whose personal rights have been damaged due to any administrative act and actions under Article 2 of Law no. 2577 may bring an action for compensation. It is also set forth in the same article that the administrative jurisdiction is limited to the review of lawfulness. Accordingly, in cases of an action for annulment or compensation, administrative courts may either issue an annulment decision or award compensation if they have found the administrative act or action unlawful.

117. It has been explained above under the heading of admissibility that Law no. 6458 does not vest the administrative courts with the authority to review the lawfulness of foreigners' detention; that this authority is exercised solely by the magistrate judges pursuant to Article 57 of Law. 6458; and that it is possible to bring an action for compensation only when magistrate judges find the detention unlawful.

118. The applicant was released by the Kumkapı Centre on 21 August 2014, upon the letter of the Directorate General of Immigration Authority, after having been detained under administrative custody. His detention was discontinued by virtue of an administrative act, and there is no judicial decision taken with respect to the lawfulness

of his detention. As the administrative courts are not tasked with the review of the lawfulness of detention, it has been considered that the applicant had no opportunity to ensure redress of his damage by means of directly bringing an action for compensation before lodging an individual application with the Constitutional Court.

119. In the present case, the Court has found a violation of the right to personal liberty and security on the grounds that the applicant's detention was not lawful, that the reasons for his detention was not duly notified and that there was no effective remedy to challenge his detention. It is therefore necessary that, pursuant to Article 19 § 9 of the Constitution, the applicant should have been provided with a remedy capable of offering redress for his damages.

120. Consequently, the Court has found a violation of Article 19 § 9 of the Constitution as the applicant's challenge to the administrative detention order restricting his liberty was rejected by the 7th Chamber of the İstanbul Criminal Court on 17 July 2014 and the administrative courts were not, under Law no. 6458, vested with the review of lawfulness of the administrative detention and did not therefore have the capacity to award compensation in favour of those detained.

C. Application of Article 50 of Code no. 6216

121. Article 50 §§ 1 and 2 of the Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court 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 resolution 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."

122. The applicant claimed 2,498.14 Turkish liras (TRY) for pecuniary damage and TRY 30,000 for non-pecuniary damage.

123. It has been concluded that the applicant's right to personal liberty and security was violated on the grounds that his detention was unlawful, that the reasons for his detention was not duly notified to him, and that there was no effective remedy to challenge his detention and no opportunity capable of offering redress for his wrongful detention.

124. The applicant was awarded a net amount of TRY 10,000 for his non-pecuniary damage which could not be redressed by merely finding a violation.

125. In order for the Court to award pecuniary compensation, there must be a causal link between the pecuniary damage allegedly sustained by the applicant and the violation found. Although he claimed pecuniary compensation, for the days he could not work, on the basis of the minimum wage, his claim for pecuniary damage must be rejected for the absence of casual link between his unemployment and the violations found.

126. The court expense of TRY 1.800, which covers the counsel fee, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 30 November 2017:

A. The applicant's request for concealing his identity in public documents be ACCEPTED;

B. 1. By MAJORITY and by dissenting opinion of Mr. Serruh Kaleli that the alleged violation of the prohibition of treatment incompatible

with human dignity due to the detention conditions be DECLARED INADMISSIBLE for *non-exhaustion of available remedies*;

2. UNANIMOUSLY that the alleged violation of the applicant's right to personal liberty and security due to the breach of the principle of being promptly brought before a judge be DECLARED INADMISSIBLE for *being manifestly ill-founded;*

3. UNANIMOUSLY that the alleged violation of his right to personal liberty and security due to the unlawfulness of his detention, the failure to duly notify him of the reasons for his detention and the lack of an effective remedy to challenge his detention as well as of an opportunity capable of offering redress for his wrongful detention be DECLARED ADMISSIBLE.

C. UNANIMOUSLY that the right to personal liberty and security was VIOLATED in so far as it concerned Article 19 §§ 2, 4, 8 and 9 of the Constitution due to the unlawfulness of the applicant's detention, the failure to duly notify him of the reasons for his detention and the lack of an effective remedy to challenge his detention as well as of an opportunity capable of offering redress for his wrongful detention.

D. A net amount of TRY 10,000 be PAID to the applicant as non-pecuniary compensation, and his other claims for compensation be DISMISSED;

E. The court expense covering the counsel fee of TRY 1,800 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. A copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE SERRUH KALELİ

The applicant maintained that he was arrested on 23 June 2014 while attempting to go abroad with a false passport and that he was initially placed under administrative custody in a detention room for six days by virtue of an order having no legal basis and subsequently in the Kumkapı Foreigners' Removal Centre for fifty-four days.

He asserted that while being detained, he had been subject to treatment incompatible with human dignity; that he had been deprived of daylight during the first six day and had had no opportunity to do physical exercise; that physical conditions of his detention had failed to comply with the criteria set by the European Court of Human Rights ("the ECHR") as well as with international standards; that the cells had been overcrowded; and that he had had to stay with in an unhealthy and smoker environment with full of pests and persons suffering from all kinds of diseases. He further maintained that he had been ensured to have access to fresh air for only 10 minutes once a week; that there had been no doctor and health officer at the facility with limited access to medical assistance; that there had been no social care specialist; that toilets and bathrooms had been dirty and not been cleaned regularly; that prisoners had not been provided with clean potable water which could be only purchased in return for money; that prisoners had been served insufficient and poor quality food; that he had had to live in a noisy environment with lights on at night and he had been therefore mentally depressed, which amounted to a humiliating treatment incompatible with human dignity; and that there had been no effective remedy whereby he could challenge his detention. He accordingly lodged an application and requested the Court to find a violation of Article 3 of the Convention and Article 17 of the Constitution.

ASSESSMENT AS TO THE ALLEGED VIOLATIONS OF THE PROHIBITION OF TREATMENT INCOMPATIBLE WITH HUMAN DIGNITY AND OF THE RIGHT TO AN EFFECTIVE REMEDY IN CONJUNCTION THEREWITH:

1) Although it is not bound by the legal qualification of the facts by the applicant, the Court, in its previous judgments, examined the detention conditions of the foreigners who were placed in administrative detention within the ambit of the prohibition of treatment incompatible with human dignity (see *Rıda Boudraa*, no. 2013/9673, 21 January 2015; *K.A.*; *F.A. and M.A.*, no. 2013/655, 20 January 2016; *A.V. and Others*, no. 2013/1649, 20 January 2016; *F.K. and Others*, no. 2013/8735, 17 February 2016; *T.T.*, no. 2013/8810, 18 February 2016; *A.S.*, no. 2014/2841, 9 June 2016; and *I.S. and Others*; no. 2014/15824, 22 September 2016).

2) Regard being had to the impugned facts of the present case as well as the fact that the Court had previously declared admissible all applications of similar nature and there being no ground declaring it inadmissible, the present application was declared admissible and accordingly decided to be examined as to its merits under Articles 17 and 40 of the Constitution.

3) The applicant's first complaint which he considered to fall under the prohibition of treatment incompatible with human dignity concerns the conditions of the detention room where he had been placed in custody for 6 days.

4) The applicant, an Uzbekistan citizen who entered Turkey illegally and also attempted to leave the country with a false passport, was arrested on 23 June 2014. He was then placed in the detention room of the Sabiha Gökçen Airport for 6 days until 28 June 2014 when he was transferred to the Kumkapı Centre. It is evident from the "Interview Report" issued by the law enforcement officers on 23 June 2014 following their interview with the public prosecutor by phone that the applicant was being placed under administrative detention as there was no instruction for taking him in custody for the offence of forgery.

5) Upon the applicant's challenge to lift the administrative detention order, which was dated 15 July 2014, the 7th Chamber of the İstanbul Criminal Court rendered a decision where it was indicated that the applicant had been under administrative detention since 30 June 2014.

6) For the material conditions to which the persons placed under administrative detention have been subject to fall into the ambit of Article 17 § 3 of the Constitution, it must attain a minimum threshold of severity. Detention conditions must not reach an intensity exceeding the unavoidable level of suffering inherent in detention as well as must have no mental effect on the foreigner detained and foster a sense of desperation in him. In making such an assessment as to this minimum threshold of severity, all information of the detention conditions, notably the duration of detention, its physical or mental effects as well as the victim's sex, age and state of health must be taken into consideration (see *K.A.*, § 93; and *Rıda Boudraa*, § 60).

7) A treatment is described as "inhuman", if it has been premeditated and has caused actual bodily injury or physical or mental suffering, and degrading if it has been "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see *K.A.*, § 94; and *Rıda Boudraa*, § 61).

8) It may be inevitable under certain circumstances to place the foreigners -who illegally entered Turkey and were arrested by law enforcement officers while attempting to leave Turkey- in detention rooms before necessary steps being taken pending their deportation and prior to their detention in the foreigners' removal centres. However, mandatory placement in detention rooms for a short period of time does not *per se* amount to a violation of the treatment incompatible with human dignity. In this respect, the duration of detention also plays an important role for the foreigners' placement in detention at police stations to exceed a minimum level of severity. The placement of a foreigner/refugee in detention rooms -like high security penitentiary institutions where suspects of ordinary offences are being held- for a long time may, in combination with other conditions, constitute a breach of the treatment incompatible with human dignity. In order to conclude that the mandatory and short-term placement in detention rooms has exceeded the minimum threshold of severity, a certain part of the other elements of the ill-treatment must also exist.

9) It is indicated in various reports that detention rooms which are defined in Article 4 of the Regulation on Arrest, Custody and Statement-Taking Procedures as "places where suspects or accused are placed until they are brought before the judicial authorities" do not afford appropriate conditions for detention of the foreigners to be deported to their countries of origin.

10) However, it has been found unreasonable to consider that placement, in detention rooms for a reasonable period, of foreigners, who would undergo an assessment as to whether a deportation order would be issued pursuant to Articles 54 and 57 of Law no. 6458, until they are transferred to foreigners' removal centres as well as of foreigners, who have sought international protection pursuant to Article 71 of the Law and received no final decision yet, until they are transferred to the foreigners' admission and accommodation centres is *per se* sufficient to exceed the minimum threshold of severity.

11) The applicant did not complain of having been deprived of opportunities -such as food, cleaning and health-care services- to the extent it would go beyond the inevitable element of suffering and humiliation connected with the conditions of the detention rooms where criminal suspects are being held. Besides, the applicant's abstract allegations of being deprived of daylight and outdoor activities without providing any detailed explanation as to the conditions of detention rooms is not sufficient for acknowledging that the application is substantiated.

12) The applicant's placement in a detention room conditions of which have not been assessed to be compatible with the requirements of the prohibition of treatment incompatible with human dignity for 6 days before his transfer to the foreigners' removal centre was not *per se* considered sufficient to accept that the minimum threshold of severity has been exceeded with regard to the prohibition of treatment incompatible with human dignity, which is enshrined in Article 17 § 3 of the Constitution (for a similar judgment where the ECHR held that a foreigner's placement in a detention room with insufficient physical conditions for 11 days had not exceeded the minimum threshold of severity, see *Moghaddas v. Turkey*, § 56).

13) For these reasons, the present application must be declared inadmissible for being manifestly ill-founded as it is explicit that the applicant's placement in a detention room for 6 days was not in breach of the prohibition of treatment incompatible with human dignity. However, the Court did not make any assessment in this respect.

14) As regards the applicant's other complaint concerning the conditions of detention at the Kumkapı Foreigners' Removal Centre, Articles 5, 13, 16, 17 and 23 of the Constitution read as follows:

"Article 5 – Fundamental aims and duties of the State

The fundamental aims and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence.

Article 13- Restriction of fundamental rights and freedoms (Amended on 3 October 2001 by Article 2 of Law no. 4719)

Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.

Article 16 - Status of aliens

The fundamental rights and freedoms in respect to aliens may be restricted by law compatible with international law.

Article 17 - Personal inviolability, corporeal and spiritual existence of the individual

Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.

…

No one shall be subjected to torture and mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.

…

Article 23 - Freedom of residence and movement

Everyone has the freedom of residence and movement.

Freedom of residence may be restricted by law for the purpose of preventing crimes, promoting social and economic development, achieving sound and orderly urbanization, and protecting public property.

Freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and prevention of crimes…".

15) The right to protect and develop one's corporeal and spiritual existence is safeguarded under Article 17 of the Constitution. The first paragraph of the same provision intends to protect human dignity. In its third paragraph, it is prescribed that no one shall be subjected to "torture" and "mal-treatment" as well as to penalties or treatment incompatible with human dignity (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 80).

16) However, in order to conclude that these rights which are safeguarded by this prohibition have been under absolute protection, it is not sufficient for the State to avoid inflicting torture and ill-treatment. It must also protect individuals against the acts of its own agents and even third parties which may amount to torture and ill-treatment (see *Cezmi Demir and Others*, §§ 81-82).

17) The said article does not embody any exception to the State's negative obligation not to inflict torture and ill-treatment. It is also specified in Article 15 of the Constitution which allows for suspension of fundamental rights and freedoms in times of war, mobilization or

a state of emergency that the integrity of individuals' corporeal and spiritual existence shall be inviolable. This points out the absolute nature of the prohibition of torture and ill-treatment (see *F.R.*, no. 2016/4405, 15 February 2017, § 54).

18) In Article 5 of the Constitution, it is among the State's fundamental aims and duties to provide the conditions required for the development of the individual's corporeal and spiritual existence. Regard being had to Articles 17 and 5 of the Constitution in conjunction with the principle of constitutional holism, it appears that the State is also obliged to protect individuals against torture and ill-treatment (positive obligation) (see *F.R.*, § 56).

19) For a treatment to fall into Article 17 § 3 of the Constitution, it must have attained the minimum threshold of severity. This minimum threshold may vary and must therefore depend on the particular circumstances of each case. In this sense, in determining the level of severity, factors such as the duration of time spent in detention; sex and age of the applicant; and mental health of the victim are of importance (see *Tahir Canan*, § 23). The aim and motivation of the alleged treatment may also be added to these factors (see *Cezmi Demir and Others*, § 83).

20) Given its effects on individual, ill-treatment is graded and defined with different terms in the Constitution and the Convention. Therefore, it appears that the expressions included in Article 17 § 3 of the Constitution involves difference not in terms of nature but intensity. In order to ascertain whether a treatment may be qualified as "torture", it is necessary to consider the distinction between the notions of "mal-treatment" as well as treatment "incompatible with human dignity" and the notion of torture that are specified in the said provision. Accordingly, pursuant to the constitutional arrangement, the treatment which causes damage, to the highest extent, to the individual's corporeal and spiritual existence is "torture". Along with the severity of the treatment, Article 1 of the United Nations Convention on Torture and other Cruel, Inhuman or Degrading Treatment and Punishment points out that "torture" is applied notably

for the purposes of obtaining information, punishing or intimidating, or with a discriminatory motive (see *Cezmi Demir and Others*, § 84).

21) Inhuman treatments which do not reach the level of "torture" but which is premeditated, last for a certain period of time and cause intense physical and mental suffering may be defined as "mal-treatment". Suffering in these cases must not go beyond the level which is inevitable in a given form of legitimate treatment or punishment. Unlike torture, "mal-treatment" does not involve the condition of causing a suffering with a certain motivation (see *Cezmi Demir and Others*, § 88).

22) Treatments which arouse feelings of fear, anguish or inferiority capable of humiliating and embarrassing individuals or which cause the victim to act against his own will and conscience may be characterised as "treatment or penalty incompatible with the human dignity". Unlike "mal-treatment", such treatment creates a humiliating or degrading effect on the individual even if it does not lead to any physical or mental suffering (see *Cezmi Demir and Others*, § 89).

23) In order to determine under the scope of which notion a treatment falls, each concrete case must be assessed in the light of its own particular circumstances. If a treatment is applied publicly or the public is informed of such treatment, it would play an important role in establishing the degrading nature of this treatment. However, non-public nature of the treatment would not prevent its being defined as ill-treatment if it makes him feel inferior. Besides, it is also taken into consideration whether the treatment is applied with the intent of humiliation or degradation. However, the failure to establish such an intent would not mean that the treatment does not amount to an ill-treatment (see *Cezmi Demir and Others*, § 90).

24) The authority to control foreigners' entry into, and their residence within, the country as well as the authority to deport the foreigners in the country are entrusted by virtue of international law to sovereign States. Pursuant to Article 23 of the Constitution, everyone has the freedom of residence and movement. It is also specified therein that citizens cannot be deported or deprived of their right of entry into

the homeland. However, it is set out in Article 16, which is the basic arrangement as to the fundamental rights and freedoms enjoyed by foreigners: *"the fundamental rights and freedoms in respect to foreigners may be restricted by law compatible with international law"*.

25) In this respect, it seems possible to impose restriction on the freedom of movement and residence exercised by the foreigners arrested while attempting to illegally enter in or leave the country as well as to detain them. However, this distinction between citizens and foreigners must be in accordance with international law. It is possible to arrest or take into custody the foreigners having illegally entered in, or attempting to illegally leave, Turkey in compliance with the procedure prescribed in the laws, pending their deportation or their request for international protection (see *Rıda Boudraa*, § 73).

26) It has been noted above that the Constitutional Court examines the conditions of detention of migrants -who are placed under administrative detention in the foreigners' removal centres- within the scope of the prohibition of treatment incompatible with human dignity. In its judgments of such kind, the Court has taken into consideration the criteria inherent in the standards recognised by the European Committee for the Prevention of Torture (CPT) with regard to "the migrants placed under administrative custody" in making an assessment as to whether physical conditions of the places where the foreigners are detained attain the minimum threshold specified in Article 17 § 3 of the Constitution.

27) According to the standards accepted by the CPT, in cases where foreigners are to be deprived of their liberty for a long time pursuant to the legislation on foreigners, they must be placed in centres especially designed for this purposes and having a program appropriate for their legal status, physical conditions and adequately qualified staff. Such centres must be furnished with adequate equipment, be clean and tidy and must provide a sufficient living space for detainees. Such centres must be also ensured, to the greatest extent possible, to leave the impression that they are not in the form of prisons. Programmed activities must involve access to outdoor exercises as well as to a

room where they can spend time and which is furnished with radio/ television, newspapers/journals and other appropriate recreation means. It is accepted that the longer the period under which such individuals are detained, the more extensive the activities to be provided for them must be. In this sense, CPT accepts that all convicts without any exception (including those kept in solitary confinement) must be provided with the opportunity to do outdoor exercises; and that places where open-air exercises will be performed must be of reasonable size and provide shelter, as much as possible, against unfavourable weather conditions. It is explicit that this standard introduced for convicts are a fortiori applicable to "the migrants kept in detention" (see *K.A.*, § 98).

28) The above-mentioned principles form in principle minimum standards for the assessments to be made by the Court on this issue. However, these principles must be assessed in the light of the particular circumstances of each concrete case.

29) As appears from the individual application form and the information provided by the Security General Directorate, it is undisputed that the applicant was held in the Kumkapı Foreigners' Removal Centre for 54 days between 28 June and 21 August 2014. The challenges experienced by those detained in such centres due to the limited space allocated to them as well as existence of places other than dormitories where inmates may spend time are the factors to be taken into consideration as a criteria in assessing the living conditions pursuant to Article 17 of the Constitution.

30) The applicant failed to provide precise information about the total number of inmates kept at the Kumkapı Centre at the relevant time as well as about the unit where he was staying and the number of inmates kept in that unit, -information which could be taken into consideration in determination of the living conditions at the Kumkapı Centre and the number of inmates-. However, he instead noted that there were sometimes over 500 inmates at the Kumkapı Centre.

31) In this sense, the most significant materials at hand are the information submitted through the letter of the Security General

Directorate dated 16 March 2016, the report of 2012 issued by the Grand National Assembly of Turkey, findings of the UN Special Rapporteur on the Human Rights of Migrants, the ECHR's judgment in the case of *Yarashonen v. Turkey* dated 24 June 2014 as well as the CPT's report referred to in this judgment, the Constitutional Court's judgment in the case of *K.A.* and the report issued by the Human Rights Foundation of Turkey ("the Foundation) which substantially form a basis for the *K.A.* judgment.

32) Another element to be considered within the scope of the prohibition of treatment incompatible with human dignity is the spaces -other than dormitories- where inmates may spend time as such spaces are in fact capable of reducing the unfavourable effects of the living conditions.

33) Regard being had to the conditions under which the applicant was kept, it has been observed that there are a large hall allocated as a corridor and dining hall, along with the units which are separated from the administrative offices by iron doors, as indicated in the Foundation's report . There are three sports equipment in the corridor. It is indicated that some of the migrants are sleeping in the TV room for lack of available space in the dormitories. It has been accordingly concluded that the spaces designed for common use of inmates are very limited as they are used as a dormitory due to overcrowding in the dormitories. Accordingly, it has been observed that the migrants staying at overcrowded dormitories with attached bunk beds and cupboards are not provided with an environment where they could have a rest.

34) In the report containing the findings and conclusions reached through the official visit paid by the UN Special Rapporteur on the Human Rights of Migrants to the Kumkapı and Edirne Foreigners' Removal Centres between 25 and 29 June 2012, it is indicated that conditions of the removal centres are poor; those who are under administrative detention as well as the children are usually kept locked in rooms or units with very limited or no access to outdoor spaces; and that the other significant concerns are "overcrowding", "unhealthy conditions" and "inadequate food".

35) In addition to the above-given considerations, in the light of the standards established by the CPT on this issue, those detained at the Kumkapı Centre must be provided with the opportunity to do open-air exercise every day for at least one hour, as a measure capable of ensuring the inmates to maintain their daily lives under acceptable conditions.

36) In the GNAT's report issued with regard to the visit of 11 May 2012, it is pointed out that irregular migrants detained at the Kumkapı Centre have access to fresh air for short periods only once a week because of the location of the Kumkapı Centre and understaffing. However, it is not evident from the report whether this finding based on theoretical information submitted by the authorities complies with the practice. However, it is indirectly stated in this report that merely this finding has turned the Kumkapı Centre into a prison for irregular migrants and that the opportunity to have access to fresh air once a week is inadequate.

37) In the Foundation's report, it is indicated by the director of the Kumkapı Centre that those under administrative detention have access to fresh air at the yard for 45 minutes during weekdays and for 2-3 hours during weekends. However, the applicant maintained that he had access to fresh air only for 10 minutes once a week. According to the non-governmental organizations whose considerations are referred to in the report, the migrants' statements that they have not been indeed provided with the fresh air opportunity as indicated and even some of them could not avail of this opportunity for weeks while some of them could have access to fresh air only twice during three or four months increase the plausibility of the applicant's allegation.

38) In the Security General Directorate's letter of 16 March 2013, it is indicated "inmates, in groups, are ensured to have access to fresh air at the yard to the extent possible given the physical conditions of the Kumkapı Centre and number of staff, and within the centre, there is also an outdoor space designated for ventilation where all inmates may use during the day". However, in its letter dated 7 January 2016 in reply to the individual application of *K.A.*, there is no information

as to this space designated for ventilation and no explanation as to its features and capacity as well as the duration during which inmates may use there. It is contradictory that the Security General indicates, on one hand, that the Kumkapı Centre has a space where all inmates may avail for ventilation during the day and, on the other hand, that inmates are ensured to have access to fresh air to the extent possible given the physical conditions and number of staff. This contradictory explanation is in support of the alleged lack of sufficient ventilation at the Kumkapı Centre.

39) Besides, given the absence of any information indicating that the criticisms included in the report issued with regard to the visit paid on 2 May 2014 shortly before 28 June 2014, the starting date of the applicant's administrative detention, it is explicit that the ventilation opportunity provided "to the extent possible given the physical conditions and number of staff of the Kumkapı Centre" is not capable of satisfying the CPT's standards. Moreover, as pointed out in the Foundation's report, the authorities admitted that the yard of the Kumkapı Centre is being used as a parking lot and that the inmates could not be provided with the opportunity to have access to fresh air for reasons such as security risk and unfavourable weather conditions.

40) Regard being had to the above-mentioned findings, it has been concluded that the conditions under which the applicant was detained at the Kumkapı Centre was of the nature that could reach the level of the prohibition of "treatment incompatible with human dignity" safeguarded by Article 17 of the Constitution; that insufficient spaces for common use, which are designed not for accommodation but for rest, as well as most importantly, the very limited opportunity of access to fresh air made the applicant's detention conditions intolerable, which was in breach of the prohibition of treatment incompatible with human dignity (see, for the Court's similar judgments, *Rıda Boudraa*, no. 2013/9673, 21 January 2015; *K.A.*; *F.A. and M.A.*, no. 2013/655, 20 January 2016; *A.V. and Others*, no. 2013/1649, 20 January 2016; *F.K. and Others*, no. 2013/8735, 17 February 2016; *T.T.*, no. 2013/8810, 18 February 2016; *A.S.*, no. 2014/2841, 9 June 2016; and *I.S. and Others*, no. 2014/15824, 22 September 2016).

ALLEGED VIOLATION OF THE RIGHT TO AN EFFECTIVE REMEDY:

41) The applicant maintained that he was detained, at the detention room and the Kumkapı Foreigners' Removal Centre for 60 days, under conditions that would constitute inhuman and degrading treatment; and that there was no effective legal remedy whereby he could challenge the detention conditions. He accordingly alleged that his rights to a fair trial and to an effective remedy were violated.

Article 40 of the Constitution reads as follows:

"ARTICLE 40- Protection of fundamental rights and freedoms

Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities.

(Paragraph added on October 3, 2001; Act No. 4709) The State is obliged to indicate in its proceedings, the legal remedies and authorities the persons concerned should apply and time limits of the applications…"

42) The right to an effective remedy ensuring the protection of fundamental rights and freedoms is enshrined in Article 40 of the Constitution. This right is a fundamental right safeguarded by the Constitution and entitles an individual alleging a violation of his freedom to promptly resort to a competent authority. This right is not an independent right which can be exercised alone but a complementary right which may be exercised only in case of an alleged violation of any other fundamental right and freedom safeguarded by the Constitution. In other words, in order to discuss whether the right to an effective remedy has been violated, it must be firstly ascertained in respect of which fundamental rights and freedoms the right to an effective remedy has been restricted (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, §§ 33-34; and *Sıtkı Güngör*, no. 2013/5617, 21 April 2016, § 86).

43) To exercise the right to an effective remedy, existence of violation of one of the fundamental rights and freedoms is not a pre-requisite. This right requires an individual who is of the opinion that

he has sustained damage on account of an alleged unconstitutionality to have recourse to a legal remedy in order to ensure adjudication of his allegations as well as, if possible, redress of his damage. In other words, everyone alleging to be victim of an arguable violation of any fundamental rights and freedoms enshrined in the Constitution is entitled to an effective remedy under Article 40 of the Constitution (see *Sıtkı Güngör*, § 87).

44) The administrative and judicial remedies which are prescribed for acts or actions allegedly constituting a violation and all of which must be exhausted before lodging an individual application with the Court are to be accessible, capable of offering redress as well as, once exhausted, to offer a reasonable prospect of success for preventing the applicant's alleged violations, for terminating the alleged violation if it still continues, or for affording redress for the alleged violation which no longer continues. Therefore, the existence of these remedies must be sufficiently certain not only in theory but also in practice or must not be at least proven not to be ineffective. In this regard, in order for a legal remedy to be effective, recourse to this remedy must not be unjustly prevented notably by the acts or omissions of public authorities (see *Ramazan Aras*, no. 2012/239, 2 July 2013, §§ 28-29; *Hatice Gizem Dağcı and Sevin Gül Dağcı*, no. 2013/3438, 17 September 2014, § 28; and *K.A.* [GC], no. 2014/13044, 11 November 2015, § 71).

45) It appears from the information included in the individual application form and the letter issued by the Security General Directorate that the applicant was placed under administrative detention at the Kumkapı Foreigners' Removal Centre for 54 days between 28 June 2014 and 21 August 2014.

46) It is set out in Article 53 of Law no. 6458 that a foreigner in respect of whom a deportation order has been issued may challenge the deportation order before the administrative court within 15 days as from the notification of the order. This remedy includes the general review to be conducted by the administrative court in respect of the impugned deportation act but does not include any information as to the scope of the examination to be conducted by the administrative court in respect of special considerations.

47) The legal remedy set forth in Article 57 of Law no. 6458 which allows for an appeal against the administrative detention order before the magistrate judges does not afford a special type of administrative or judicial mechanism which provides the opportunity for a review of the compatibility of detention conditions with Article 17 § 3 of the Constitution or, in case of an unconstitutionality, for improving the conditions or ending the detention, which sets the conditions of detention, and which involves judicial review of such conditions. It has been observed that this remedy is intended to review the lawfulness of the administrative detention order; that in the present case, upon the applicant's challenges against this order, the incumbent magistrate judges made assessments merely to that end but not in respect of the allegedly poor conditions of detention which are put forward by the applicant in his petition.

48) As a matter of fact, it is indicated in the 2012 report of the GNAT that there is no arrangement to ensure uniformity among all removal centres in terms of the treatments to be applied to the irregular migrants detained therein and the relevant processes, which has led to different treatments; and that a regulatory legal instrument must be prepared on this matter.

49) In the light of these findings, it has been concluded that there existed no administrative and judicial remedy which offered a reasonable prospect of success and was effective both in theory and in practice in respect of the applicant's legal interests safeguarded by Article 17 § 3 of the Constitution.

50) For these reasons, it has been held that there was no effective legal remedy required by Article 40 of the Constitution for the alleged violation of Article 17 of the Constitution on account of poor detention conditions; and that there had been therefore a violation of the right to an effective remedy. Therefore, I do not agree with the conclusion reached by the majority.

The assessment as to the grounds submitted by the majority of the Court:

51) In reaching such conclusion, the majority of the Court departed from the Court's established case-law whereby in case of the alleged violations sustained by the applicants under detention, the Court finds violations of Article 17 § 3 of the Constitution as well as Article 40 for lack of an effective remedy.

52) In the majority's opinion, it is stated that the applicant has been no longer kept at the impugned centre; that the violation no longer continues as "his detention" has ended; that there is no legal interest in respect of the applicant in seeking prospective improvement of the conditions; that the application is devoid of merit; that if the applicant has actually sustained damage, the effective legal mechanism to offer a redress is COMPENSATORY remedy; that in spite of non-existence of any judicial/administrative decision awarding compensation, non-operation of such a remedy cannot be a proof of its ineffectiveness; and that what is indeed effective should have been the existence of a decision where it is held that no compensation would be paid.

53) Besides, majority of the Court found the application inadmissible for non-exhaustion of available remedies without making any further examination as to admissibility conditions as Article 2 of Law no. 2577 formed a sufficient legal basis for the damage caused by the administration; the courts were in a better position to assess the physical conditions of the foreigners' removal centres; and this was a remedy offering a prospect of success and sufficient redress. Therefore, the majority did not examine the application under Article 40 of the Constitution.

54) In Article 5 of the Constitution, it is one of the State's fundamental aims and duties to provide the conditions required for the development of the individual's material and spiritual existence. When Articles 17 and 5 of the Constitutions are taken together by virtue of the principle of constitutional holism, it appears that the State is also obliged to protect individuals from torture and ill-treatment (positive obligation) (see *F.R.*, no. 2016/4405, 15 February 2017, § 56).

55) The wording of the grounds submitted by the majority and likely to be construed that in cases where the applicant has left the

place where he was detained, there is no need to fulfil this prospective duty incumbent on the State, which is not therefore in the applicant's favour or involves no legal interest for him, leads to implicit JUSTIFICATION of these treatments exposed by such individuals, diminishes the State's obligation to increase detention conditions up to the standards safeguarded by the Constitution, as well as instead of primarily ensuring the protection of their rights, affords an opportunity for individuals -detained under conditions incompatible with human dignity- to obtain monetary redress on account of the damage they have sustained if proven, which is legally unacceptable.

56) Besides, in the compensatory proceedings in our country, the burden of proof is on the defendant to substantiate his expenses and gains. The criteria and considerations afforded through the compensatory proceedings for offering redress for distress and suffering always remain insufficient and vary according to the courts/experts dealing with the compensatory proceedings. The compensatory amount awarded has on no account had a social deterrent effect on those leading to award of compensation.

57) Given the facts and incidents taking place at the removal centre where the applicant was unlawfully detained, content of the case-file, the reports and documents issued by the institution and the commission as a whole, there is no doubt that the applicant's living conditions during the period when he was deprived of his liberty in a way incompatible with human dignity do not satisfy the conditions set out in the Convention as well as the relevant standards. It also appears from the information provided by the Kumkapı Centre in reply to the questions put by the Court concerning the national and international criteria that the issues of which the applicant is complaining are also proven to have existed, even in part.

58) In the Court's previous case-law, the question as to the detention conditions has been explicitly established in compliance with the ECHR's case-law and in a way that would involve the procedure both in theory and in practice. In this sense, as it is a legal obligation incumbent on the State to ensure the conditions at the removal centres

to be in compliance with the humane living conditions and legal rules, I do not agree with the grounds leading to a change in the Court's established case-law which is considered to have justified the unjust interference with the right in question under similar circumstances.

59) A step to be taken for preventing violation covers an area from which everyone would benefit. However, redress of the damage sustained due to the violation has an individual sphere of influence. In case of a violation which could no longer be remedied in respect of the individual having suffered, offering redress is of course the sole remedy. However, I do not concur with the conclusion which points out a new administrative remedy which has not yet been tried and yielded to any outcome of probative nature in respect of this way of redress.

60) Besides, in respect of the notion of an effective remedy, rather than a sole decision, a series of decisions whereby the existence of the violation has been found in every case of similar nature and a redress is granted may constitute a basis for the effectiveness criteria. What is important is to protect fundamental rights and freedoms and contribute their maintenance and improvement as well as to permanently prevent unjust interferences with these rights and freedoms and to take preventive measures in this regard.

61) I do not consider that in case of such a complaint, relying, as a ground as in the present case, on the judicial or administrative authorities' expectation of a decision based on a PRESUMPTIVE OUTCOME which almost justifies a degrading treatment incompatible with human dignity, is an accurate legal thesis. For these reasons, I do not agree with the majority's conclusion as there have been violations of Articles 17 and 40 of the Constitution and there is no ground requiring departure from the Court's previous case-law.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

DECISION

SELAHATTİN DEMİRTAŞ

(Application no. 2016/25189)

21 December 2017

On 21 December 2017, the Plenary of the Constitutional Court declared inadmissible the individual application lodged by *Selahattin Demirtaş* (no. 2016/25189).

THE FACTS

[9-90] The applicant is currently a member of the Parliament and the Co-Chairperson of the HDP. He was elected from the İstanbul district as the candidate of the HDP on 1 November 2015. A number of investigations were conducted against the applicant by various chief public prosecutor's offices for certain offences allegedly committed when he was an MP, and thirty one separate motions were drawn up for lifting his parliamentary immunity.

In the meantime, a provisional article was added to the Constitution for lifting parliamentary immunities for the pending motions (Law no. 6718, Article 1, published at the official gazette on 8 June 2016). Provisional article 20 provides that parliamentary immunity shall not be applicable to motions for lifting immunities submitted to competent authorities by 20 May 2016, the date of adoption of this provisional article by the Grand National Assembly of Turkey ("the GNAT").

Because the investigation files against the applicant also fell within the scope of the provisional article, the necessary action was taken, and those files were joined and handled by the Diyarbakır Chief Public Prosecutor's Office ("the Prosecutor's Office").

The applicant was summoned by the investigation authorities for taking his statement. Numerous summons issued to that end were served on the applicant on 12 July, 15 July, 28 July, 12 August, 6 September and 11 October 2016. However, he failed to comply with these summons. Furthermore, after the constitutional amendment proposal concerning the parliamentary immunity had been brought before the GNAT, the applicant expressly noted in his speech that absolutely no MP would appear before the prosecutor's offices for giving statement.

On 4 November 2016, the applicant was taken into custody at his house located in Diyarbakır and subsequently taken to the Prosecutor's Office. On the same date the Prosecutor's Office referred the applicant to the Diyarbakır 2nd Magistrate Judge's Office with a request of his

detention. By the decision of the Judge's Office dated 4 November 2016, the applicant's detention was ordered for his alleged membership of an armed terrorist organization and for public incitement to commit a criminal offence.

On 11 January 2017, the Prosecutor's Office indicted the applicant for the offences of establishing or managing an armed terrorist organization, making propaganda of a terrorist organization, praising an offence and offender, publicly inciting hatred and hostility, provocation to disobey the Law, organizing, conducting and participating in unlawful meetings and demonstration marches, participating in unlawful meetings and marches without arms and not dispersing willingly despite warnings, publicly inciting to commit an offence, and inciting unlawful meetings and demonstration marches.

On 2 February 2017, the 8th Chamber of the Diyarbakır Assize Court applied to the Ministry of Justice for the transfer of the applicant's case for public security reasons. The 5th Criminal Chamber of the Court of Cassation, upon examining the Ministry's request to that end, referred the case to the 19th Chamber of the Ankara Assize Court. The case was joined with another file, and then separated. Following these processes, the case was pending before the first instance court as of the date when this individual application is examined by the Constitutional Court. The applicant is still detained on remand within the scope of the case-file no. E. 2017/189.

V. EXAMINATION AND GROUNDS

91. The Constitutional Court, at its session of 21 December 2017, examined the application and decided as follows.

A. Alleged Violation of the Right to Personal Liberty and Security

1. Alleged Unlawfulness of the Applicant's Arrest and Police Custody

a. The Applicant's Allegations and the Ministry's Observations

92. The applicant maintained that his right to personal liberty and security safeguarded by Article 19 of the Constitution was violated,

indicating that he was arrested and taken into police custody in breach of the procedures prescribed by the Constitution and the relevant law although he should have been questioned without being taking into custody in his capacity as a Member of Parliament (MP) as well as the co-chairman of the People's Democratic Party (HDP), the third largest group in the Turkish parliament, which was a disproportionate measure.

93. In its observations, the Ministry stated that the right to challenge a custody order was prescribed in the Code of Criminal Procedure no. 5271 ("Code no. 5271" or "the CCP") which also offered a compensation remedy; and that the applicant did not, however, resort to these procedural remedies.

94. In his counter-observations, the applicant reiterated his allegations indicated in the application form and accordingly alleged he was arrested and taken into custody both unlawfully and unconstitutionally due to his opinions and explanations falling into the scope of the freedom of expression, in spite of still being under parliamentary immunity.

b. The Court's Assessment

95. The last sentence of Article 148 § 3 of the Constitution provides as follows:

> *"In order to make an application, ordinary legal remedies must be exhausted".*

96. Article 45 § 2, titled *"Right to individual application"*, of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, provides as follows:

> *"All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application".*

97. Pursuant to the said provisions of the Constitution and the CCP, in order for an individual application to be lodged with the Court, ordinary legal remedies must be exhausted. It is the constitutional task of all State bodies to respect for fundamental rights and freedoms, and

it is incumbent on the administrative and judicial authorities to redress any breach of right caused by the neglect of that task. Therefore, it is essential that the alleged violations of fundamental rights and freedoms be primarily brought before, dealt with and concluded by inferior courts. Accordingly, the individual application to the Constitutional Court is a remedy of subsidiary nature which may be resorted in case of inferior court's failure to redress the alleged violations (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, §§ 16 and 17).

98. However, the remedies to be exhausted must be accessible, capable of providing redress in respect of the applicant's complaints and offer reasonable prospects of success. Accordingly, the existence of such remedies must be sufficiently certain not only in theory but also in practice, or at least proven not to be ineffective (see *Ramazan Aras*, no. 2012/239, 2 July 2013, § 29).

99. In this respect, it appears that Article 141 § 1 of Code no. 5271 titled compensation claim -where it is laid down that those who have been arrested, taken into or kept in detention under conditions or in circumstances not complying with the laws as well as those who are detained lawfully but has not been brought before a judicial authority and has not obtained a verdict, within a reasonable time may claim compensation from the State for their any kind of pecuniary and non-pecuniary damages- is a remedy of such kind. It is also set out in Article 142 § 1 of the same Law where the conditions for compensation claims are specified that the claim for compensation may be lodged within three months after the person concerned has been informed that the decision or judgment has become final, and in any event within one year after the decision or judgment has become final. (see *Zeki Orman*, no. 2014/8797, 11 January 2017, § 27).

100. With reference to the relevant case-law of the Court of Cassation, the Court has concluded that it is not necessary to wait for a final decision on the merits of the case before ruling on a compensation claim lodged under Article 141 of the CCP due to alleged excessive length of pre-trial detention or alleged unlawfulness of arrest or detention; and that this opportunity to lodge a compensation claim is an effective legal remedy required to be exhausted (see *Hikmet Kopar and Others* [Plenary], no.

2014/14061, 8 April 2015, §§ 64-72; *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, §§ 53-64; *Günay Dağ and Others* [Plenary], no. 2013/1631, 17 December 2015, §§ 141-150; and *İbrahim Sönmez and Nazmiye Kaya*, no. 2013/3193, 15 October 2015, §§ 34-47).

101. Finding a violation as a result of the individual application lodged by an individual who has been taken into custody and subsequently detained on the basis of a criminal charge due to alleged unlawfulness of his custody -as regards the termination of deprivation of liberty- does not have a bearing on the applicant's personal situation. That is because, even if the custody order is unlawful, a finding of unlawfulness as well as a violation in this regard will not *per se* ensure the release of a "detainee" as his detention had been by the trial judge. Therefore, a probable violation judgment to be rendered through an individual application may give rise to an award of compensation in favour of the applicant if requested (see *Günay Dağ and Others*, § 147; and *İbrahim Sönmez and Nazmiye Kaya*, § 44).

102. In the present case, the alleged unlawfulness of the decision ordering the applicant's custody may be examined through an action to be brought under Article 141 of the Code no. 5271. As a matter of fact, the approach taken by the Court of Cassation (see decision of the 12th Criminal Chamber of the Court of Cassation dated 1 October 2012 and no. E.2012/21752, K.2012/20353; and *Günay Dağ and Others*, § 145) indicates that as regards such claims, there is no need to wait for a final decision on the merits of the case. If the custody order is found to be unlawful as a result of this action, the applicant may be also awarded compensation.

103. It has been accordingly concluded that the remedy provided by Article 141 of the CCP no. 5271 is an effective remedy capable of offering redress for the applicant's complaints; and that the examination by the Court of individual applications lodged without exhaustion of this ordinary remedy does not comply with the "subsidiary nature" of the individual application system.

104. Besides, any individual who has been arrested or taken into custody is entitled, by virtue of Article 91 § 5 of the CCP, to file a challenge with the magistrate judge against the public prosecutor's written order for his arrest or custody in order to secure his immediate release. According

to the CCP, such a challenge may be filed by not only the individual arrested, but also his defence counsel or legal representative, spouse or first-degree or second-degree relatives by blood. There is no information or document in the application form and annexes thereto, which indicates that the applicant challenged the unlawfulness of his arrest or custody before the magistrate judge and that his challenge did not lead to any outcome.

105. For these reasons, this application has been declared inadmissible for *non-exhaustion of domestic remedies* in so far as it relates to the alleged unlawfulness of the applicant's arrest and custody.

2. Alleged Unlawfulness of Detention

a. The Applicant's Allegations and the Ministry's Observations

106. Maintaining that he had been detained contrary to the procedure prescribed by the Constitution after his parliamentary immunity being lifted; and that the imputed acts indeed fell into the scope of the freedom of expression and right to engage in political activities, the applicant alleged that his detention was unlawful.

107. The applicant considered that all of the imputed acts, which were the speeches he had made, in his capacity as an MP and chairperson of a political party, on different dates during the events such as meetings, press statements or conferences, should have been considered under the freedom of expression; and that however, they were regarded to constitute an offence.

108. He also argued that his detention order was unlawful; that decisions ordering his detention and rejecting his challenge against detention were lack of any concrete and legal grounds; and that there was no strong criminal suspicion of guilt. He asserted that although he should have been provided with the opportunity of conditional bail as a political figure, his detention was ordered in breach of the principle of proportionality; that his detention order was issued six months after the relevant amendment to the Constitution; and that as his impugned expressions were dated back to a few years ago and all evidence was already collected, there was no risk of his fleeing.

109. Besides, the applicant maintained that the detention order aimed at preventing his political activities as an MP and the co-chairperson of the HDP as well as his punishment due to these activities. He considered that the detention order had a political motive which was contrary to the motives specified in the Constitution; and that he was precluded from performing his political activities as an MP due to his detention on remand.

110. Consequently, the applicant maintained that his rights to personal liberty and security as well as to a fair trial safeguarded respectively by Articles 19 and 36 of the Constitution and by Articles 5 §§ (1) and (3) and Article 6 §§ (1) and (3) of the European Convention on Human Rights ("Convention") were breached. He also requested his release.

111. In his additional written submission of 26 July 2017, the applicant maintained that as his detention order aimed at precluding him from engaging in political activities and representing his electors as well as at punishing him due to his such political activities.

112. In its observations, the Ministry referring to the similar judgments concerning detention rendered by the Constitutional Court and the European Court of Human Rights ("the ECHR") noted that the relevant court had taken an individualized approach in issuing the detention order, demonstrated plausible evidence to suspect that the applicant had committed an offence, explained the reasons for his detention, provided concrete evidence and made an assessment as to the proportionality of his detention.

113. The Ministry also indicated that, through his speech concerning the 6-7 October events, the applicant defended the ditches and trenches dug by the terrorist organization members and called on the people to resist against security officers endeavouring to fill these ditches and trenches; and that the acts performed upon these calls had caused the death and injury of many people as well as damage to public and private buildings. It further stated that in the detention order, these acts were relied on as a ground for strong suspicion of guilt; and that his application must be assessed in the light of these explanations.

114. In his counter-statements, the applicant asserted that the Ministry's submissions could not be accepted on the grounds that the strong indications specified in the detention order were merely consisted of his speeches falling under the freedom of expression and the rights to assembly and to engage in political activities; that there was no legitimate aim justifying his detention; that the detention measure was of political nature; and that the detention order had no justification.

b. The Court's Assessment

115. Article 13 of the Constitution, titled *"Restriction of fundamental rights and freedoms"*, reads as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

116. The first paragraph and the first sentence of the third paragraph of Article 19 of the Constitution, titled "*Personal liberty and security*", read 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."*

117. The applicant's allegations under this section must be examined within the scope of the right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution.

118. Moreover, in his counter-statements against the Ministry's opinion, the applicant raised new complaints -which had not been previously indicated in the application form- to the effect that the

decisions ordering his continued decision provided no relevant and sufficient grounds; that the opinion of the prosecutor's office concerning the continued detention was not notified to them; that the challenges against his continued detention were not concluded; and that no hearing was held despite the long period having elapsed.

119. In case of detention on a criminal charge, an individual application whereby the applicant alleges that the period of his detention exceeded reasonable time or he was not provided with the procedural safeguards during the judicial review of his detention must be lodged, within the prescribed period upon the exhaustion of available remedies or following his release, at every stage when his continued detention is ordered pending the investigation or first-instance proceedings against him (see *Mehmet Emin Kılıç*, no. 2013/5267, 7 March 2014, § 28). Accordingly, the applicant whose trial has been pending before the 19th Chamber of the Ankara Assize Court still has the opportunity to bring his complaints concerning the reasonable time requirement as well as concerning the procedural aspect of his detention reviews before the Court, at every stage when his continued detention is ordered pending his first-instance proceedings, by once again lodging an individual application within the prescribed period upon exhausting the legal remedies. However, he must satisfy the necessary procedural obligations such as to fill in a fresh application form and to pay the application fee. This is the only possible way for the Court to examine the applicant's abovementioned complaints under Article 19 §§ 7 and 8 of the Constitution.

120. Therefore, the Court did not make a further examination as to the complaints subsequently raised by the applicant.

i. General Principles

121. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, certain circumstances under which individuals may be deprived of liberty are set forth, provided that the conditions of detention must be prescribed by law. Therefore, a person may be deprived of his liberty only in cases where one of the circumstances specified in this article exists (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

122. Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53 and 54).

123. In Article 13 of the Constitution, it is set forth that fundamental rights and freedoms may be restricted only by law. Article 19 of the Constitution also provides for that terms and conditions under which the individual's right to personal liberty and security may be restricted are to be prescribed by law. Therefore, detention constituting an interference with the individual's personal liberty must have a legal basis pursuant to Articles 13 and 19 of the Constitution (see *Murat Narman*, § 43; and *Halas Aslan*, § 55).

124. As set out in Article 19 § 3 of the Constitution, individuals under a strong suspicion of criminal guilt may be apprehended by decision of a judge solely for the purposes of preventing the risk of their fleeing, destroying or altering the evidence as well as in other circumstances prescribed by law and necessitating detention (see *Halas Aslan*, § 57).

125. Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, the accusation needs to be supported with convincing evidence likely to be regarded as strong. Nature of the facts likely to be regarded as convincing evidence mainly depends on the particular circumstances of every concrete case (see *Mustafa Ali Balbay*, § 72).

126. In case of an initial detention, it may not be always possible to show the existence of strong suspicion of guilt, along with all relevant evidence. This is because, one of the aims of detention is to proceed with

the criminal investigation and/or prosecution in order to confirm or refute the suspicions regarding the person concerned (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87; and *Halas Aslan*, § 76). It is not therefore certainly necessary that there must be sufficient evidence at the time of arrest and detention. Accordingly, the facts underlying the suspicions to constitute a basis for the accusation and thereby for detention must not be considered to be at the same level with the facts to be discussed at the subsequent stages of the criminal proceedings and to be a basis for the conviction (see *Mustafa Ali Balbay*, § 73).

127. In cases where serious allegations indicate, or circumstances of the present case reveal, that the acts imputed to suspect or accused fall within the ambit of fundamental rights and freedoms sine qua non for a democratic society such as the freedom of expression, right to trade-union freedom and right to engage in political activities, judicial authorities ordering detention must act with more diligence in determining the strong suspicion of guilt. The question as to whether the duty of diligence has been fulfilled is subject to the Court's review (for a violation judgment rendered at the end of such review, see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, §§ 72-78; and for inadmissibility decisions, see *Mustafa Ali Balbay*, § 73; *Hidayet Karaca*, § 93; *İzzettin Alpergin* [Plenary], no. 2013/385, 14 July 2015, § 46; and *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, §§ 124, 133 and 142).

128. Besides, it is set forth in Article 19 § 3 of the Constitution that a detention order may be issued for the purposes of preventing the risk of "fleeing" or "destroying or altering the evidence". The constitution-maker has also laid down the phrase *"in other circumstances prescribed by law and necessitating detention"* whereby it is implied that the grounds for detention are not limited to those specified in the Constitution and any such ground other than the specified ones may be regulated only by law (see *Halas Aslan*, § 58).

129. Article 100 of Code no. 5271 embodies the grounds for detention. Accordingly, a detention order may be issued if the suspect or accused flees, absconds or there exists concrete evidence causing suspicion to that effect and if his behaviours cause strong suspicion that he attempts to destroy, conceal or alter the evidence or to exercise pressure on the

witnesses, victims or others. This Article also provides a list of offences for which there is a statutory presumption of the existence of grounds for detention (see *Ramazan Aras*, § 46; and *Halas Aslan*, § 59). However, in case of an initial detention, it may not be always possible, by its very nature, to concretely specify all facts forming a basis for the grounds for detention prescribed in the Constitution and Law (see *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 68).

130. On the other hand, Article 13 of the Constitution provides for that any restriction with fundamental rights and freedoms cannot fall foul of the principle of "proportionality". The phrase *"necessitating detention"* included in Article 19 § 3 of the Constitution also points out the requirement that detention must be proportionate (see *Halas Aslan*, § 72).

131. This principle is formed of three sub-principles, namely "sufficiency", "necessity" and "proportionality". "Sufficiency" means that the envisaged interference must be sufficient for attaining the desired aim; "necessity" means that the interference must be necessary for the desired aim, in other words, it is not possible to attain the said aim through a less severe interference; and "proportionality" means a reasonable balance must be struck between the interference and the aim sought to be attained (see the Court's judgment no. E.2016/13 K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

132. One of the factors to be taken into consideration is the fact that the detention measure is to be proportionate to the gravity of the imputed offence as well as to severity of the sanction to be imposed. As a matter of fact, Article 100 of Code no. 5271 indicates that a detention order cannot be issued if the gravity of the act is not in proportion with the expected penalty or security measures to be taken (see *Halas Aslan,* § 72).

133. Besides, detention measure may be said to be proportionate only when the other preventive measures alternative to detention are not sufficient. Accordingly, in the event that requirements of conditional bail -having a lesser impact on fundamental rights and freedoms as compared to detention- are sufficient for the legitimate aim sought to be achieved, detention measure must not be applied, which is also pointed out by Article 101 § 1 of Code no. 5271 (see *Halas Aslan*, § 79).

134. In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations.

135. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's 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*, § 79; and *Selçuk Özdemir*, § 76). As a matter of fact, it is set out in Article 101 § 2 of Code no. 5271 that in detention orders, evidence indicating strong suspicion of guilt, existence of grounds for detention and the proportionality of the detention measure will be justified with concrete facts and clearly demonstrated (see *Halas Aslan*, § 75; and *Selçuk Özdemir*, § 67).

ii. Application of Principles to the Present Case

136. In the present case, it must be primarily ascertained whether the applicant's detention had a legal basis. His detention was ordered due to his acts specified in thirty-one investigation reports, pursuant to Article 100 of Code no. 5271, for his alleged membership of an armed terrorist organization, namely the PKK, and public incitement to commit an offence.

137. The applicant also complained that his parliamentary immunity was lifted in breach of the constitutional procedure and he must be therefore ensured to enjoy this immunity; and that his detention could not be ordered.

138. Article 83 § 2 *in limine* of the Constitution sets forth that an MP who is alleged to have committed an offence prior or subsequent to election shall not be arrested, questioned, detained or tried "unless the Assembly decides otherwise".

139. However, by Provisional Article 20 added to the Constitution by Article 1 of Law no. 6718, it is set forth that motions for lifting parliamentary immunity which have been submitted to the Ministry of Justice, the Prime Ministry, the Office of the Speaker of the Grand National Assembly of Turkey ("GNAT or Assembly") or to the Office of the Joint Committee composed of the members of the Committees on the Constitution and on Justice by 20 May 2016 -the date of adoption of this article in the Grand National Assembly of Turkey- shall be exempt from the parliamentary immunity enshrined in Article 83 § 2 *in limine* of the Constitution.

140. A request for annulment of the above-cited legal arrangement was filed with the Court by 70 MPs including the applicant, maintaining that "this arrangement was in the form of an Assembly's resolution on lifting the parliamentary immunity". The Court concluded that it was not a resolution as regards lifting parliamentary immunity under Article 85 of the Constitution, but a constitutional amendment. It also dismissed the request due to the failure to pursue the procedure as regards the request for annulment of constitutional amendments (see the Court's judgment no. E.2016/54 K.2016/117, 3 June 2016, §§ 4-15).

141. Regard being had to the Constitutional Court's above-mentioned decision, it appears that in the present case, no decision for lifting the applicant's parliamentary immunity has been taken; but an exemption to parliamentary immunity has been introduced by the constitutional amendment with respect to the motions at certain stages. As a matter of fact, the applicant raised no allegation that the offences imputed to him fell outside this exemption.

142. As a matter of fact, in ordering the applicant's detention, the Ankara 2nd Magistrate's Judge stated *"By virtue of Provisional Article 20 added to the Turkish Constitution by Article 1 of Law no. 6718, the imputed offences are not within the scope of parliamentary immunity, and therefore investigation and prosecution into these acts may be conducted"*.

143. Therefore, it cannot be said under the specific circumstances of the present case that the applicant's detention cannot be ordered for his enjoying parliamentary immunity. Accordingly, it has been concluded that the detention measure applied in respect of him had a legal basis.

144. Before proceeding with an assessment as to whether the detention measure revealed to have a legal basis has a legitimate aim and is proportionate, it must be determined whether there is strong indication of the applicant's having committed an offence, which is the prerequisite of the detention.

145. Referring to the facts within the scope of the "6-7 October events", "ditch events", the applicant's certain speeches and activities within the Democratic Society Congress (DTK), the Diyarbakır 2nd Magistrate Judge ordering the applicant's detention concluded that there was strong criminal suspicion on his part for the alleged membership of an armed terrorist organization, the PKK, and for public incitement to commit an offence.

146. The investigation authorities found that when an armed conflict erupted in Kobani between the PYD—considered to be the PKK's Syrian wing—and the DAESH during the Syrian civil war, a call was made on 5 October 2014 through a social media account associated with the PKK to provoke people to defend Kobani and to occupy cities in Turkey for this cause. The next day, a public statement was made through the HDP's social media account that its Central Executive Board had convened with the agenda of Kobani events. Through this statement people were also called to take immediate action and to pour out into the streets for supporting those who had been already fighting to protect regions. It was also stated therein "*Everywhere is Kobani from now on. We call for permanent resistance FOR AN INDEFINITE PERIOD OF TIME until the end of the siege and brutal aggression in Kobani*" (*"Bundan böyle her yer Kobane'dir. Kobane'deki kuşatma ve vahşi saldırganlık son bulana kadar SÜRESİZ DİRENİŞE çağırıyoruz").* In the meantime and thereafter, continuous announcements and calls were made through a web site operating under the PKK's guidance for urging people to uprising and engage in armed conflicts on streets with security forces. Upon these calls, mass violent acts took place. These violent acts — which created a great public disturbance and resulted in a great number of casualties including many dead and vandalizing of public and private property—started on 6 October 2014, lasted for days and spread to many regions of the country.

147. The applicant noted through his press statement that the call by the HDP's Central Executive Committee was made upon having heard that the DAESH had been getting closer to Turkey's border and was not a call for violence; that the demonstrations had gone beyond its purpose and violent acts took place on account of provocateurs; and that they stood behind the call.

148. It is undoubted that a call was made through HDP's social media account, on its Central Executive Committee's behalf, to incite people to pour out into the streets and join the resistance; and that the applicant was at that time the co-chairman of the party and a member of the Central Executive Committee.

149. This call was made at a time when the internal conflict in Syria had posed a threat to national security in Turkey, following armed clashes between the PYD and the DAESH in Kobani. It must be further emphasized that this call was made on the next day of the call "to occupy the metropolitan cities" in Turkey by a leader of the PKK terrorist organization, which is one of the parties of the clashes, on the pretext of the incidents taking place in Kobani. Besides, the statement published on the same day via a web-site operating under the guidance of the PKK contained discriminatory statements and made a call to extend the uprising to the maximum level by using the phrase "make life unbearable" for a political party.

150. The applicant should have foreseen that the call made for uprising in favour of a terrorist organization upon the conflicts that took place in Kobani between two terrorist organizations might have led to widespread mass violent acts in Turkey, which would undoubtedly disturb the public order. It is also clear that the civil war in Syria posed a serious threat to the national security of Turkey due to its location. It is undeniable that in this atmosphere, such a call, which was made from the social media account of the HDP on behalf of the HDP's Central Executive Board, would highly influence a certain part of the community. As a matter of fact, the mass violent acts started right after these calls were made and spread gradually over time. Accordingly, it has been observed that the investigation authorities relied on factual and legal grounds while

establishing a causal link between the calls made on behalf of the HDP's Central Executive Board and the PKK, as well as between the calls and the violent acts in question.

151. Furthermore, during the period when the terrorist events known as "ditch events" occurred, the PKK tried to gain dominance over some parts of the provinces located in the eastern and south-eastern regions of Turkey. To that end, the PKK dug ditches, constructed barricades and planted bombs and explosives in these barricades, thereby trying to gain dominance in these cities under the name of "self-governance". The security officers carried out operations for the purpose of filling these ditches and removing the barricades, thereby returning the life to normal. During these operations, many heavy weapons and explosives were seized, the ditches were filled, the barricades were removed, and many terrorists were neutralized.

152. According to the investigation authorities, in his public speech delivered in Cizre at the time of these events, the applicant stated *"they are considering to prevent once again, by tanks and guns, the understanding adopted by people … to have the ability to govern themselves through self-governance" ("halkın özyönetimle artık ben kendimi yönetmek istiyorum … anlayışının bir kez daha tankla, topla durdurabileceklerini sanıyorlar").* In his speech in Cizre, he noted "*Our people have the power to resist against pressure and massacre policies everywhere. We have the power to protect ourselves against any attack. We will show that we are not despairing; we will resist together; we will achieve salvation without forgetting our motherland and history and by defending our rights" ("Halkımız atananların değil seçilmişlerin yetkili olduğu kendi meclisleri ile belediye ile kendini yönetmek istiyor. Halkımız her yerde baskı politikalarına katliam politikalarına karşı direnebilecek güçtedir. Bütün saldırılara karşı kendimizi koruyacak gücümüz var. Çaresiz olmadığımızı gösteriyoruz, birlikte direneceğiz, kendi ana vatanımızı da tarihimizi de unutmadan haklarımızı da savunarak hep birlikte kurtuluşa gideceğiz").* In his speech in Diyarbakır, he stated *"Everywhere you carry out operations is filled with an atmosphere of enthusiasm rather than fear and panic. Do you know why? Because these people are so sure that they will triumph from the very first day… We will not let cruelty and fascism win any more; this resistance will triumph. Those who*

try to downplay it by calling it ditches and holes should look back at history. There are tens of millions of heroes and brave people resisting against this coup. You are waging a war against the people. The people are resisting and will resist everywhere." ("Bugün operasyon yaptığınız her yerde korku ve panik havası değil coşku havası hakim. Neden biliyor musunuz? O insanlar daha ilk günden kazandıklarından o kadar eminler ki… Bir kez daha zulmün, faşizmin kazanmasına izin vermeyeceğiz, bu direniş kazanacaktır. Öyle hendek, çukur diye küçümsemeye çalışanlar da dönüp tarihe baksınlar. On milyonlarca kahraman, yiğit bu darbeye karşı direnen insan var. Sen halka karşı savaş açmışsın. Halk her yerde direnir, direnecektir"). In his last speech, the applicant also noted that significant decisions concerning the management of "self-governance" process on the political grounds would be taken at the extraordinary meeting of the Democratic Society Congress and would be materialized.

153. In his speech in this congress in 2015, the applicant noted *"We are expressing these facts as a reply to unproductive discussion that barricades and ditches have emerged as a result of the "self-governance" demands. Barricades and ditches have not been established as the Kurdish people want "self-governance" but as those making massacre plans in Ankara have started to realize their plans… It is neither a matter of ditch not a barricade. This question cannot be underestimated. The reason behind barricades and ditches is the stance against and resistance to fascism and massacre. It does not mean that autonomy is represented by barricades and ditches. Autonomy is … the right to live in dignity. If any person does not respect it or says 'those wanting autonomy will be detained, destroyed or forced to kneel down', then it is not unreasonable to set barricades and dig ditches"* (*"Barikat ve hendek öz yönetim taleplerinin sonucunda ortaya çıktı gibi kısır bir tartışmaya bir cevap olsun diye bunları ifade ediyoruz. Barikat ve hendek Kürt halkı öz yönetim istediği için kazılmadı. Barikat ve hendek Ankara'da katliam planları yapanlar o planları hayata geçirmeye başladığı için kazıldı… Ne hendeği ne barikatı mevzu oralara kadar küçümsenemez. Hendekteki barikattaki direnişin nedeni faşizme karşı katliama karşı duruş ve direniştir. Özerklik eşittir hendek barikat değildir. Özerklik … onurlu yaşama hakkıdır eğer biri bunu kabul etmiyor, … bunu aklından geçirenleri 'ben tutuklayacağım, katledeceğim, diz çöktüreceğim' diyorsa vallahi o barikat hendek kazmışlar çok değil").* He also added *"I thank to my fellows who have been resisting … We once again reiterate our loyalty to our each and*

every fellow … struggling at the risk of his/her life, his/her families as well as our martyrs" (Direnen arkadaşlarımıza … teşekkür ediyorum. Canını ortaya koyan … her bir arkadaşımıza, ailelerine, şehitlerimize bir kez daha vefa ve bağlılık sözümüzü tekrar ediyoruz").

154. In his speech delivered on 26 March 2016 at the extraordinary Democratic Society Congress in Diyarbakır pending the ditch events, the applicant stated *"… The struggle taking place today in Cizre, Silopi, Yüksekova, Sur, Nusaybin or any other place is not against terrorism and terrorists… A community is completely presented as a target… If you have declared all Kurds in pursuit of their rights and freedom as terrorist and said necessary step will be taken, the community with a population of 15 million for sure shows resistance to your fascist practices. Then the resistance becomes justified. Otherwise, war is not justified There cannot be no justified war. But resistance is justified…" ("… Bugün Cizre'de, Silopi'de, Yüksekova'da, Sur'da veya başka bir yerde, Nusaybin'de teröre ve teröriste karşı mücadele edilmiyor… Bir halkın tamamı hedefe konulmuş durumdadır… hak ve özgürlük isteyen Kürtlerin hepsini terrorist ilan edip gereğini yapacağım derseniz, 15 milyonluk halk da elinde ne imkan varsa sizing faşist uygulamalarınıza karşı tabi ki direnir. Orada direniş meşru olur. Yoksa savaş meşru bir şey değildir. Savaşın meşruiyeti olmaz. Direniş meşrudur…").*

155. These speeches were delivered mainly at the region where the "ditch events" intensively took place. In this respect, given the applicant's political position, the time and period of the impugned speeches as well as their contents and contexts, the investigation authorities' acknowledgement that his speeches were an indication of his having committed a terrorism-related offence cannot be said to be unfounded.

156. The applicant was also charged by the investigation authorities on account of certain speeches delivered by him in 2012 and 2013. In this respect, according to the findings of the investigation authorities, in his speech delivered in Kızıltepe in 2012 with a view to giving support to the indefinite hunger strike launched at prisoners by prisoners throughout the country in protest against the conditions of Abdullah Öcalan's detention, he noted *"They said you couldn't put up the poster of Öcalan. Those who said it ... Let me speak clearly. We are going to put up a sculpture*

of President Apo." ("Demişler ki Öcalan posteri asamazsınız. Onu diyenlere açıkça sesleniyorum... Biz başkan Apo'nun heykelini dikeceğiz heykelini."). He also made the following statements in Diyarbakır in 2013 *"The Kurdish movement used to see the war as a war of self-defence… Today, those who criticise us also say that the Kurdish people would not exist, at least in Turkish Kurdistan, without the PKK movement. You could not speak of the existence of Kurds in Turkish Kurdistan. Without the coup in 1984 [the year of the first PKK attacks], without the guerrillas, no one today could speak of the existence of the Kurdish people; the Kurds would have no other choice. ... At the time of the initial resistance in Şemdinli [and] Eruh [the first terrorist attacks by the PKK, carried out in the Şemdinli district in Hakkari and the Eruh district in Siirt on 15 August 1984], no one was aware of what was happening but the resistance has today created [the] reality of the [Kurdish] people. We have gained our identity." ("Kürt hareketi savaşı meşru müdafaa savaşı olarak ele aldı…PKK hareketi olmasaydı bugün Kürt halkı diye bir şey Türkiye Kürdistan'ı için en azından olmayacaktı. Türkiye Kürdistanı'nda Kürtlerin varlığından söz edilmeyecekti. 1984 hamlesi olmasaydı, gerilla savaşı olmasıydı, kimse bugün Kürt halkının varlığından söz edemezdi, çünkü Kürtlerin başka çaresi yoktu. ... Şemdinli'de Eruh'ta ilk direniş sergilendiğinde kimse ne olduğunun farkında değildi ama o direniş bugün büyük bir halk gerçeği yarattı. Kimliğimizi kazandık.").* Therefore, the acknowledgement that the applicant's speeches affirming the terrorist acts of the PKK were an indication of his having committed a terror-related offence cannot be said to be unfounded.

157. Lastly, it was maintained that the applicant had acted in accordance with the instructions given by the heads of the PKK terrorist organization. Regard being had to a document where it is indicated that a visit would be paid by a group including the applicant to the family of a organization member "who had been mistakenly executed" and that a letter of apology issued by the organization would be delivered to the family -the document allegedly containing the instructions of Sabri Ok stated to be one of the founders and high-level heads of the PKK terrorist organization- as well as to the contents of the phone conversations -alleged to have taken place between Sabri Ok and K.Y., who is stated to be a head of the terrorist organization, and between the applicant and K.Y.- concerning the participation of the applicant himself in a

negotiation for which an appointment was made with Council of Europe, the consideration of the investigation authorities that the applicant acted in accordance with the instructions by the terrorist organization's heads has a factual basis.

158. Therefore, it must be concluded that there is a strong indication of guilt on the part of the applicant.

159. Besides, it must be assessed whether the applicant's detention in respect of which the prerequisite condition of existence of strong suspicion of guilt has been fulfilled has a legitimate aim.

160. It has been observed that in ordering the applicant's detention, the Diyarbakır 2nd Magistrate's Judge relied on the severity of the penalty provided in the law for the alleged membership of an armed terrorist organization and on the fact that the imputed offence was among the catalogue crimes set out in Article 100 § 3 of Code no. 5271.

161. "Membership of an armed terrorist organization" and "inciting to commit an offence" on accounts of which the applicant was arrested are the types of offences punishable with heavy penalties under the Turkish criminal law. Given the severity of the punishment set forth in the law for the imputed offence, it may be concluded that the risk of fleeing exists. Furthermore, the membership of an armed terrorist organization is among the offences enumerated in Article 100 § 3 of Code no. 5271 that are *ipso facto* presumed as a ground for detention.

162. In addition, it has been observed that upon the entry into force of the constitutional amendment as to the parliamentary immunity, the relevant chief public prosecutor's offices summoned the applicant many times on different dates for the purpose of taking his statement; however, he failed to comply with these summons. After the constitutional amendment proposal concerning the parliamentary immunity had been brought before the GNAT, the applicant expressly said in his speech delivered on behalf of HDP that absolutely no MP would appear before the prosecutor's offices for giving statement. Accordingly, it can be said that this attitude of the applicant was beyond a personal approach but rather a planned political attitude that aimed at obstructing the

investigation and prosecution processes and would be therefore likely to continue at the subsequent stages.

163. As a result, it has been concluded that the grounds for the applicant's detention due to the risk of fleeing had factual basis.

164. It must be also ascertained whether the applicant's detention was proportionate. In determining whether a detention measure is proportionate within the meaning of Articles 13 and 19 of the Constitution, all particular circumstances of the present case must be taken into consideration (see, in the same vein, *Aydın Yavuz and Others*, § 268; and *Selçuk Özdemir*, § 76).

165. In this scope, the applicant stated that his detention prevented him from carrying out political activities. Referring to certain decisions of the Constitutional Court, the applicant also maintained that his detention was disproportionate.

166. The Court has not so far rendered any decision as to the alleged unlawfulness of the pre-trial detention of any MP during the period when he has acting as an MP. Nor did the Court make an assessment as to whether the (initial) detention had been lawful in its decisions of *Kemal Aktaş and Selma Irmak* (no. 2014/85, 3 January 2014), *Faysal Sarıyıldız* (no. 2014/9, 3 January 2014), *İbrahim Ayhan* (no. 2013/9895, 2 January 2014) and *Gülser Yıldırım* (no. 2013/9894, 2 January 2014) where the applicants were elected as an MP while in detention as there was no such allegation. However, in its decisions of *Mehmet Haberal* (an academician and a doctor of medicine at the time of his detention; subsequently elected as an MP) and *Mustafa Ali Balbay* (a journalist at the time of his detention; subsequently elected as an MP), the Court found inadmissible the applicants' allegations that they had been deprived of their liberties in the absence of a strong suspicion of criminal guilt as well as of any grounds of detention (alleged unlawfulness of their detention) for being manifestly ill-founded (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, §§ 60-78; and *Mustafa Ali Balbay*, §§ 68-78).

167. In its previous judgments concerning MPs' detention on remand, the Constitutional Court only examined the complaints concerning "the

unreasonable length of detention" in connection with the rights to stand for election and to engage in political activities. In those judgments (see *Mehmet Haberal*, § 99; *Mustafa Ali Balbay*, § 114; *Kemal Aktaş and Selma Irmak*, § 57; *Faysal Sarıyıldız*, § 57; *İbrahim Ayhan*, § 56; and *Gülser Yıldırım*, § 56), it is indicated that deputyship will be taken into consideration in terms of detention only under the following scope:

> *"…if the person whose continued detention has been ordered is a Member of Parliament, a new conflicting value occurs in addition to those currently existing. Therefore, the public interest being deprived of due to the detained MP's inability to engage in legislative activities must be also taken into consideration, along with the right to personal liberty and security. Accordingly, in ordering the continued detention of MPs, the courts are to demonstrate, relying on concrete facts, the existence of an interest which overweighs the interest inherent in the exercise of both the right to personal liberty and security and the rights to stand for election as well as to engage in political activities…".*

168. In those above-mentioned judgments, the Court, finding a violation of the right to personal liberty and security concerning MPs, took into consideration the length of the detention period as well as the public interest inherent in the exercise of the right to stand for election and to engage in political activities (4 years 3 months and 22 days in the case of *Mehmet Haberal*; 4 years and 5 months in the case of *Mustafa Ali Balbay*; 4 years, 8 months and 16 days in the case of *Kemal Aktaş and Selma Irmak*; 4 years, 6 months and 15 days in the case of *Faysal Sarıyıldız*; 3 years, 2 months and 26 days in the case of *İbrahim Ayhan*; and 3 years, 10 months and 5 days in the case of Gülser Yıldırım).

169. There is no constitutional provision providing that MPs cannot be detained on remand in the event that parliamentary immunity is lifted or a constitutional exception has been introduced in this regard. Contrary to what the applicant submitted, the Constitutional Court did not make any assessment in the above-mentioned decisions that the MPs could not be detained. Accordingly, being an MP does not constitute in itself a protection against detention. Nevertheless, in cases where there are serious allegations that the acts imputed to the MPs fall into the scope

of the right to engage in political activities, the courts ordering detention must apply a higher scrutiny in determining whether strong criminal suspicion exists.

170. Similarly, the European Court of Human Rights ("the ECHR") made no assessment that the detention measure cannot be applied in respect of the MPs under any circumstances or that such a detention would be automatically disproportionate. On the contrary, in the application *Sakık and Others v. Turkey*, the European Commission of Human Rights ("the Commission") pointed out that the applicants, whose legislative immunities were lifted and who were subsequently detained, while serving as MPs, on charges of disrupting the unity and the integrity of the State, were convicted of making separatist propaganda and/or membership of an armed organization. It accordingly rejected the alleged unlawfulness of detention. In the course of the examination before the ECHR, the applicants stated that they accepted the conclusion reached by the Commission. According to the ECHR, it was explicit that Article 5 § 1 of the European Convention on Human Rights ("the Convention") was not violated.

171. Lastly, as a detention order was issued a long time after the date of the imputed acts which were mainly taking place between October 2011 and March 2016, it must be examined in the present case whether the detention –as an element of the principle of proportionality– was "necessary" or not during the investigation. As a matter of fact, the Court also made such assessments in certain applications of similar nature (when there is a significant period of time between the date of offence and date of detention).

172. In this respect, in the judgment *Erdem Gül and Can Dündar* (§§ 79-81), one of the factors taken into account by the Court finding a violation of the applicants' right to personal liberty and security is the fact that neither the particular circumstances of the present case nor the grounds of their detention demonstrate which evidence (other than the impugned news) the investigation authorities obtained during the period of nearly six months running from the public announcement that an investigation had been initiated against the applicants to the date they were detained,

and thereby why their detention was "necessary". Nevertheless, in its judgments *Mehmet Baransu* (§§ 139-141) and *Süleyman Bağrıyanık and Others* (no. 2015/9756, 16 November 2016, §§ 228-232), the Court found the applicants' detention necessary, in spite of a long period of time having elapsed between the date of offence and the date of detention, considering that the investigation procedures continued to be conducted and that the investigation authorities did not fail to act.

173. In the present case, it must be primarily borne in mind that pursuant to the first sentence of Article 83 § 2 of the Constitution, the applicant cannot be detained when he enjoys parliamentary immunity. The constitutional amendment introducing an exception to parliamentary immunity for the pending motions entered into force on 8 June 2016. Thereafter, the investigation files against the applicant were sent to the relevant chief public prosecutor's offices. The applicant was detained approximately 5 months after the entrance into force of the constitutional amendment in question.

174. It appears that after the provisional article had become effective, the necessary actions were taken in due time: motions were drawn up concerning the existing investigation files initiated at various jurisdictional districts, the files were sent to the competent prosecutor's office and were joined; and summons were issued for taking statement of the applicant. Hence, the public authorities, in particular the investigation authorities, cannot be said to have remained inactive during the investigation process.

175. Besides, conducting an investigation into terrorist offences leads public authorities to confront with significant difficulties. Therefore, the right to personal liberty and security must not be constructed in a way that would seriously hamper the judicial authorities' and security forces' effective struggle against crimes -particularly organized crimes- and criminality (see, in the same vein, *Süleyman Bağrıyanık and Others*, § 241; and *Devran Duran*, § 64).

176. Regard being had to the abovementioned facts as to the proportionality, the conclusion reached by the Diyarbakır 2nd Magistrate Judge that the detention measure was proportionate and conditional bail would remain insufficient on the basis of the severity of punishment

prescribed for the imputed offences and the gravity of the acts committed by the applicant cannot be regarded as unfounded or arbitrary.

177. Besides, in view of all abovementioned explanations as to the alleged unlawfulness of the applicant's detention, there is no circumstance requiring an examination as to the applicant's allegation that his detention order had a political motive which was contrary to the motives specified in the Constitution.

178. For these reasons, as there was no violation in respect of the alleged unlawfulness of the applicant's detention, the Court declared this part of the application inadmissible *for being manifestly ill-founded*.

Mr. Engin YILDIRIM did not agree with this conclusion.

3.Alleged Restriction of Access to the Investigation File

a. The Applicant's Allegations and the Ministry's Observations

179. The applicant maintained that he had not been informed in detail of the accusations during his custody and statement-taking processes; that his request to examine the investigation file had been rejected due to the "restriction" order; that he had been therefore unaware of the accusations against him and the evidence thereof; and that he had been therefore deprived of the opportunity to self-defence and to challenge as required by the principles of equality of arms and adversarial proceedings. He accordingly alleged that there had been violations of his rights to personal liberty and security safeguarded by Article 19 of the Constitution and Article 5 §§ 2 and 4 of the Convention, as well as to a fair trial safeguarded by Article 36 of the Constitution and Article 6 § 1 of the Convention.

180. In its observations, the Ministry of Justice indicated that the applicant had the opportunity to challenge the restriction order as of the date when he had become aware thereof; however, he did not do so. Reminding that the applicant had refused to give statement and to answer the questions put to him during his questioning by the prosecutor and interrogation by the magistrate judge, the Ministry emphasized that his allegation would be in breach of his duty of honesty. It also underlined

that the offences imputed to him and grounds of his detention were explicitly laid down in the detention order and noted that his case must be examined in reference to the similar decisions of the Constitutional Court.

181. In his counter-statements against the Ministry's observations, the applicant reiterated his allegations included in the application form and maintained that the restriction order had hindered his right to an effective defence against the investigation authorities' acts.

b. The Court's Assessment

182. Article 19 § 8 of the Constitution reads as follows:

> *"Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful".*

183. The applicant's allegations under this heading must be examined within the ambit of the right to personal liberty and security enshrined in Article 19 § 8 of the Constitution.

i. General Principles

184. Article 19 § 4 of the Constitution provides for that individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them, and in cases of offences committed collectively, this notification shall be made, at the latest, before the individual is brought before a judge (see *Günay Dağ and Others*, § 168).

185. Besides, it is set forth in Article 19 § 8 of the Constitution that a person deprived of his liberty for any reason is entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding his situation and for his immediate release if the restriction imposed upon him is not lawful. Even if it is not possible to offer all safeguards inherent in the right to a fair trial through the procedure laid down in this provision, all the safeguards applicable to the alleged

conditions of detention are to be secured through a judicial decision (see *Mehmet Haberal*, §§ 122 and 123).

186. In this respect, in examining the requests for continuation of detention or for release, the principles of "equality of arms" and "adversarial proceedings" must be complied with (see *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, § 30). The principle of equality of arms means that parties of the case must be subject to the same conditions in terms of procedural rights and requires that each party be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. The principle of adversarial proceedings requires that the parties must be given the opportunity to have knowledge of and comment on the case file, thereby ensuring the parties to actively participate in the proceedings (see *Bülent Karataş*, no. 2013/6428, 26 June 2014, §§ 70 and 71).

187. It may be necessary to impose a restriction, during the investigation phase, on access to certain evidence for the purposes of protecting fundamental rights of the third parties, maintaining public interest or securing the methods applied by the judicial authorities in conducting investigation. Therefore, it cannot be said that imposing a restriction on the counsel's power to examine the file in order for the sound conduct of the investigation stage is not necessary for the public order of a democratic society. However, such a restriction on access to the investigation file must be proportionate to the aim sought to be attained and must not hinder the sufficient exercise of the right to defence (see the Court's judgment, E.2014/195 K. 2015/116, 23 December 2015, § 107).

188. Any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness within the scope of Article 19 § 8 of the Constitution. However, Article 19 § 4 of the Constitution does not entail that the information provided to the person arrested or detained in the course of his arrest or detention must embody a full list of imputed offences, in other words, all evidence forming a basis for the charges against him must be notified or disclosed (see *Günay Dağ and Others*, § 175).

189. If the applicant is asked, during the process when his statement or defence submissions are taken, questions about the content of documents access to which has been restricted or he makes a reference to the content of such documents in raising a challenge against his detention order, it must be accepted that the applicant has had access to the documents underlying his detention and had sufficient information about the contents, and thus he has had the opportunity to challenge the reasons of his detention in a sufficient manner. In such a case, the person concerned has sufficient knowledge about the contents of the documents underlying his detention (see *Hidayet Karaca*, § 107).

ii. Application of Principles to the Present Case

190. On 7 September 2016, the Diyarbakır Chief Public Prosecutor's Office filed a request with the Diyarbakır 4th Magistrate Judge to obtain an order imposing a restriction on the powers of the applicant's lawyer to examine the file and take a copy of the documents on the ground that *"it may imperil the aim of the investigation"* by virtue of Article 153 § 2 of the Code no. 5271. On 9 September 2016, the magistrate judge issued a "restriction" order in line with this request. The applicant was detained on remand on 4 November 2016, subsequent to the restriction order.

191. There is no document or information as to whether the restriction order was subsequently lifted. However, it appears that by 2 February 2016 when the indictment was accepted by the 8th Chamber of the Diyarbakır Assize Court, the impugned restriction had automatically expired pursuant to Article 153 § 4 of the Code no. 5271.

192. The accusations brought against the applicant are related to his acts specified in the investigation reports issued by the relevant chief public prosecutor's offices prior to the constitutional amendment concerning the parliamentary immunity. There is no finding or claim that the applicant or his lawyers had been denied access, prior to the restriction order, to these investigation reports and contents of the investigation files attached thereto. Besides, during his statement-taking process before the Diyarbakır Chief Public Prosecutor's Office, the applicant noted that he had comprehended the offences imputed to him but refused to give statement as the investigation had political motives.

193. It appears from the letter requesting the applicant's detention, which was issued by the Diyarbakır Chief Public Prosecutor's Office on 4 November 2016, that a comprehensive explanation as to the accusations brought against the applicant is provided. In this respect, certain information and evidence concerning the imputed acts are laid down therein, and assessments concerning the legal qualification of these acts are also made. This letter was read out to the applicant also by the Diyarbakır 2nd Magistrate Judge before his interrogation. It is also indicated in the interrogation report that the imputed acts were read out and explained to him. During his interrogation, the applicant did not give information about the imputed acts and refused to answer the questions that were put to him. On the other hand, his lawyers who were present in the interrogation had the opportunity to present comprehensive defence submissions about the merits of the accusations. In its detention order, the magistrate judge also made comprehensive assessments about the accusations (imputed acts) forming a basis for his detention. Moreover, in the applicant's ten-page petition whereby his detention was challenged, detailed defence submissions as to the procedural and substantive aspects are provided. It has been therefore revealed that the applicant and his lawyers had access to the imputed acts as well as information underlying his detention both prior and subsequent to the interrogation.

194. Accordingly, regard being had to the scope of judicial review conducted at the initial stage of the applicant's detention on the basis of a suspicion of his guilt, nature of the evidence underlying the detention as well as to the facts that the applicant or his lawyer were informed of the basic elements forming a basis for the accusations and that the applicant was provided with the opportunity to challenge them, it has been concluded that the alleged denial of access to the investigation file merely on account of the restriction order imposed is manifestly ill-founded.

195. For these reasons, this part of the application was declared inadmissible for *being manifestly ill-founded* as it is clear that there was no violation of the applicant's alleged denial of access to the investigation file due to the restriction order imposed.

B. Alleged Violation of the Freedom of Expression and the Rights to Be Elected and Engage in Political Activities

1. The Applicant's Allegations and the Ministry's Observations

196. The applicant maintained that all of the imputed acts forming a basis for the investigation and his detention were the speeches that he had delivered, in his capacity as an MP and chairman of a political party, during meetings, press releases and conferences at various dates; and that he was precluded from exercising his right to engage in legislative activities for being detained on remand. He accordingly alleged that there had been a breach of his freedom of expression as well as his rights to stand for election and to engage in political activities, which are safeguarded respectively by Articles 19, 26 and 67 of the Constitution as well as by Articles 5 and 10 of the Convention and Article 3 of the Protocol No. 1 of the Convention.

197. Referring to the decisions already rendered by the Court, the Ministry indicated in its observations that the applicant's complaint that he had been detained due to his statements falling within the ambit of his freedom of expression and right to engage in political activities fell essentially under the scope of his alleged detention in the absence of any strong suspicion of his guilt. The Ministry accordingly noted that this complaint must be examined under Article 5 § 1 (c) of the Convention. It also emphasized that given the applicant's position as an MP having an influence over a certain section of society supporting him as well as his continuous performance of the imputed acts forming a basis for his detention, the detention measure was necessary for, and proportionate to the requirements of, protecting the society, maintaining public order and preventing violence in a democratic society.

198. In his counter-statements against the Ministry's observations, the applicant asserted that the speeches underlying his detention had been mainly delivered under the GNAT as a part of his legislative activities; that these statements had been reiterated in the platforms he attended as a leader of the opposition party and in representation of his voters; and that he could not take part in the legislative activities for being detained on

remand, which was also in breach of his own voters' right to free election.

2. The Court's Assessment

199. In examining the effects of detention measure upon the fundamental rights and freedoms such as the freedoms of expression and the press, the freedom of association as well as the rights to stand for election and engage in political activities, the Court firstly assesses whether the detention is lawful and/or whether it has exceeded a reasonable time. The Court then ascertains whether there has been a violation of any other fundamental rights and freedoms by also taking into account its conclusion as to the lawfulness of detention and reasonableness of the detention period (see *Erdem Gül and Can Dündar*, §§ 92-100; *Hidayet Karaca,* §§ 111-117; *Mehmet Baransu*, §§ 157-164; *Günay Dağ and Others*, § 191-203; *Mehmet Haberal,* §§ 105-116; *Mustafa Ali Balbay*, §§ 120-134; *Kemal Aktaş and Selma Irmak*, §§ 61-75; *Faysal Sarıyıldız*, §§ 61-75; *İbrahim Ayhan,* §§ 60-74; and *Gülser Yıldırım,* §§ 60-74).

200. In the present case, as regards the alleged unlawfulness of the applicant's detention, it has been concluded that there was convincing evidence giving rise to suspicion that the applicant might have committed an offence; and that there were also grounds requiring his detention which was proportionate. Regard being had to the assessments made in this regard, there is no circumstance which would compel the Court to reach a different conclusion in respect of the allegation that the applicant had been under investigation and subsequently detained on remand merely on account of his acts falling within the scope of the freedom of expression as well as the rights to stand for election and to engage in political parties.

201. Consequently, the Court declared this part of the application inadmissible for *being manifestly ill-founded* as there is no violation of the alleged violations of the applicant's freedom of expression and rights to stand for election and to engage in political activities due to his detention.

Mr. Engin YILDIRIM did not agree with this conclusion.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 21 December 2017:

A. 1. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to the unlawfulness of the applicant's arrest and custody be DECLARED INADMISSIBLE for *non-exhaustion of available remedies*;

2. By MAJORITY and by dissenting opinion of Mr. Engin Yıldırım that the alleged violation of the right to personal liberty and security due to the unlawfulness of the applicant's detention be DECLARED INADMISSIBLE for *being manifestly ill-founded;*

3. UNANIMOUSLY that the alleged violation of the right to personal liberty and security due to the restricted access to the investigation file be DECLARED INADMISSIBLE for *being manifestly ill-founded;*

4. By MAJORITY and by dissenting opinion of Mr. Engin Yıldırım that the alleged violations of the freedom of expression as well as the rights to stand for election and to engage in political activities due to the applicant's detention be DECLARED INADMISSIBLE for *being manifestly ill-founded;*

B. The court expenses be COVERED by the applicant.

DISSENTING OPINION OF JUSTICE ENGİN YILDIRIM

1. The applicant, who is still the Member of Parliament for İstanbul, was taken into custody on 4 November 2016 and subsequently detained on remand by virtue of the detention order of the same date, which was issued by the Diyarbakır 2nd Magistrate Judge for his alleged membership of an armed terrorist organization and public incitement to commit offence. In the detention order, it is primarily indicated that there was strong suspicion of the applicant's guilt, which is a pre-requisite for detention, and as regards the existence of grounds for detention, it is noted *"regard being had to the lower and upper limits of punishment prescribed in the relevant law for the imputed offence as well as the facts that the imputed offence is among the catalogue offences laid down in Article 100 § 3 of the Code of Criminal Procedure and that detention measure is proportionate and necessary compared to the punishment likely to be imposed, it has been considered that the measure of conditional bail would remain insufficient"*.

2. Article 19 § 1 of the Constitution sets forth *"Everyone has the right to personal liberty and security"*. It is also laid down in Article 19 § 3 *"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"*.

3. In Article 13 of the Constitution, it is set forth *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality"*.

4. In the same vein, Article 5 § 1 of the European Convention on Human Rights ("the Convention") safeguards that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. In subparagraph (c) of the same provision, the lawful arrest or detention of a person effected for the purpose of bringing him

before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so is listed as an exemption from the right to personal liberty and security.

5. Pursuant to Article 19 § 3 of the Constitution, the first general condition of detention is the existence of strong indication of criminal guilt on the part of the accused. However, strong indication is not *per se* sufficient for detention but constitutes the first step needed to be assessed for finding criminal guilt. At the subsequent stage, it must be examined, in the light of the concrete evidence, whether there is a risk of fleeing, destroying or altering the evidence on the part of the accused or the suspect or any other risk specified in the relevant provision. An abstract risk of fleeing is not sufficient for detention. The question as to whether the risk of fleeing is to the extent that would require detention must be ascertained on the basis of the particular circumstances of the relevant case and characteristics of the accused or the suspect. The fact that objective conditions are appropriate for fleeing must not always give rise to the acknowledgement that there exists a risk of fleeing. It must be also inquired whether the accused or the suspect has tendency to do so.

6. An interference with the right to personal liberty and security would be in breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53-54). The phrase *"necessitating detention"* set out in Article 19 § 3 of the Constitution indicates that one of the conditions sought for detention is proportionality.

7. The Diyarbakır 2nd Magistrate Judge, ordering the applicant's detention, concluded that there was strong suspicion of criminal guilt on the part of the applicant in terms of the alleged membership of the armed

terrorist organization, namely PKK, and public incitement to violence, making a reference to the "6-7 October events", the "ditch events", the applicant's certain speeches and activities under the Democratic Society Congress.

8. It is beyond any doubt that a call was made through HDP's social media account, on its Central Executive Committee's behalf, to incite people to pour out into the streets and join the resistance; and that the applicant was at that time the co-chairman of the party and a member of the Central Executive Committee. In his capacity as the co-chairman and a member of the Central Executive Committee, the applicant admitted having partaken in that call. It cannot be said that certain expressions of the applicant during the meetings, press statements and conferences attended by him in his political capacity as well as certain expressions used in the call made by the Central Executive Committee of his political party were not inciting to violence or tending to be perceived as a call for uprising and insurrection. For these reasons, regard being had to the acts performed by the applicant, it cannot be concluded that there is no strong indication of guilt.

9. In its recent judgment, the European Court of Human Rights ("the ECHR") held that under Article 5 § 1 (c) of the Convention, a person may be detained on remand, solely within the scope of criminal proceedings, for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence; however, relevant and sufficient reasons must be also given to demonstrate the existence of reasons justifying detention (see *Buzadji v. Moldova* [GC], no. 23755/07, 5 July 2016).

10. The criterion of relevant and sufficient reasons requires that in addition to concrete evidence proving the existence of reasonable or strong suspicion of guilt which has given rise to the detention of the suspect, facts demonstrating the risk of fleeing and insufficiency of the conditional bail measure for the prevention of such risks must be concretely demonstrated in the initial detention order (see *Buzadji v. Moldova* [GC], no. 23755/07, 5 July 2016, §§ 92 and 102). Accordingly, in the first initial detention order, not only the severity of the offence and

the relevant punishment are taken into account or merely the fact that the offence necessitating detention is a catalogue offence is deemed sufficient for detention, but also there must be relevant and sufficient reasons justifying detention.

11. Leaders of political parties are expected to act cautiously and prudently as speeches delivered during a critical period and in a region where terrorist events are taking place for a long time may be differently perceived by certain sections of the society. However, lack of political cautious and prudence does not justify a disproportionate interference with the right to personal liberty and security, which is among the most fundamental constitutional rights.

12. Existence of strong indication of having committed an offence does not suffice for detention of a person to be deprived of his liberty, and the principle of proportionality must be also satisfied. As a requisite of the principle of proportionality, if it is possible to attain the same aim through an alternative measure which involves less severe interference with the fundamental rights and freedoms, such measure must be resorted to, and any measure which is more severe must not be applied. If the aim expected to be attained through the preventive measure of detention may be attained also through one of the conditional bail measures, the detention measure must be no longer resorted to as it would lead to unfairness. Otherwise, any preventive measure that is more severe than what is required would constitute a penalty rather than a measure. Accordingly, resorting to a more severe measure in cases where it is possible to attain the expected aim through a less severe one would be contrary to the principle of proportionality.

13. In the present case, the incumbent court found the detention measure necessary and proportionate on the grounds that the offence imputed to the applicant was among the catalogue offences and that conditional bail would remain insufficient given the lower and upper limits of the penalty likely to be imposed. The applicant, a Member of Parliament, is the co-chairman of the third largest political party represented in the GNAT. Even if the speeches delivered by the applicant in his capacity as a politician as well as other allegations raised against

him in the relevant investigation reports are accepted to have constituted a strong indication of guilt, the applicant's detention does not, given his position and titles, meet a pressing social need in a democratic society. Regard being had to the presumption of innocence as well, detention may be regarded as a justified measure only when there is a real public interest overriding the right to personal liberty and security safeguarded by Article 19 of the Constitution. The applicant's detention on account of the nature of the imputed offences and severity of the prescribed sanctions pursued no public interest.

14. Detention measure must be applied only in very exceptional circumstances and as a last resort, and less restrictive alternatives must be primarily taken into consideration. In the present case, in ordering his detention, no justified grounds were provided as to which concrete facts had caused doubt into the risk of his fleeing or hiding himself, which conducts and behaviours of the applicant had caused doubt into the risk of his tampering with the evidence as well as why the conditional bail would remain insufficient.

15. The grounds for the applicant's detention, which are specified in his detention order, have two basis: the severity of the penalty prescribed in the relevant law for the imputed offence and the applicant's refusal to be present at the chief public prosecutor's offices for giving his statements. Deeming the severity of the relevant penalty, by itself, sufficient for the existence of the risk of fleeing would give rise to a very narrow and strict interpretation of the right to personal liberty and security. It is not possible to agree with the conclusion that the applicant's refusal to give statement constituted a risk of his fleeing. This is because he continued his political activities before public and did not make any attempt to flee after he had refused to give statement.

16. The dates when the applicant's parliamentary immunity was lifted and when he was arrested and detained on remand are 20 May 2016 and 4 November 2016 respectively. It has been observed that during this period of nearly six months, he continued performing his political and parliamentary activities and never attempted to flee. The constitutional amendment lifting his parliamentary immunity took effect on 8 June 2016.

As proven by his passport entries, he had travelled abroad and returned to the country tens of times from this date to 4 November 2016 when his detention was ordered. The risk of his fleeing and tampering with the evidence does not *per se* constitute a ground.

17. It is necessary to make a further assessment with reference to a number of other relevant factors which may either confirm the existence of a danger of fleeing or make it appear so slight that it cannot justify detention pending trial. The risk of fleeing has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties, his reaction against the detention order, the issue whether he indeed plans to flee to another country as well as all kinds of links with the country he plans to flee (see *Becciev v. Moldova*, no. 9190/03, 4 January 2006, § 58).

18. Pointing out the difficulty in conducting an investigation into terrorist offences, the majority of the Court emphasized the necessity that the right to personal liberty and security should not be interpreted in a way that would make it extremely difficult, for judicial authorities and security forces, to effectively combat with crimes and criminality. I agree with this finding as a principle; however, in the present case, it was not concretely demonstrated how and why resorting to an alternative measure imposing a lesser restriction on the right to personal liberty and security would make extremely difficult the struggle against crimes and criminality.

19. In one of its judgment, the ECHR found a violation of Article 5 § 3 of the Convention, considering that the relevant courts had not taken into account the possibility of granting conditional bail and had not mentioned why those alternative measures would not have warranted his presence before the court or why, had the applicant been released, his trial would not have followed its proper course (see *Jablonski v. Poland*, no. 33492/96, 21 December 2000).

20. Severity of the penalty prescribed for the imputed offences should not *per se* form a basis for the risk of fleeing. As a matter of fact, the ECHR considers that such a danger cannot be gauged solely on the basis of the severity of the penalty to be imposed. It must be assessed with reference

to a number of other relevant factors which may either confirm the existence of a danger of fleeing or make it appear so slight that it cannot justify detention pending trial (see *Letellier v. France*, no. 12369/86, 26 June 1991, § 43).

21. The applicant is a Member of Parliament and also co-chairman of a political party (HDP). In his capacity as the co-chair, he is entitled to represent the party as indicated in Article 15 § 3 of the Law no. 2820 on Political Parties. HDP is the fourth biggest political party based on the number of votes it received during the general election of 1 November 2015, that is 5.148.085, and the third biggest political party based on its number of members of parliament.

22. The right to engage in political activities, which is not an unlimited and absolute right, does not mean that persons who have taken part in activities involving criminal suspicion can in no way be detained or tried. A Member of Parliament or a (co-) chairperson of a political party in respect of whom there is strong indication of guilt may be, of course, detained on remand after his parliamentary immunity is lifted duly; however, his detention must be based on concrete factual basis whereby the risk of fleeing as well as the other risks laid down in Article 19 § 3 of the Constitution are taken into consideration. Any detention which lacks such a basis and falls foul of the principle of proportionality would cause a deterrent effect on political activities and thereby cause a damage to the order and progress of the democratic society.

23. The applicant's detention undoubtedly hindered his right to take part in legislative activities for being precluded from engaging in political activities. In the same vein, it may be said that detention of the applicant, co-chairman of a political party having received over five million votes, -in the absence of any risk of fleeing, tampering with or concealing evidence but merely on the grounds that the offences imputed to him are among the catalogue offences and he refused to be present at the chief public prosecutor's offices for giving statement- would also have an unfavourable impact on the relevant voters' participation in a democratic life.

24. Consequently, I disagree with the conclusion reached by the majority of the Court, considering that taken in conjunction with Article

13 of the Constitution, the applicant's right to personal liberty and security safeguarded by Article 19 of the Constitution as well as his rights to elect, to stand for election and to engage in political activities safeguarded by Article 67 thereof were violated.

CHAPTER TWO

JUDGMENTS

RIGHT TO LIFE (ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

GÜRKAN KAÇAR AND OTHERS

(Application no. 2014/11855)

13 September 2017

On 13 September 2017, the Second Section of the Constitutional Court found a violation of the right to life safeguarded by Article 17 of the Constitution in the individual application lodged by *Gürkan Kaçar and Others* (no. 2014/11855).

THE FACTS

[8-41] Gürkan Kaçar, one of the applicants, is mentally disabled and he was a minor at the material time. When he was playing on a railway which was separated from the street fronting his house with a ruined wall, he touched a high voltage power line. As a result, he was exposed to electric shock and got injured seriously. The Chief Public Prosecutor's Office launched an investigation. In the report prepared in the scene by the police officers, the way the applicant had been injured was confirmed, as well as it was noted that some of the grounding cables were out of order. The medical report issued by the hospital indicated that the applicant faced a life-threatening danger due to the incident, and his injuries would prevent him from performing his daily activities for fifteen days.

The public prosecutor carried out a scene examination more than five months after the incident and found out that the grounding cable was operating and that there were iron guardrails on both sides of the railway, which constituted a barrier between the street and the railway. The report issued by an expert, who accompanied the public prosecutor, indicated that the applicant Gürkan Kaçar was at complete fault in the incident.

The Chief Public Prosecutor's Office filed a criminal case against the Chief of the Turkish State Railways (TCDD) for recklessly causing injury without specifying the evidence being relied upon.

The report obtained by the criminal court from the academic experts also pointed out that the applicant Gürkan Kaçar, who was mentally disabled, was found to be at complete fault in the incident. At the end of the trial, the court acquitted the accused, and the judgment was upheld by the Court of Cassation.

The applicants applied to the administration by seeking compensation for their alleged pecuniary and non-pecuniary damages. As they did

not receive any response, they brought an action for damages before the administrative court. The court held that there was no causal link between the alleged damages and the administrative act in question, therefore it dismissed the action brought by the applicants.

The applicants appealed against the decision of the administrative court. The Council of State quashed the decision on the ground that an examination was necessary with respect to the fault of the applicants who did not fulfil their supervision responsibility, as well as an inquiry was required into the information and documents pertaining to the criminal case filed against the administrative staff for a determination of service fault.

At the retrial made upon the quashing judgment of the appellate court, the administrative court examined the criminal case file and then dismissed the case again. The applicants again appealed, and the Council of the State upheld the decision.

V. EXAMINATION AND GROUNDS

42. The Constitutional Court, at its session of 13 September 2017, examined the application and decided as follows.

A. Alleged Violation of the Right to Life

1. The Applicants' Allegations and the Ministry's Observations

43. The applicants maintained; that Gürkan Kaçar, the minor applicant with mental disability, got injured upon touching the cables as the protective walls near the railway lines had been demolished and the necessary security measures had not been taken; that there was a neglect of duty on the part of the administration; and that their action for damages in this respect was dismissed following unreasonably lengthy proceedings. In this regard, the applicants alleged that their son's right to life safeguarded by Article 17 of the Constitution was violated, and they requested compensation for non-pecuniary damages.

44. The Ministry, in its observations, specified that the application should be examined from the standpoint of the right to life safeguarded by Article 17 of the Constitution. The Ministry also stated that whether the severe injury sustained by the applicant Gürkan Kaçar after being exposed to electric shock had resulted from the malfunctioning of the administration could not be established in the absence of sufficient inquiry, and that whether the State had taken any reasonable measures –such as putting a warning sign stating that it was forbidden to enter the railway- concerning the environmental safety of the railway in question when the railway transport, one of the hazardous means of transportation, had been carried out was not investigated, either. It was further indicated that conclusion of the case after a very long time must also be considered to constitute a violation of the right to life.

45. The applicants, in their counter statements, indicated; that it was found established on the basis of the relevant investigation and case files that no security measures had been taken in the area where the railways in question were located; that after the incident, these railways remained underground in time; and that therefore, requesting a new expert report concerning the incident would make no sense.

2. The Court's Assessment

46. Article 17 § 1 of the Constitution, titled "*Personal inviolability, corporeal and spiritual existence of the individual*", provides as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence."*

47. Article 5 of the Constitution, titled "*Fundamental aims and duties of the State*", in so far as relevant, provides as follows:

> *"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."*

a. Applicability

48. In the present case, the applicant Gürkan Kaçar is alive. For this reason, in the first place, it is necessary to make an assessment as to the applicability of Article 17 § 1 of the Constitution which safeguards the right to life.

49. In order for the application of the principles concerning right to life, there must be an unnatural death. However, in certain cases, the incident may be examined within the scope of the right to life, even if there occurred no death (see *Mehmet Karadağ*, no. 2013/2030, 26 June 2014, § 20).

50. Although the applicant Gürkan Kaçar had escaped from the incident where he had been exposed to high electric shock with injuries, when the fatal nature of the electric shock in question and its effects on the applicant's physical integrity are taken into consideration together with other elements, it has been concluded that the application should be examined within the scope of the applicant's right to life. For this reason, the allegations submitted by the applicant in conjunction with the right to a fair trial safeguarded by Article 36 of the Constitution fall within the scope of the right to life, and therefore the relevant allegations have been examined in this framework.

b. Admissibility

i. As Regards the Applicants Sevim İçöz and Hüseyin Kaçar

51. It was decided by the 1st Chamber of the Magistrates' Court in civil matters that the applicant Gürkan Kaçar be restricted for his being mentally disabled and that he be under the guardianship of the applicants Sevim İçöz and Hüseyin Kaçar.

52. These applicants indicated that they lodged an application in the capacity of the guardians of their son Gürkan Kaçar and claimed that their right to life was also violated, stating that they felt sorrow due to the incident. Therefore, it must be noted that although the right to life is applicable in the present case, the applicants did not have victim status under the mentioned right.

53. Article 148 § 3 of the Constitution, in so far as relevant, provides as follows:

> *"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. …"*

54. Article 45 § 1 of the Law no. 6216 on Establishment and Rules of Procedures of the Constitutional Court dated 30 March 2011, titled "*Right to an individual application*", provides as follows:

> *"Everyone can apply to the Constitutional Court based on the claim that any one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."*

55. Article 46 § 1 of the Law no. 6216, titled "*Persons who have the right to an individual application*", provides as follows:

> *"The individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation."*

56. While the individuals who are able to operate the individual application remedy are essentially those who directly have the victim status, the individuals who have a direct personal or special relationship with the victim, and accordingly have been affected by the alleged violation of the Constitution or have a legitimate and personal interest in the elimination of the said violation may also lodge an individual application in their capacity as "indirect victims", according to the circumstances of the case and the nature of the violated right (see *Engin Gök and Others*, no. 2013/3955, 14 April 2016, § 53).

57. However, whether the "indirect victim status" arises may vary according to the specific circumstances of the case and to the nature of the violated right. As a matter of fact, in certain cases where the victim cannot

lodge an application in person and there is a close relationship –especially in cases of alleged violation of the right to life-, the Constitutional Court has held that the applicants who are not directly affected by the alleged violation can lodge an application on their own behalf on account of having been indirectly affected by the alleged violation in question (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 41; *Cemil Danışman*, no. 2013/6319, 16 July 2014; *Sadık Koçak and Others*, no. 2013/841 , 23 January 2014; and *Rıfat Bakır and Others*, no. 2013/2782, 11 March 2015).

58. In the present case, the applicants Sevim İçöz and Hüseyin Kaçar argued that not only their son's (Gürkan Kaçar) right to life but also their own right to life was violated. In order to be able claim to have indirectly been a victim due to the violation of the right to life, person(s) with whom there is a close relationship is required to have lost her/his life in the impugned incident. Although the applicants' son had sustained fatal injuries in the incident, he was alive on the date when the application was lodged; and he availed of this opportunity to lodge an application. Accordingly, the applicants cannot be said to have been direct or indirect victims of the alleged violation of the right to life.

59. For the reasons explained above, this part of the application must be declared inadmissible for incompatibility *ratione personae* and there being no need for a further examination in terms of other admissibility criteria.

ii. As Regards the Applicant Gürkan Kaçar

60. The alleged violation of the applicant's right to life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

c. Merits

i. General Principles

61. The right to life enshrined in Article 17 of the Constitution, when read together with Article 5 of the Constitution, imposes positive and negative obligations on the State (see *Serpil Kerimoğlu and Others*, § 50).

62. Within the scope of its positive obligations, the State has a liability to protect the right to life of every person within its jurisdiction against risks which may arise out of the actions of public authorities, other individuals or the individual himself/herself. First and foremost, the State should introduce deterrent and protective legal regulations and take administrative measures against such risks to the right to life. This liability also includes the obligation to protect the life of an individual from all kinds of dangers, threats and violence (see *Serpil Kerimoğlu and Others*, § 51).

63. In cases where there is a loss of life under the circumstances which may fall under the responsibility of the State, the public authorities should primarily establish effective legal and administrative measures against the threats and risks against the right to life by using every means within their jurisdiction in accordance with Article 17 of the Constitution. In this scope, the legal and administrative measures in question must be capable of stopping violations of the right to life and punishing those responsible, if necessary. This obligation applies to all situations where the right to life is at stake (see *Serpil Kerimoğlu and Others*, § 52).

64. In addition, the measures to be taken while fulfilling the positive obligations imposed within the scope of the right to life shall be determined by the administrative and judicial authorities. Many methods can be adopted for safeguarding rights and freedoms, and even if there is a failure in the fulfilment of any measure prescribed by the law, positive obligations can be fulfilled through another measure (see *Bilal Turan and Others*, no. 2013/2075, 4 December 2013, § 59).

65. In cases where the public authorities know or ought to know the existence of a real and immediate risk to the life of an individual, they are expected to take measures capable of avoiding such risk. However, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose a disproportionate burden on the authorities (see *Serpil Kerimoğlu and Others*, § 53).

66. The State's positive obligations within the scope of the right to life have also a procedural aspect (see *Serpil Kerimoğlu and Others*, § 54). Accordingly, the relevant authorities must act with reasonable promptness and due diligence in the actions for compensation to be brought before administrative and judicial authorities in order to identify those who have legal responsibility within the scope of the right to life. In this context, the Constitutional Court must examine whether the inferior courts carried out an examination in accordance with the requirements of Article 17 of the Constitution within the scope of the proceedings related to such incidents. Because the sensitivity of the inferior courts in this respect will prevent any prejudice to the role of the judicial system in force in the prevention of similar violations of rights that may arise in the future (see *Perihan Uçar*, no. 2013/5860, 1 December 2015, § 52).

ii. Application of Principles to the Present Case

67. In the present case, it is beyond dispute that the applicant with mental disability who was a minor on the date of incident got injured seriously upon touching the cables in the railway.

68. At this point, it must first be noted that the railway transportation, by its very nature, contains certain risks to the lives and physical integrities of the individuals, and therefore it is a hazardous activity in terms of the State's obligation to protect the lives of individuals. Due to the hazardous nature of this activity, the public authorities are expected to take the necessary security measures in the operation of the railways and to do what is needed in a reasonable way in order to prevent deaths and injuries during the navigation of trains or in establishments such as stations and etc.

69. Another issue to be mentioned is the fact that the children, persons with physical or mental disabilities or other persons in similar situations are in need of more protection against such hazardous activities than the others. In other words, children and the individuals with mental disabilities need special protection as they do not have the ability of discernment. Children and the individuals with mental disabilities cannot be expected to exhibit the minimum behaviours expected from the adults against the incidents and the dangers posed to them.

70. Although such an obligation must be interpreted in a way which does not impose a disproportionate burden on the authorities, bearing in mind the unpredictability of human conducts, the relevant authorities must pay a special attention to the children, the persons with mental disabilities and the other persons in need of special protection while making predictions about human conducts and must put into practice the convenient administrative measures they have determined in this respect without delay. In other words, while taking the necessary measures for the protection of individuals' lives and physical integrities, the public authorities must act by taking into account also the individuals who are in need of special protection.

71. Therefore, in assessments to be made in terms of the State's obligation to protect the lives of individuals, the physical and mental developments of the children and the persons with mental disabilities must be taken into consideration, and a conclusion must be reached accordingly. As a matter of fact, in previous similar cases, the Constitutional Court took into consideration the children's said conditions while determining the necessary measures to be taken for the protection of the lives of individuals and reached a conclusion accordingly (see *Salih Ülgen and Others*, no. 2013/6585, 18 September 2014; and *Adem Ülgen and Others*, no. 2013/6581, 25 February 2015).

72. Otherwise, the children or the individuals who are undoubtedly in need of special protection due to their disabilities would be imposed a burden such as behaving in a way expected from the adults with no disabilities. This does not comply with the State's duty to show the maximum possible effort to ensure the children or the individuals with disabilities to survive and to ensure their full and effective participation in the society.

73. In the present case, it could not be understood whether the applicants' statements that the wall in the scene had been collapsed and that the applicant Gürkan Kaçar had entered the railway from there were taken into consideration in the expert report issued following the site inspection, which was carried out more than five months after the incident, within the scope of the criminal investigation. In addition, it

could not be understood whether the existence, at the material time, of the situation regarding the security measures established during the site inspection was investigated or not. Besides, the inspection report did not provide sufficient explanation as to how the applicant Gürkan Kaçar had entered the place where the incident occurred and how he was exposed to electric shock.

74. However, within the scope of the action for compensation brought by the applicants, it was acknowledged; that the applicant had entered the scene from a ruined part of the wall surrounding the railway; that one of the electric cables there had been broken or cut off and picked up by the applicant to play; and that he had touched to the catenary line on the railway, and therefore had been injured due to electric shock.

75. At this point, it must be noted that the State's obligation to protect life cannot be unlimited with regard to persons who act extremely carelessly against danger. In addition, this obligation does not provide an absolute security against danger in any circumstances. However, it must also be noted that, in case of any failure by the public authorities to take the necessary security measures expected from them, especially the careless acts of the individuals in need of special protection will not eliminate the responsibility of these authorities completely.

76. In the present case where the minor applicant Gürkan Kaçar with mental disability, who thus cannot be expected to have acted carefully by exhibiting the minimum behaviours expected from any person with no disability in the face of the incidents and dangers against himself, had entered the hazardous zone through a ruined security wall and been seriously injured as a result of being exposed to electric shock by touching the open electric cables, it cannot be accepted, without taking into consideration the administration's failure to take the necessary security measures, that the applicant was at complete fault due to his careless conduct and that he must bear the serious damage he had sustained.

77. As a result, it has been concluded that in the present case there had been a real and immediate risk against life which could have been predicted by the public authorities and that they had failed to take the reasonable measures expected from them to prevent such danger.

78. In addition, in the present case, there must be an assessment as to whether an effective judicial protection of the life has been ensured. In the relevant case, which lasted approximately nine years, due regard was not paid to the fact that the administration failed to take the necessary measures for the people in need of protection, and that the supervision failure of the applicant's family did not eliminate the responsibility of the administration to do so, and therefore the applicant was found to be at complete fault due to his careless conduct.

79. It has been observed that such a conclusion did not comply with the abovementioned principles concerning the obligation to protect life and that in addition, the relevant authorities failed to act with reasonable promptness as regards the nature of the incident. That is to say, there had been no factor or obstacle hindering the progress of the proceedings. In addition, the case was not of complex nature to necessitate such prolongation of proceedings. It has therefore been concluded that the case was not concluded within reasonable time in a manner that might damage the significant role of the current judicial proceedings in the prevention of similar violations of the right to life.

80. However, showing maximum sensitivity in this regard is of critical importance to maintain the commitment of people to the rule of law and not to shake the confidence in justice.

81. In the light of all these explanations, it has been concluded that the present case was clearly incompatible with the principle of providing an effective judicial protection against a real risk to the life.

82. Consequently, the Constitutional Court has found a violation of the right to life safeguarded by Article 17 of the Constitution.

B. Alleged Violation of the Right to a Fair Trial

1. Allegations of the Applicants Sevim İçöz and Hüseyin Kaçar and the Ministry's Observations

83. The applicants maintained that their action for damages due to the incident where their son had been injured had not been concluded

within a reasonable time, which was in breach of their right to a fair trial safeguarded by Article 36 of the Constitution, and they therefore requested compensation for non- pecuniary damages.

2. The Court's Assessment

a. Admissibility

84. The alleged violation of the right to a trial within a reasonable time must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

85. The alleged unreasonable length of the proceedings concerning the disputes falling within the scope of "public law" as per the legal provisions inherent in the legal system as regards civil rights and obligations but decisive on civil rights and obligations by their outcomes was previously raised within the scope of individual application. In this respect, the Constitutional Court acknowledged that the right to a trial within a reasonable time was included in the scope of the right to a fair trial and specified that in the assessment of whether the length of the proceedings in a case was reasonable, the issues such as the complexity of the proceedings and the level of jurisdiction, the attitudes shown by the parties and the relevant authorities in the proceedings and the nature of the applicant's interest in expeditious conclusion of the proceedings would be taken into consideration (see *Güher Ergun and Others*, no. 2012/13, 2 July 2013, §§ 34-64; and *Selahattin Akyıl*, no. 2012/1198, 7 November 2013, §§ 54-60).

86. As a result of the assessment of the present case taking account of the Court's previous judgments in similar cases, it has been understood that the present case was not of a complex nature, considering the criteria such as the difficulty in the resolution of the legal dispute in question, complexity of the material facts, obstacles to collect evidence and the number of parties to the case. It cannot also be said that the applicants had a significant part in the prolongation of the proceedings due to their attitudes and behaviours and to their inattentive conducts while enjoying

their procedural rights. Accordingly, it has been concluded that in the present case, there was an unreasonable delay in the proceedings which lasted approximately 9 years.

87. Consequently, the Constitutional Court has found a violation of the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution.

c. Application of Article 50 of Code no. 6216

88. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."

89. The applicant Gürkan Kaçar requested 50,000 Turkish liras (TRY) and the other applicants requested respectively TRY 25,000 for non-pecuniary compensation.

90. It has been concluded that the applicant Gürkan Kaçar's right to life and the other applicants Sevim İçöz and Hüseyin Kaçar's right to a trial within a reasonable time were violated.

91. As there is a legal interest in conducting retrial in order to redress the consequences of the violation of the applicant Gürkan Kaçar's right

to life, a copy of the judgment must be sent to the 1st Chamber of the Eskişehir Administrative Court for retrial in respect of Gürkan Kaçar.

92. The applicants Sevim İçöz and Hüseyin Kaçar must be awarded jointly TRY 9,600 for their non-pecuniary damages that cannot be redressed with the sole finding of a violation of their right to a trial within a reasonable time.

93. As there has been a violation of the obligation of effective judicial protection of the right to life as to its requirement to act with a reasonable promptness, the applicant Gürkan Kaçar must also be awarded TRY 25,000 for his non-pecuniary damages that cannot be redressed with the sole finding of a violation and a retrial.

94. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicants jointly.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 13 September 2017 that

A. 1. Alleged violation of the right to life of the applicants Sevim İçöz and Hüseyin Kaçar be DECLARED INADMISSIBLE for incompatibility *ratione personae*;

2. Alleged violation of the right to a fair trial of the applicants Sevim İçöz and Hüseyin Kaçar be DECLARED ADMISSIBLE;

3. Alleged violation of the right to life of the applicant Gürkan Kaçar be DECLARED ADMISSIBLE;

B. 1. The right to a trial within a reasonable time, safeguarded by Article 36 of the Constitution, of the applicants Sevim İçöz and Hüseyin Kaçar was VIOLATED;

2. The applicant Gürkan Kaçar's right to life safeguarded by Article 17 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to 1st Chamber of the Eskişehir Administrative Court to conduct retrial in respect of Gürkan Kaçar in order to redress the consequences of the violation of his right to life;

D. 1. The applicant Gürkan Kaçar be AWARDED TRY 25,000 for non-pecuniary damages, and his other claims for compensation be REJECTED;

2. The applicants Sevim İçöz and Hüseyin Kaçar be AWARDED jointly TRY 9,600 for non-pecuniary damages, and their other claims for compensation be REJECTED;

E. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be JOINTLY REIMBURSED to the applicants;

F. The payments be made within four months as from the date when the applicants apply 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; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

İRFAN DURMUŞ AND OTHERS

(Application no. 2014/4153)

11 May 2017

On 11 May 2017, the First Section of the Constitutional Court found a violation of the right to life safeguarded by Article 17 of the Constitution in the individual application lodged by *İrfan Durmuş and Others* (no. 2014/4153).

THE FACTS

[8-57] Hakan Durmuş (H.D.), who is the son of the applicants Muhammet Durmuş and Kadriye Durmuş and the brother of İrfan Durmuş, was a person who had been diagnosed with psychotic disorder by different health institutions before the incident.

At the material time, H.D. was being held in the Aydın E-Type Closed Prison. He was placed in a single cell. On 12 August 2012, a fire broke out in his cell as a result of which he sustained burns. Afterwards, he was taken to the state hospital by an ambulance (112 emergency service). Due to his serious health condition and to the lack of a burn treatment unit in the relevant state hospital, attempts were made to refer him to another state or university hospital with a burn treatment unit even in other cities. However, he was not admitted to the other hospitals for lack of space. It was three days later that he was referred to a hospital with a burn treatment unit in another city by an air ambulance. However, he lost his life five days later at the relevant hospital.

A criminal investigation was launched into the incident. The public prosecutor took the statements of the doctors and the prisoners who were held in the same unit with the applicant. The prisoners' statements indicated that the administration had allowed the prisoners to smoke in the unit where the deceased had been held, that they could have lighters to smoke and that a cigarette lighter had been given to the deceased just before the incident upon his request. The officers in the penitentiary institution gave similar statements in the capacity of suspects. During the investigation, the public prosecutor and the crime scene investigation team carried out examinations to determine how the incident had occurred and to obtain material evidence that might shed light on the

assessment to be made in this respect. At the end of the investigation, the public prosecutor's office issued a decision of non-prosecution.

The applicants found inconsistent and contradictory the statements taken during the investigation process. They opposed to the public prosecutor's decision. However their objection was dismissed by the 2nd Chamber of the Söke Assize Court.

V. EXAMINATION AND GROUNDS

58. The Constitutional Court, at its session of 11 May 2017, examined the application and decided as follows.

59. By the very nature of the right to life, an application concerning this right with respect to the person who has lost his life can only be filed by his relatives who have suffered losses due to his death (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 41). The applicants Muhammet Durmuş, Kadriye Durmuş and İrfan Durmuş are respectively father, mother and brother of the deceased. Therefore, there is no deficiency in terms of eligibility for filing a case.

A. As Regards the Applicant Muhammet Durmuş

60. Article 48 § 5 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court dated 30 March 2011, titled "*Conditions for and examination of the admissibility of individual applications*", provides as follows:

> *"The conditions for the examination of admissibility and the procedures and principles thereof and other issues shall be regulated by the Internal Regulation."*

61. Article 80 of the Internal Regulations of the Court, in so far as relevant, provides as follows:

> *"(1) A decision of dismissal can be made by the Sections or the Commissions at all stages of the trial in the following circumstances:*
>
> *…*

d) That no reason justifying the continuation of the examination of the application is found due to another justification identified by the Sections or the Commissions.

(2) The Sections or the Commissions can continue to examine an application which bears the quality indicated in the paragraph above in circumstances required by the implementation and interpretation of the Constitution or the determination of the scope and limitations of fundamental rights or the respect for human rights."

62. Applicant Muhammet Durmuş, father of the deceased, lost his life on 6 September 2016 after the incident. Muhammet Durmuş's wife and his five children, who are alive, are his legal inheritors and they are the mother and siblings of the deceased. Accordingly, there has been no obstacle for these persons to lodge an individual application for the alleged violation of the right to life safeguarded by Article 17 of the Constitution in terms of the incident where the their son and brother had lost his life. As a matter of fact, Kadriye Durmuş and İrfan Durmuş, the wife and the son of Muhammet Durmuş and the mother and the brother of the deceased filed an individual application for the alleged violation of the right to life, having exhausted the legal remedies; however, the other inheritors did not file an individual application. Given the fact that the persons who are among the inheritors of Muhammet Durmuş but did not file an individual application with the Constitutional Court are the siblings of the deceased and have had the opportunity to file an individual application from the very beginning on condition of exhausting the legal remedies, they have not been asked whether they wish to pursue the case.

63. For these reasons, as it has been understood that there has been no reason justifying the continuation of the examination of the alleged violations of the rights raised by the applicant Muhammet Durmuş who died after the application, it has been concluded that the relevant proceedings should be discontinued with respect to this applicant.

B. As Regards the Other Applicants

1. Alleged Violations of the Obligation Not to End the Life as well as the Obligation to Protect the Life, by Failure to Protect against the Violence of the Third Party

a. The Applicants' Allegations

64. The applicants maintained that their relative had been held in a single cell in the penitentiary institution before his death and that therefore it had been impossible for him to obtain a lighter and a belt, and thus acknowledgement –during the investigation– of the fact that he had committed the said act by himself was not reasonable. In this regard, they alleged that their relative's right to life safeguarded by Article 17 of the Constitution had been violated, and hence they sought to be awarded both pecuniary and non-pecuniary compensation.

65. The Ministry did not submit any observation as to the admissibility of the said allegation.

b. The Court's Assessment

66. Article 17 §§ 1 and 4 of the Constitution, titled "*Personal inviolability, corporeal and spiritual existence of the individual*", provides as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> *…*
>
> *The act of killing in case of self-defence and, when permitted by law as a compelling measure to use a weapon, during the execution of warrants of capture and arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during state of emergency, do not fall within the scope of the provision of the first paragraph."*

67. Article 5 of the Constitution, titled "*Fundamental aims and duties of the State*", in so far as relevant, provides as follows:

"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."

68. Within the scope of the negative obligation concerning the right to life, the officers who use force with a public authority bear the liability not to end the life of any individual in an intentional and unlawful way. In addition, within the scope of its positive obligations, the State has a liability to protect the right to life of every person within its jurisdiction against risks which may arise out of the actions of public authorities, other individuals or the individual himself/herself. First and foremost, the State should introduce deterrent and protective legal regulations and take administrative measures against such risks to the right to life. This liability also includes the obligation to protect the life of an individual from all kinds of dangers, threats and violence (see *Serpil Kerimoğlu and Others*, § 51).

69. In this scope, under certain special circumstances, the State has an obligation to take the necessary measures to protect the life of an individual against the risks that may arise from his own acts. In order for such an obligation that also applies to the deaths occurring in the penitentiary institutions to arise, it is necessary to determine whether the authorities of the penitentiary institution knew or ought to have known the existence of a real risk that a person under their control would kill himself, as well as to examine, if such a risk exists, whether they have done everything expected from them reasonably and within the scope of their powers to eliminate the alleged risk (see *Sadık Koçak and Others*, no. 2013/841, 23 January 2014, § 74).

70. When the documents included in the file of the individual application as well as the investigation documents concerning the present case were examined, it was understood that the applicants complained about two situations. The first of these was that their relative had been

burned in the penitentiary institution where he had been held, and the second was that he had died due to, inter alia, the deficiency and the negligence in the medical treatment process.

71. Therefore, in the present case, the framework for the assessment to be made within the scope of the right to life needs to be determined separately with respect to both allegations.

72. In the present case, it was claimed by the applicants that, contrary to what had been acknowledged at the end of the investigation conducted into the incident, their relative had not died as a result of his own act, and that the impossibility of this had not been considered under the circumstances of the case in the course of the investigation. In addition, it had not also been specified during the investigation that the prison officers had been aware of or predicted or ought to have been aware of or predicted the potential risk to the life of the applicant's relative, although their relative had faced a danger as a result of his own act due to his psychological disorder or for any other reason.

73. It can be said, in terms of the individual applications lodged within the scope of the right to life, that for an examination to be made on the State's obligation not to end the life, it is not always necessary to raise an allegation in this respect and it may be sufficient that there is suspicion under the circumstances of the incident where the obligation not to end the life has been violated. However, in order for an examination to be made on the State's obligation to protect the life, there must be an alleged violation of this obligation.

74. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). However, the issue to be determined by the Constitutional Court *ex officio* is the legal qualification of the facts submitted by the applicants, in other words, the right and freedom under which the application will be examined, and this should not be interpreted such as the fact that the issues not raised within the scope of the application will be examined. Otherwise, where a violation of the right to life has been found in each case filed within the scope of

the right to life having several various aspects such as substantive and procedural with regard to the State's obligations, then it may result in the examination of the State's all obligations within the scope of the right to life, despite in the absence of allegedly insufficient redress. However, such a situation will fall foul of the secondary nature of the individual application.

76. In this regard, in the present case, no examination has been made on the State's obligation to protect the deceased from his own acts, as no claim was raised in this sense.

77. However, the applicants complained about the alleged killing of their relative without specifying whether the act had been committed by public officials or by a third party. It appears that the applicants, according to the circumstances of the present case, considered that it was impossible for their relative to burn himself and claimed that he had been killed without specifying that the perpetrator had been a prisoner or a public official. In the present case, considering the relevant allegations and the circumstances of the case, it should be examined whether the State acted in breach of its obligation not to end the life by failing to protect the life of the applicant's relative form the lethal violence of the third parties.

78. Cases of death occurring as a result of the use of force by public officers must be considered within the scope of the State's negative obligation under the right to life (see *Cemil Danışman,* no. 2013/6319, 16 July 2014, § 44). To ensure the effectiveness of investigations concerning cases of deaths arising from the use of force by public officers, the investigative authorities must be independent from those persons who might have been involved in the case. This requirement not only defines hierarchical and institutional independence but also necessitates that the investigation is actually (also in practice) carried out independently (see *Cemil Danışman,* § 96).

79. The public prosecutor took the statements of the prisoners held in the same unit with the applicant, within the scope of the investigation conducted into the incident. The statements indicated that the administration had allowed the prisoners to smoke in the unit where the

deceased had been held, that they could have lighters to smoke and that a cigarette lighter had been given to the deceased just before the incident upon his request. The officers in the penitentiary institution gave similar statements in the capacity of suspects.

80. During the investigation, the public prosecutor and the crime scene investigation team carried out examinations to determine how the incident had occurred and to obtain material evidence that might shed light on the assessment to be made in this respect. It appears that such examinations and collection of evidence in the scene were not carried out by the administration of the penitentiary institution as well as the officers working there. As a result of these examinations, a lighter tied to a rope was found, but no signs of substances that might have started or accelerated the fire were found. According to the statement of the 112 Emergency Service doctor who had arrived at the scene upon receiving an emergency call, he remembered that the applicant had told him that the bed in his room had burst into flames.

81. In addition, although it was claimed by the applicants that the deceased had told them during his treatment at the State Hospital that he had been burned, it was then understood that their statements taken during the investigation process in this respect were inconsistent and contradictory. Nor there existed any finding within the scope of the investigation that the deceased had been able to speak and give statement after he had been referred to the State Hospital and taken to the intensive care unit.

82. Furthermore, the Chief Public Prosecutor's Office also put emphasis on the applicant Irfan Durmuş's allegation that the deceased had been battered by other prisoners before the incident and investigated the accuracy of these allegations, as well as whether this situation had had any relation with the death incident in question. The accuracy of these allegations and the alleged relation of the said situation with the present case could not be established.

83. In the course of the investigation process carried out into the alleged killing of the applicants' relative, the Chief Public Prosecutor's Office dealt

with the incident immediately after the incident and carried out a crime scene investigation in person; the crime scene investigation team collected material evidence upon the instruction of the Chief Public Prosecutor's Office; the material evidence collected from the scene was secured by the Chief Public Prosecutor's Office; the officers of the Penitentiary Institution were not allowed to collect and secure the evidence; therefore, the risk of tampering with the evidence was eliminated from the very beginning; a post-mortem examination as well as a systematic autopsy were carried out under the supervision of the Public Prosecutor immediately after the death incident; the exact cause of death of the deceased was determined as a result of these procedures; and the statements of the suspects and witnesses were taken by the public prosecutor. All these findings indicate that there had been no deficiency in the investigation which might lead to the suspicion as regards the authorities' willingness to clarify the incident in terms of the relevant allegation.

84. As a result, it appears that within the scope of the investigation which was launched *ex officio* and immediately and conducted independently and impartially, all evidence capable of revealing how the incident had occurred was collected and all reasonable measures were taken in this respect; the consistency of the evidence was confirmed in a way leading to an impartial and objective opinion about the course of the incident, so that how the fire had broken out could be understood without any doubt; and consequently, a conclusion was reached following a comprehensive and impartial analysis of the evidence obtained.

85. Consequently, in the present case, there was no evidence or information that would create the impression that the applicants' relative had been killed by burning in the penitentiary institution where he had been held. The applicants raised such an allegation on account of the physical environment and certain deprivations of the deceased. They made no explanation as to the existence of indications before the incident that their relative had faced the risk of being killed or such an incident would occur, nor did they mention any case that could be taken into consideration in this scope.

86. On the other hand, it can be considered that it may be difficult for the applicants to obtain evidence to prove that their relative had been subjected to lethal violence. In fact, this should not be usually expected from the applicants. Especially in cases where the persons under the State control have lost their lives, the applicants should not be expected to obtain or provide conclusive evidence to prove the fact that their relative was killed deliberately.

87. However, in the present case, there is no reasonable suspicion, contrary to the conclusion reached at the end of the investigation, that the deceased had faced a threat of violence before the incident or was killed as a result of a sudden incident.

88. It appears that the applicants provided general explanations, in their petitions for complaint and appeal, which they had submitted in the course of the criminal investigation process, as well as in their letter of individual application, as to the alleged killing of their relative. They only argued about the actual impossibility of the fact that the fire had broken out as a result of their relative's own act. In addition, they did not submit any detailed information regarding their allegation which might lead to a conclusion contrary to the one reached on the basis of the evidence obtained during the investigation

89. In the light of these assessments, it should be concluded that there is no evidence beyond any reasonable doubt as to the fact that the applicants' relative had been killed in the penitentiary institution. Accordingly, the applicants' allegations in this regard have been of abstract nature and unfounded. For this reason, this part of the application should be declared inadmissible for being *manifestly ill-founded*.

2. Alleged Violation of the Obligation to Protect the Life due to the Failure to Provide the Necessary Medical Treatment

a. The Applicants' Allegations and the Ministry's Observations

90. The applicants maintained that there had been certain inadequacies and negligence in terms of the medical treatment applied to their relative after he had sustained burns. In this regard, they claimed that their

relative's right to life safeguarded by Article 17 of the Constitution had been violated, and they requested both pecuniary and non-pecuniary compensation.

91. The Ministry, in its observations, stated that the positive obligation to "establish an effective judicial system" within the scope of the right to life did not necessarily entail the initiation and conduct of a criminal investigation in any case; that in the present case, there was no information that the applicants had brought an action for compensation before the criminal or administrative courts against the relevant persons or the administration; and that therefore the applicants did not avail of a legal remedy capable of leading to the determination of the responsibility on the part of the relevant health personnel or the administration and the payment of compensation, if necessary. The Ministry argued that these issues should be taken into consideration in the examination to be carried out on the admissibility of the application.

b. The Court's Assessment

92. Article 56 § 3 of the Constitution provides as follows:

> *"The State shall regulate central planning and functioning of the health services to ensure that everyone leads a healthy life physically and mentally, and provide cooperation by saving and increasing productivity in human and material resources."*

93. The positive obligation to protect life within the scope of the right to life also covers the medical activities. As a matter of fact, it is stipulated in Article 56 of the Constitution that everyone shall be entitled to live in a healthy and balanced environment, that the State shall "*regulate central planning and functioning of the health services to ensure that everyone leads a healthy life physically and mentally (…)*", and that the State shall fulfil such a duty by taking advantage of and supervising the public and private medical institutions.

94. The State is obliged to regulate health services -whether they are carried out by public or private health institutions- in a way ensuring that the necessary measures are taken to protect the lives of patients (see *Nail Artuç*, no. 2013/2839, 3 April 2014, § 35).

95. Particular emphasis should be placed on the fact that the State would not be able to fulfil its positive obligations, if the mechanisms envisaged to protect the right to life remained only in theory. Therefore, such mechanisms must effectively function also in practice.

96. In this scope, in addition to the capacity within the legal and administrative framework to provide health services, if there is a legal and administrative framework that effectively protects the right to life, it should be examined whether the right to life is actually protected within that framework.

97. However, as detailed in the assessment made below, in the present application, there has been no argument that allows for an examination of the applicants' allegation within the scope of the aforementioned principles.

98. In the present case, although it has been understood that the deceased was first taken to the state hospital, and then attempts were made to refer him to another state or university hospital due to his serious health condition and lack of burn treatment unit, it is not clear that the deceased could not be referred to a burn treatment unit either due to the lack of space, in other words due to the State's failure to take administrative and legal measures concerning the capacity of burn treatment centres, or the relevant authorities' failure to take the necessary actions expected from them and/or their failure to take the necessary measures.

99. Therefore, as regards the applicants' allegations that there had been deficiencies in the treatment of their relative and there had been negligence on the part of the authorities, an examination was made only within regard to the State's obligation to establish an effective judicial system in terms of protecting lives.

i. Admissibility

100. In the present case, the applicants did not submit any document to the individual application file indicating that they had brought an action for compensation before administrative or judicial courts. Accordingly,

it appears that the applicants lodged an individual application having exhausted only the remedy of criminal investigation. In this regard, it should be examined whether the effective legal remedies have been exhausted with respect to the allegation raised.

101. The State's positive obligation within the scope of the right to life requires carrying out an effective investigation capable of identifying those who are responsible for the death which is not natural and punishing them, if necessary. The main aim of such an investigation is to ensure the effective implementation of the law that protects the right to life and, in the incidents in which public officials or institutions are involved, to ensure that they are accountable against the deaths which occur due to their interference or under their responsibility or by the actions of other individuals (see *Serpil Kerimoğlu and Others*, § 54).

102. This obligation concerning the right to life can be fulfilled via criminal, civil or administrative investigations, depending on the nature of the case. However, in cases pertaining to incidents of death or fatal injuries occurring as a result of intention or ill-treatment perpetrated by public officers, the State has an obligation, by virtue of Article 17 of the Constitution, to conduct criminal investigations capable of leading to the identification and punishment of those responsible. In such cases, imposition of an administrative sanction or compensation as a result of administrative investigations and actions for compensation is not sufficient to redress the violation and thereby remove the victim status (see *Serpil Kerimoğlu and Others*, § 55).

103. A different approach may be adopted in terms of the obligation to conduct an investigation into deaths caused by unintentional acts. In this context, positive obligation does not necessarily entail criminal proceedings in all cases where the right to life has not been violated or the physical integrity has not been damaged intentionally. It may be sufficient to provide legal, administrative and even disciplinary remedies to the victims (see *Serpil Kerimoğlu and Others*, § 59).

104. This approach also applies to deaths alleged to have occurred as a result of medical errors. On the other hand, such an acknowledgement does not mean that the criminal investigations carried out in such cases

will not be assessed by the Constitutional Court. However, in principle, the main remedy in terms of the complaints about medical errors is the civil or administrative action for compensation in order to determine the legal responsibility (see *Kenan Sayın*, no. 2013/5376, 14 October 2015, § 50; *Coşkun Gömüç and Taşkın Gömüç*, no. 2013/9597, 21 April 2016, § 64; *Zeki Kartal*, no. 2013/2803, 21 January 2016, § 78; and *Nail Artuç*, § 38).

105. However, if the public authorities fail to take necessary measures within their authority despite being aware of the probable outcomes of a dangerous situation or if they act based on erroneous judgment or fault going beyond mere inattention, a criminal investigation must be initiated against those putting the individuals' lives at risk even if the victims have resorted to other legal remedies (see *Serpil Kerimoğlu and Others*, § 60).

106. The same applies to the activities carried out in the field of health if the authorized persons and institutions cause harm to the life or body integrity of a patient, who has applied to the health institutions, by disregarding their professional duties and to an extent beyond an assessment error regarding the diagnosis and treatment of the disease (see *Kenan Sayın*, § 47).

107. Considering the circumstances of the case in this regard, it has been concluded that the present application is related to the alleged violation of the right to life not due to a medical error made by a doctor or another medical personnel or an incorrect diagnosis of the disease, but due to the failure to take the necessary measures to protect the life of a patient (the deceased), the seriousness of whose health condition was known to the competent authorities, by not admitting him to a hospital with a medical treatment unit.

108. In other words, the present case relates to the failure of the medical institutions with a burn treatment unit to admit the deceased who had been suffering burns, rather than a wrong medical intervention or a wrong diagnosis. The present application therefore clearly differs in this respect from the other applications concerning medical errors which were declared inadmissible by the Constitutional Court for non-exhaustion of the legal remedies, namely an action for compensation.

109. Although in the applications concerning medical errors which the Constitutional Court has declared inadmissible for non-exhaustion of legal remedies on the ground that no action for compensation has been brought before the civil or the administrative courts it is claimed that the right to life has been violated due to an alleged mistake during the medical intervention or follow-up or due to a wrong diagnosis (see for example, among many other judgments, *Kenan Sayın*, *Coşkun Gömüç and Taşkın Gömüç*, and *Zeki Kartal*, cited above, and *Saadet Ergün and Others*, no. 2013/4194, 14 October 2015), the present case is not related to the failure to meet the medical requirements during the medical intervention of the deceased, but rather the failure to provide the necessary treatment.

110. For this reason, it has been concluded that the established case-law of the Constitutional Court concerning the requirement for the exhaustion of legal remedies is not applicable to the present case, that the criminal investigation process should be examined and that there has been no deficiency in terms of the exhaustion of legal remedies.

111. Consequently, the alleged violation of the right to life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

Mr. Rıdvan GÜLEÇ did not agree with this conclusion.

ii. Merits

(1) General Principles

112. In order to be able to say that an investigation is effective and sufficient, investigation authorities need to act *ex officio* and collect all evidence which can shed light on the death and can be suitable for the identification of those who are responsible. A deficiency in the investigation that would reduce the likelihood of discovering the cause of the incident of death or those who are responsible bears the risk of clashing with the obligation of conducting an effective investigation (see *Serpil Kerimoğlu and Others*, § 57).

113. One of the matters which ensures the effectiveness of the criminal investigations to be conducted is the fact that the investigation process

is open to public scrutiny in order to ensure accountability in practice. In addition, in each incident, it should be ensured that the relatives of the deceased person are involved in this process to the extent that it is necessary so as to protect their legitimate interests (see *Serpil Kerimoğlu and Others*, § 58).

114. The investigations must be conducted at a reasonable speed and diligence. Of course, there may be difficulties which hinder progress of the investigation in certain specific circumstances. However, speedy actions taken by the authorities even in those circumstances is of critical importance for clarification of the events in a sounder manner, maintenance of the individuals' commitment to the rule of law and hindering the impression that authorities tolerate and remain indifferent to unlawful acts (see *Deniz Yazıcı,* no. 2013/6359, 10 December 2014, § 96).

115. However, on the condition that the particular circumstances of each given case are assessed separately, the acts that expressly jeopardise life and grave attacks towards corporeal and spiritual existence must not be allowed to go unpunished (see *Filiz Aka,* no. 2013/8365, 10 June 2015, § 32).

(2) Application of Principles to the Present Case

116. It is seen that the applicants did not submit any allegation as to the requirement that they should have been ensured to participate in the investigation process to the extent necessary for the protection of their legitimate interests as well as the requirement of reasonable expedition in the relevant process. As a matter of fact, there was no deficiency in this respect.

117. In spite of the fact that the applicants could participate in this process by objecting to the decision given at the end of the investigation and submitting their requests in this respect, as well as despite the necessity of carrying out various procedures such as conducting criminal examinations due to the nature of the incident, taking statements of witnesses and issuing expert reports, the investigation could be concluded within a reasonable period, namely within 1 year and 5 months.

118. Although there had been no deficiency in the investigation process in terms of ensuring the applicants' participation and conduct of

the process at a reasonable speed, it should be examined, in terms of its effectiveness, as to whether all evidence was collected to clarify all aspects of the incident and to identify those responsible, if any.

119. As explained under the facts of the case, it is seen that the incident, subject matter of the application, had many stages in terms of the medical intervention and treatment of the deceased. The first stage is that the deceased was taken to the state hospital by the 112 Emergency Service team who arrived at the scene upon a call due to the deceased's having sustained second and third degree burns as a result of the fire that had broken out in the single room where he had been held in the penitentiary institution. The next stage is that the deceased was taken to the intensive care unit in the state hospital for his medical treatment and that at the same time he was urgently tried to be referred to a state or university hospital with a burn treatment unit due to the seriousness of his health condition.

120. There is no doubt that at this stage, the deceased's health condition was not good due to the severe burns on his body, that he had a risk of death, that his medical treatment should have been continued in a hospital with a burn treatment unit without any delay and that the relevant doctor made intensive efforts to transfer him to such a hospital. It was clearly stated in the statement of the doctor, the report issued by the First Specialization Board of the Forensic Medicine Institute and the decision of non-prosecution issued by the Chief Public Prosecutor's Office, which were included in the epicrisis report issued by the state hospital, that the deceased's transfer could not be made for some time due to the lack of space and for some other reasons. It was also emphasized in the relevant decision of the Chief Public Prosecutor's Office that as the deceased could not be admitted to other hospitals for lack of space, his treatment had to be continued at the state hospital until 15 July 2012.

121. According to the statements taken during the investigation and to the relevant documents, the deceased could be transferred to another state hospital only after another patient had lost his life and a room could therefore be found.

122. It was observed that the investigation process conducted into the incident contained no deficiency concerning the period beginning from the time when the deceased had been referred to a state hospital and underwent medical treatment there for a certain period until the time when he was transferred to another hospital with a burn treatment unit where he subsequently lost his life. In addition, according to the report issued by the First Specialization Board of the Forensic Medicine Institute with regard to the medical personnel in charge, the deceased had been immediately referred to the state hospital from the penitentiary institution after the necessary measures had been taken, he underwent medical treatment under the existing conditions and then his follow-up and treatment process was also carried out appropriately at the training and research hospital which had a burn treatment unit. It was thus stated in the relevant report that there had been no error or negligence in the said interventions and treatments.

123. However, the investigation should be evaluated in terms of whether it was clarified why the deceased had not been admitted to other hospitals with a burn treatment unit in different regions of the country and thus whether this stage of the incident could be clarified.

124. The investigation documents stated that many state and university hospitals in different regions had been consulted regarding the transfer of the deceased; however it was also stated by some of these hospitals that there was no room and the rest of the hospitals did not admit the deceased through the 112 emergency service.

125. Although it was concluded at the end of the investigation that the deceased could not be admitted to the hospital with a burn treatment unit due to the lack of space, it was stated in the epicrisis report issued by the state hospital that some hospitals had specified some other reasons in addition to the lack of space. Namely, they had specified that they could not admit the deceased through the 112 Emergency Service. However, according to the epicrisis report in question, no investigation was conducted in this regard and hence the situation could not be clarified.

126. Besides this deficiency, although it was stated in the report issued by the First Specialization Board of the Forensic Medicine Institute that

the medical personnel in the state hospital had endeavoured to transfer the deceased to another hospital and contacted various burn treatment units to have him admitted but had failed for a certain period, the said report included no explanation concerning the effect of this delay on the deceased's life.

127. First of all, it should not be concluded that the Constitutional Court's duty is to decide whether an expert report or an expert opinion is required in any investigation or case. The admissibility and evaluation of expert reports and similar evidence fall within the competence of the investigation authorities (see *Ahmet Gökhan Rahtuvan*, no. 2014/4991, 20 June 2014, §§ 59, 60).

128. It should also be noted that the Constitutional Court does not have a duty to scrutinize whether the conclusions of the experts or their scientific perspectives are accurate, by making speculations based on the available medical information.

129. In addition, although it is the duty of the administrative and judicial authorities to evaluate the evidence concerning a death incident, including expert reports, it might be necessary for the Constitutional Court to examine how the incident occurred in order to be able to understand the course of the incident and make an objective assessment on the steps to be taken by the investigation authorities and the inferior courts to clarify all aspects of the death of the applicant's relative (see *Rıfat Bakır and Others*, no. 2013/2782, 11 March 2015, § 68).

130. In the present case, the deceased's health condition posed a serious risk to his life due to the degree of the burns he had sustained. The degree of the risk was so high that it might result in death; therefore, his transfer to another hospital for treatment, as stated by the relevant health personnel, was required to be made by an air ambulance, not in ordinary ways. As a result, the transfer was made by an air ambulance, despite the short distance between Aydın and İzmir.

131. This situation per se requires a satisfactory answer about the effect of the delay in the transfer of the deceased on his health status. At this point, it should be said that the severity of the health status of a

patient who applied to the health institution but not admitted there and the little chance of his survival given the similar incidents make no sense in this regard. The actual issue that needs to be carefully scrutinized and investigated by the investigating authorities is whether the authorized persons or institutions have done what could reasonably be expected of them to reduce or, if possible, to eliminate the risks against the patient's chance of survival.

132. Within the scope of the investigation conducted in the present case, it was not investigated whether the failure to admit the deceased to the burn treatment unit of the relevant health institutions through 112 Emergency Service had resulted from a legal or administrative requirement or from the failure of the authorities of these institutions to perform what could have reasonably be expected of them and/or to take the necessary measures. In addition, it was not investigated whether the deceased's non-admission to the relevant institution had had an effect on the risk to the deceased's life (regardless of his little chance to survive given the similar incidents).

133. This led to the uncertainty as to whether the life of the deceased, whose application to the health institutions had been made by the authorized persons or institutions, had been put at risk by the authorities as a result of disregarding their professional duties and going beyond an assessment error regarding treatment. Thus, all aspects of the incident could not be clarified.

134. Consequently, the Constitutional Court has found a violation of the obligation to protect life.

Mr. Rıdvan GÜLEÇ did not agree with this conclusion.

C. Other Allegations of Violation

135. It has been considered that the allegations raised by the applicants in conjunction with the right to a fair trial and the right to an effective remedy, which are respectively safeguarded by Articles 36 and 40 of the Constitution, fall within the scope of the right to life. Therefore, these allegations have been examined within this framework.

D. Application of Article 50 of Code no. 6216

136. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

137. The applicants requested pecuniary and non-pecuniary compensation depending on the severity and gravity of the violation.

138. It has been concluded that the applicants' relative's right to life was violated.

139. There is a legal interest in conducting retrial (investigation) in order to redress the consequences of the violation, therefore, a copy of the judgment should be sent to the Aydın Chief Public Prosecutor's Office.

140. The applicants Kadriye Durmuş and İrfan Durmuş should be awarded 30,000 Turkish liras (TRY), jointly, for their non-pecuniary damage that could not be redressed with a sole finding of a violation of the right to life.

141. In order for the Court to award pecuniary compensation, a causal link must be established between the pecuniary damages allegedly

sustained by the applicants and the violation found. As the applicants failed to submit any document to substantiate their claim for pecuniary compensation, their claim must be rejected.

142. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicants jointly.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court held on 11 May 2017:

A. 1. UNANIMOUSLY that as *there has been no reason justifying the continuation of the examination* of the alleged violations of the rights raised by the applicant Muhammet Durmuş, the relevant proceedings be DISCONTINUED with respect to him;

2. UNANIMOUSLY that alleged violations of the State's obligation not to end the life as well as its obligation to protect against the lethal force used by a third party, which were raised by the applicants Kadriye Durmuş and İrfan Durmuş, be DECLARED INADMISSIBLE as *being manifestly ill-founded*;

3. By MAJORITY and by dissenting opinion of Mr. Rıdvan GÜLEÇ that alleged violation of the State's obligation to protect the life due to its failure to provide the necessary medical treatment, which were raised by the applicants Kadriye Durmuş and İrfan Durmuş, be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinion of Mr. Rıdvan GÜLEÇ that the right to life was VIOLATED;

C. That a copy of the judgment be SENT to the Aydın Chief Public Prosecutor's Office to conduct retrial (investigation) for redress of the consequences of the violation of the right to life;

D. That the applicants Kadriye Durmuş and İrfan Durmuş be AWARDED TRY 30,000, jointly, for their non-pecuniary damage, and their other claims for compensation be REJECTED;

E. That the total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be JOINTLY REIMBURSED to the applicants;

F. That the payment be made within four months as from the date when the applicants apply 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; and

G. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE RIDVAN GÜLEÇ

I do not agree with the judgment, given by the majority, finding a violation of the right to life safeguarded by Article 17 of the Constitution due to the failure to provide the necessary medical treatment and thus failure to fulfil the obligation to protect the life.

It has been observed that the investigation process conducted into the incident contained no deficiency concerning the period beginning from the time when the deceased had been referred to a state hospital and underwent medical treatment there for a certain period until the time when he was transferred to another hospital with a burn treatment unit where he subsequently lost his life. In addition, according to the report issued by the First Specialization Board of the Forensic Medicine Institute with regard to the medical personnel in charge, the deceased had been immediately referred to the state hospital from the penitentiary institution after the necessary measures had been taken, he underwent medical treatment under the existing conditions and then his follow-up and treatment process was also carried out appropriately at the training and research hospital which had a burn treatment unit. It was thus stated in the relevant report that there had been no error or negligence in the said interventions and treatments.

Considering the above-mentioned information included in the file of the reports submitted within the scope of the individual application, as well as the allegations raised by the applicants together, the positive obligation of the State within the scope of the right to life is limited to an effective investigation. In the present case, rather than being the subject of alleged interference with the right to life by burning himself in the prison where he had been held, the applicant became the object due to his death as a result of the injuries he had sustained as a result of fire.

Although the positive obligation of the State covers the interferences arising from the individual's own acts, the course of the incident in question and the subsequent developments have made it difficult to reach the conclusion reached by the majority finding a violation.

It has been underlined that according to the principles laid down in a judgment (*Serpil Kerimoğlu and Others*) of the Constitutional Court, within the scope of the State's positive obligation, if the public authorities fail to take necessary measures within their authority despite being aware of the probable outcomes of a dangerous situation or if they act based on erroneous judgment or fault going beyond mere inattention, a criminal investigation must be initiated against those putting the individuals' lives at risk even if the victims have resorted to other legal remedies.

Given the chronological order of the facts, it is clear according to my personal conviction that the investigation process was concluded with a reasonable speed in a way protecting the applicants' legitimate interests, and that in terms of the efficiency criterion, there has been no violation arising from the State's failure to fulfil its positive obligation, regard being had to the relevant expert reports. Therefore, I do not agree with the conclusion reached by the majority.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SEYFULLAH TURAN AND OTHERS

(Application no. 2014/1982)

9 November 2017

On 9 November 2017, the First Section of the Constitutional Court found a violation of the procedural aspect of the right to life concerning the obligation to conduct an effective investigation in the individual application lodged by *Seyfullah Turan* (no. 2014/1982).

THE FACTS

[9-99] The applicants live in Hakkari. The applicant Seyfullah Turan, who was 17 years old at the material time, is the son of the other applicants.

On the date of incident, 23 April 2009, "National Sovereignty and Children's Day" was celebrated. According to the documents in the case file, members and supporters of an armed terrorist organization had been called upon to carry out demonstrations and violent acts approximately 1 week before this date. On the subsequent days, some members and supporters of the said terrorist organization attacked the security forces by throwing stones, sticks, Molotov cocktails and etc. in the city centre of Hakkari.

On 23 April 2009, a national news agency published a video footage where a police officer harshly hit a child by the head with the bottom of his rifle many times and kicked him, and the child laid on the ground motionless. At the end of the footage, the police officer left the child at the scene and run away. The journalist recording the video went near the child and called an ambulance. The child had sustained fatal injuries. The footage appeared on the media also the next day. The Governor's Office announced to the public that the relevant police officer B.T. was suspended from his duty and an investigation was launched against him.

The applicant Seyfullah Turan whose health condition had been serious was taken to the University Hospital and was discharged on 29 April 2009.

Disciplinary and criminal investigations were launched against the relevant police officer. Then, a criminal case was filed against the police

officer B.T. The subsequent proceedings were initiated before the Hakkari Assize Court. The police officer B.T. requested that the case be transferred to another court in another city for public security reasons. Thereupon, the case was transferred to the Isparta Criminal Court. The relevant decision on the transfer of the case included no information as to why Isparta was chosen.

The applicants filed an objection to the decision to transfer the case to Isparta and stated that they would not be able to participate in the proceedings to be carried out in Isparta due to the distance between Isparta and Hakkari, the lack of direct air transportation between the two cities and the lack of sufficient economic opportunity to travel. However, their request was dismissed.

The applicants also brought an action for both pecuniary and non-pecuniary compensation against the Ministry of Inferior. The Van Administrative Court awarded the total of 42,142.71 Turkish liras (TRY) to the applicants as pecuniary and non-pecuniary compensation.

However, the 10th Chamber of the Council of State quashed the decision of the administrative court on the ground that there had been contributory negligence in the incident. The applicants' request for rectification of the decision is still pending.

V. EXAMINATION AND GROUNDS

100. The Constitutional Court, at its session of 9 November 2017, examined the application and decided as follows.

A. The Applicants' Allegations and the Ministry's Observations

101. The applicants claimed that although the police officer B.T. had acted with a direct intent to kill the applicant Seyfullah Turan who had had no relation with the social events, it was acknowledged during the proceedings that the conditions justifying the use of force had indeed been satisfied and that these conditions had been exceeded due to

the police officer's psychological situation. Hence, a punishment that was clearly disproportionate to the alleged act and accordingly a non-deterrent punishment had been imposed on the police officer; moreover, the pronouncement of the judgment was suspended, leaving ineffective this insufficient punishment by its consequences. The applicants argued that by suspending the pronouncement of the judgment, the court had intended to relieve the B.T. of even the insufficient punishment in question.

102. The applicants also maintained that the case had been transferred to Isparta from Hakkari that was thousands of kilometres away in order to prevent them from pursuing their case and thereby preventing their effective participation in the proceedings. Therefore, the relevant authorities had achieved their aim to this end, as the applicants had suffered from transportation difficulties as well as economic difficulties to pursue their case.

103. The applicants further alleged that B.T. and another police officer (F.Y.) had left the applicant Seyfullah Turan in an injured condition in the scene.

104. The applicants Mehmet Turan and Emine Turan, inter alia, maintained that, as well as feeling sorrow for the alleged violent acts against their son, their sorrow increased after this incident had appeared on the media. In this regard, they claimed that the alleged act of violence resulted in a treatment incompatible with human dignity against themselves.

105. The applicants claimed that their right to life, right to a fair trial and right to an effective remedy, respectively safeguarded by Article 17, 36 and 40 of the Constitution and Articles 2, 3, 6 and 13 of the European Convention on Human Rights ("the Convention") had been violated and requested retrial as well as non-pecuniary compensation.

106. The Ministry, in its observations, having mentioned the facts of the case and the relevant investigation proceedings, laid weight especially on the applicants' complain about the impunity of the police officers and

specified that the relevant law, which was Law no. 5271, granted full discretion to the judge in terms of the suspension of the pronouncement of the judgment and that therefore the fact that the relevant conditions had been satisfied in the present case did not necessarily require the application of the relevant provisions in respect of the accused.

B. The Court's Assessment

1. Applicability

107. Article 17 of the Constitution, in so far as relevant, provides as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> *…*
>
> *No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.*
>
> *(As amended on May 7, 2004; Act No. 5170, April 16, 2017; Act No.6771) The act of killing in case of self-defence and, when permitted by law as a compelling measure to use a weapon, during the execution of warrants of capture and arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during state of emergency, do not fall within the scope of the provision of the first paragraph."*

108. In the present case, the applicant Seyfullah Turan is alive. Therefore, first of all, it is necessary to make an assessment as to the applicability of Article 17 § 1 of the Constitution which guarantees the right to life.

109. While one of the conditions for the application of the principles concerning the right to life within the scope of an incident is the occurrence of an unnatural death, in some cases it is possible to examine the incident within the framework of the right to life, even if death has not occurred (see *Mehmet Karadağ*, no. 2013/2030, 26 June 2014, § 20).

110. An application concerning an incident that has not resulted in death can also be examined within the scope of the right to life taking into account the circumstances of the case, such as the nature of the act against the victim and the purpose of the perpetrator. In making this assessment, whether the act is potentially lethal or not, and the consequences of the act on the physical integrity of the victim, are of importance (see S*iyahmet Şiran and Mustafa Çelik*, no. 2014/7227, 12 January 2007, § 69; and *Yasin Ağca*, no. 2014/13163, 11 May 2017, §§ 109, 110).

111. In the present case, given the severity of the violence inflicted upon the applicant and the fact that he had been brought to life as a result of an urgent medical operation, it has been concluded that the said act had potentially been lethal. Considering this situation together with the other factors included in the case, it has been concluded that the present application is required to be examined within the framework of the right to life.

112. In addition, the Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). It has been considered that the allegations submitted by the applicants in connection with the right to an effective remedy and the right to a fair trial fall within the scope of the right to life, and these allegations have been examined within the scope of the mentioned right.

113. However, it has been concluded that the allegation that the applicant Seyfettin Turan had been left at the scene in an injured condition should be examined within the scope of the prohibition of treatment incompatible with human dignity.

2. Admissibility

a. As Regards the Applicants Mehmet Turan and Emine Turan

114. The applicants claimed that the right to life and the prohibition of treatment incompatible with human dignity had been violated also with respect to themselves.

115. First, it must be determined whether the applicants had victim status in terms of the rights they put forth.

116. Article 148 § 3 of the Constitution provides as follows:

"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. …"

117. Article 45 § 1 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, titled "*Right to an individual application*", provides as follows:

"Everyone can apply to the Constitutional Court based on the claim that any one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."

118. Article 46 § 1 of the Code no. 6216, titled "*Persons who have the right to an individual application*" provides as follows:

"The individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation."

119. The Constitutional Court, in cases where it examined such complaints concerning the prohibition of treatment incompatible with human dignity, indicated that it was inevitable for the family members of the person whose rights had been violated to suffer from psychological breakdown and sadness due to the impugned incident. Therefore, in order to find a violation of these persons' rights under Article 17 of the Constitution, the existing situation has not been sufficient. The victim status of a family member depends on whether there are special factors that will give a different dimension to the sadness he suffers (see *Engin Gök and Others*, no. 2013/3955, 14 April 2016, §§ 49-54).

120. In addition, in order for an individual application to be accepted, it is not sufficient for the applicant to claim that he has victim status, he must also prove that he has directly or indirectly affected by the alleged violation or must convince the Constitutional Court that he is a victim. Therefore, the suspicion of being a victim is not sufficient for the existence of victim status (see *Ayşe Hülya Potur*, no. 2013/8479, 6 February 2014, § 24).

121. Accordingly, in order for the family members to have victim status in terms of the prohibition of treatment incompatible with human dignity, the inevitable sadness suffered due to the violence against their relatives must be given a different dimension and form.

122. The applicants maintained that as the incident had appeared on the media, their sadness that they inevitably suffered due to the act of violence against their son was given a different dimension.

123. First of all, there is no doubt that the fact that the applicants learned about the manner in which the incident had occurred after it appeared on the media increased the sadness they inevitably experienced due to the violence against their son. However, in the assessment to be made in this respect, it should first be noted that the images of the incident had not been given to the media by the public authorities –to humiliate the applicants or for any other purpose. On the contrary, they had been reported and published by a national news organization and in this way, the perpetrator of the incident could be identified. Secondly, it should also be noted that the family members' having watched the images of the incident on the media has not revealed that the applicants have directly or indirectly been victims in terms of the prohibition of treatment incompatible with human dignity. For a previous judgment of the Court finding a violation in a case –in the particular circumstances of the case– where violence had occurred in front of the eyes of the family members, see *Mehmet Şah Araş and Others*, no. 2014/798, 28 September 2016.

124. Accordingly, it has been concluded that the applicants have not been victims in terms of the prohibition of treatment incompatible with human dignity.

125. In addition, the Constitutional Court ruled that in some cases where the victim was not able to make an application in person and had close kinship - in particular in cases where the right to life was at stake- the applicants could lodge an application on their own behalf although they had not been directly but indirectly affected by the violation (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 41; *Cemil Danışman*, no. 2013/6319, 16 July 2014; *Sadık Koçak and Others*, no. 2013/841, 23 January 2014; and *Rıfat Bakır and Others*, no. 2013/2782, 11 March 2015).

126. However, in order for the close relatives to claim to have been victim in terms of the right to life, the person of whom they are close relatives must have lost his life. In the present case, the applicants' son is alive despite having sustained fatal injuries and could enjoy his right to lodge an individual application. Therefore, the applicants have not had the victim status in terms of the right to life.

127. For the reasons explained above, the present application must be declared inadmissible with regard to these applicants for not being compatible *ratione personae* and there being no need for further examination under other admissibility criteria.

b. As Regards the Applicant Seyfullah Turan

i. Alleged Violation of the Prohibition of Treatment Incompatible with Human Dignity

128. It is stressed in Article 17 § 3 of the Constitution that the prohibition of ill-treatment should not be violated, regardless of the acts of the victims or the inducement of the authorities. No matter how great the importance of the inducement; torture, mal-treatment or treatment incompatible with human dignity is not allowed even in the most difficult circumstances such as the right to life. Pursuant to Article 15 § 2 of the Constitution, this prohibition cannot be suspended even in times of war, mobilization, martial law or a state of emergency. The philosophical basis that reinforces the absolute nature of the said right does not allow for any exceptions or justifying factors or interests to be weighed, regardless of the individual's act and the nature of the offense (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014, § 104).

129. However, all allegations of ill-treatment shall not avail of the protection specified in and positive obligations imposed on the State by Article 17 § 3 of the Constitution. In this scope, allegations of ill-treatment should be supported by appropriate evidence. In order to establish the authenticity of the alleged incidents, reasonable evidence is needed rather than a suspicion based on an abstract allegation. Any evidence within this scope may consist of serious, clear and consistent indications or certain presumptions that have not been proven otherwise. In this regard, the attitudes of those involved in the process should also be taken into consideration when evaluating the evidence (see *Cezmi Demir and Others*, § 95).

130. Article 148 § 3 of the Constitution provides as follows:

"…. In order to make an application, ordinary legal remedies must be exhausted."

131. Article 45 § 2 of the Code no. 6216 provides as follows:

"All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application."

132. The applicant claimed that although he had been injured as a result of the acts of the police officers, he was left at the scene and that no effective investigation was conducted into the incident.

133. In addition, the news agency reporters who disclosed the incident with the images they had recorded stated that some of the police officers had told them that they had been sorry for the incident but could not have taken the applicant to the hospital due to the act of stoning. The reporters added that thereupon they had been involved in the incident and called the ambulance for the applicant.

134. They also stated that while the ambulance they had called had not arrived at the scene yet, a group reacted to them due to the incident and took the applicant into the neighbourhood.

135. However, there is no sufficient information or documents before the Constitutional Court as to how and when the applicant was taken to the state hospital. The applicant, like the other applicants, did not make any explanation in this respect in the course of the relevant investigations, nor did he mention that issue in his individual petition.

136. The applicant's imprecise conduct in this regard while exhausting the legal remedies was not limited to these. That is to say, according to the application letter and the relevant investigation documents, at the end of the investigation conducted against the police officer (F.Y.) who was seen to have arrived at the scene after the applicant had been injured, a decision of non-prosecution was issued. However, the applicant did not appeal against the decision.

137. It may be argued that there is a connection between the investigation conducted against the police officer B.T. and the subject matter of this investigation and that it is necessary to wait for the result of the investigation against B.T. in order to learn about the assessments of the competent judicial authorities regarding the incident. However, the investigation conducted against B.T. and the subsequent criminal case were related to the use of force in the incident. As regards the applicant's alleged abandonment at the scene, an indictment was issued against B.T. for the use of force. The indictment included a separate assessment on the matter and a further investigation was opened upon the applicant's application and a decision was rendered in line with this assessment.

138. This situation was also known by the applicant, and most importantly, he did not mention in his petition for individual application that he had been waiting, for any reason, the outcome of the investigation and the subsequent criminal case against B.T. and that he therefore had not appealed against the decision of non-prosecution in question.

139. To respect fundamental rights and freedoms is the constitutional duty of all State bodies, and to remedy violations arising due to neglect of this duty is the task of administrative and judicial authorities. Therefore, it is essential that alleged violations of fundamental rights and freedoms

first be raised before inferior courts for the latter to examine and resolve them (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 16).

140. Accordingly, in the criminal investigation into the alleged violation of the prohibition of treatment incompatible with human dignity, the judicial remedy had not been exhausted before the individual application. Therefore, the Constitutional Court cannot examine the alleged violation.

141. Consequently, this part of the application must be declared inadmissible for non-exhaustion of legal remedies and there being no need for a further examination under other admissibility criteria.

i. Alleged Violation of the Right to Life

1. Admissibility

142. The alleged violation of the applicant's right to life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a) Alleged Violation of the Substantive Aspect of the Right to Life

i) General Principles

143. Cases of death or fatal injuries occurring as a result of the use of force by public officers must be considered within the scope of the State's negative obligation under the right to life. This obligation concerns both deliberate killing and the use of force that results or may result in death without premeditation (see *Cemil Danışman*, § 44). Within the scope of the negative obligation concerning the right to life, the officers who use force with a public authority bear the liability not to end the life of any individual in an intentional and unlawful way (see *Serpil Kerimoğlu and Others*, § 51).

144. The last paragraph of Article 17 of the Constitution provides that an interference with the right to life shall be lawful in the following cases: *(i) for self-defence; and, when permitted by law as a compelling measure to use a weapon, (ii) during the execution of warrants of capture and arrest, (iii) the prevention of the escape of lawfully arrested or convicted persons, (iv) the quelling of riot or insurrection, or (v) carrying out the orders of authorised bodies during state of emergency*.

145. Considering the above provisions regarding any interference with the right to life by use of force and the previous judgments of the Constitutional Court on this matter, it may be said that the police officers are allowed to resort to "proportionate" use of force "in case of exigencies" where there is no other remedy to achieve the objectives specified in the Constitution (see *Cemil Danışman*, § 50; and *Nesrin Demir and Others*, no. 2014/5785, 29 September 2016, § 113).

146. Similar to the arrangement in our Constitution, according to Article 2 of the Constitution, if a death has occurred as a result of "use of force which is no more than absolutely necessary"; (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) in action lawfully taken for the purpose of quelling a riot or insurrection, it cannot be said that there has been a violation of the right to life (see *Cemil Danışman*,§ 51; and *Nesrin Demir and Others*, § 114).

147. However, lethal force should be used "as a last resort" in cases specified in the Constitution and where there is no other way of intervention. Therefore, having also regard to the inviolable nature of the right to life, the Constitutional Court must strictly review the necessity and proportionality of the use of force that might result in death (see *Nesrin Demir and Others*, § 107).

148. At this point, it must be noted that the Constitutional Court may not be completely bound by the assessments of the relevant authorities on the case and that it may make different assessments relying on absolutely convincing information or findings (see *Cemil Danışman*,§ 58; and *Nesrin Demir and Others*, § 117). In making an assessment on this aspect of the

use of force by public officers, all aspects of the incident must be taken into account (see *Cemil Danışman*, § 57). In addition, regard must be had, as a whole, to the conditions under which the incident had occurred and the course over which it had developed (see *Cemil Danışman*, § 57; and *Nesrin Demir and Others*, § 108).

ii) Application of Principles to the Present Case

149. In the present case, the Isparta Criminal Court of General Jurisdiction held that the police officer B.T. had unintentionally exceeded the limits of his authority to use force and injured the applicant. Therefore, firstly, it should be discussed whether the decision in question means that the use of force in the present case and exceeding the limits of the use of force have been considered to be in breach of Article 17 of the Constitution. In other words, it must first be established whether the inferior court had determined through the conviction order it had rendered that the right to life had been violated, in breach of the guarantees stipulated in Article 17 of the Constitution. The appropriateness and adequacy of the decision to remedy the applicant's victim status in terms of the violation should then be assessed separately. That's because, due to the secondary nature of the individual application, it is primarily for the inferior court, not the Constitutional Court, to find the violations and provide appropriate and adequate remedy for the violation found.

150. The Isparta Criminal Court acknowledged that the conditions for the use of force had been fulfilled in the case and stated that there had been no consequence not intended by the police officer due to "his psychological state" as a result of the previous events. The court, stating that it was not an intentional act and the impugned responsibility concerned the negligence, reached this conclusion within the framework of the provisions related to the unintentional exceeding of the limits, which eliminates the criminal liability, not directly in accordance with the provisions of the relevant Law concerning negligence.

151. At this point, it must first be noted that the decision of the Isparta Criminal Court regarding the use of force in the incident included no explanation capable of revealing the fact that the court had taken into consideration all stages of the incident, the conditions under which it had

occurred and its subsequent course. There was no sufficient assessment in the decision that the use of force had been absolutely necessary and that the lethal force had been used as a last resort since there had been no other way of intervention.

152. As the decision in question did not contain sufficient and convincing considerations that the use of force had been absolutely necessary, the application must be assessed separately by the Constitutional Court in terms of "being absolutely necessary and proportionate" which is set forth in Article 17 of the Constitution and constitutes safeguards (for individuals) regarding the use of force. However, it should be reiterated that in cases of use of force that have resulted or might result in death, the Constitutional Court may not be completely bound by the assessments of the relevant authorities on the case and that it may make different assessments relying on absolutely convincing information or findings.

153. Firstly, in view of the information and documents included in the case file, on the day when the incident occurred, there had been violent acts that had started some time ago and turned into social events in Hakkari. There is no doubt that these events had targeted the security forces. However, it should be noted that according to the images that appeared on the media and impartial witness statements taken during the investigations into the incident, which were also taken into consideration by the Isparta Criminal Court, it could not be exactly determined that the applicant had performed such an action during the incident.

154. Although it was claimed by the law enforcement officers that there were footages demonstrating the fact that the applicant had attended the social violent events the day before the incident by hiding his face, it must be indicated that the police officer who had resorted to the use of force against the applicant had not been in a position to know that issue at the time of the incident. Therefore, this issue cannot be taken into account in the assessment of whether the use of force had been necessary in the course of the incident. Furthermore, it could not be established that the applicant had participated in such an act of violence during the incident.

155. Accordingly, it cannot be concluded that the use of force had been absolutely necessary in the course of the incident. Pursuant to Article

17 of the Constitution, the use of force can only be resorted to in order to achieve the objectives set forth in the Constitution and "in case of exigencies" where there is no other remedy. Where these conditions have not been satisfied, then there will be a violation of the right to life.

156. On the other hand, in the absence of any situation absolutely requiring the use of force, the accused police officer had approached the applicant quietly behind without any warning and hit him by the head many times with the butt of the rifle and even continued hitting him although the applicant had fallen to the ground after the first hit; and afterwards, the police officer had kicked the applicant. Having been hit, the applicant's skull bones had separated from each other and some of the bones had severely been broken. The applicant sustained fatal injuries but could able to be brought back to life as a result of an urgent operation carried out by the university hospital.

157. Accordingly, even if the contrary is accepted in terms of the necessity of the use of force in the incident, given the nature of the said attack that was acknowledged by the relevant judicial authorities, it cannot be said that there had been no other remedy available and that the use of lethal force had been "absolutely necessary". In addition, there is no doubt that the police officer in question had resorted to obviously disproportionate use of force, given the aim sought to be achieved and the attack alleged to have been faced.

158. Therefore, it cannot be said that the use of lethal force had been necessary and that such a force had been used as a last resort since there had been no other way of intervention, as well as it is clear that the said force had not been used in a proportionate manner.

159. As a result, in the impugned incident the manner of which could be clearly seen by all people as it appeared on the media, -in spite of the said images that were relied on by the court in its assessment- it could not be understood how it was concluded that the use of force had been absolutely necessary, that the limits of the use of force had not been exceeded intentionally and that the accused police officer had not intended to cause severe injuries to the applicant. In fact, the accused police officer –as also clearly stated in the report issued at the end of the disciplinary

investigation conducted against him- had acted individually without respecting the operation plans of the other police officers regarding the event and the information and instructions of the authorities carrying out the operation, and hence due to his such arbitrary and intentional acts, he severely harmed not only the applicant but also the police agency where he took office.

160. The most important issue that should be indicated at this point regarding the application is to ensure that the heavy attacks against life do not go unpunished with a view to maintaining the public security, ensuring the rule of law and preventing any impression that unlawful acts are tolerated (see *Filiz Aka*, no. 2013/8365, 10 June 2015, § 32).

161. In cases where the police officers have resorted to use of force, the same applies not only to impunity but also to the cases where there is a clear disproportionality between the severity of the acts and the punishment imposed. In such cases, as the applicants' victim status on account of the violation of the right to life would not be removed, the Constitutional Court might be obliged to intervene in the case –although it respects the inferior courts' decision on the sanction to be imposed and it does not directly have such a duty. At this point, it should again be noted that the Constitutional Court is also entrusted with constitutionality review of the sanctions imposed on the public officials on account of the offences they have committed within the scope of the right to life and the prohibition of ill-treatment which are safeguarded by Article 17 of the Constitution (see *Cezmi Demir and Others*, § 76)

162. Such practices concerning sanctions –as also stated in the assessments concerning the alleged violation of the procedural aspect of the right to life- impair the State's obligation to conduct effective criminal investigation to prevent such violations, since they result in the impunity of the public officials who have caused similar violations of the right to life or prevent their duly punishment, thereby preventing any deterrence in this respect. In this part of the judgment, where the substantive aspect of the right to life is evaluated, the situation in question is of great importance in determining whether the applicant's victim status due to the said violation has been removed.

163. As stated above, in the present case, the inferior court did not sufficiently evaluate the absolute necessity of the use of lethal force, nor did it make an assessment as to the intentional exceeding of the limits of the use of force as well as its disproportionality. It only sentenced the police officer in question to 6 months and 7 days' imprisonment. This caused a clear disproportionality between the impugned offence and the sentence imposed, thereby not removing the applicant's victim status.

164. In addition, as explained in detail in the assessment made below on the alleged violation of the procedural aspect of the right to life, although there was no legal obligation and the trial court had a full discretion, it suspended the pronouncement of the judgment, which would have no legal consequences in respect of the accused as clearly stated in the law. Therefore, it has been concluded that there was again a failure to remove the applicant's victim status for another reason.

165. For all these reasons, it has been concluded that the punishment of the accused police officer did not in principle mean that the inferior court had acknowledged that the excessive use of force in the incident had been contrary to Article 17 of the Constitution. Furthermore, it cannot be said that the applicant's victim status has been removed with a punishment which was clearly disproportionate (inadequate) to the severity of the offence and even the pronouncement of which was suspended.

166. Consequently, the Constitutional Court has found a violation of the substantive aspect of the right to life.

b) Alleged Violation of the Procedural Aspect of the Right to Life

i) General Principles

167. The State has an obligation to conduct an effective investigation within the scope of the right to life. The main purpose of such an investigation is to ensure effective enforcement of the law safeguarding the right to life and to ensure that those responsible for the deaths that have occurred by the intervention of public officials or under their responsibility or by the acts of other individuals account for the deaths in question (see *Serpil Kerimoğlu and Others*, § 54).

168. The procedural obligation concerning the right to life can be fulfilled via criminal, civil or administrative investigations, depending on the nature of the case. However, in cases pertaining to incidents of death or fatal injuries occurring as a result of intention or ill-treatment perpetrated by public officers, the State has an obligation, by virtue of Article 17 of the Constitution, to conduct criminal investigations capable of leading to the identification and punishment of those responsible. In such cases, imposition of an administrative sanction or compensation as a result of administrative investigations and actions for compensation is not sufficient to redress the violation and thereby remove the victim status (see *Serpil Kerimoğlu and Others*, § 55).

169. In order to acknowledge that the obligation to conduct an effective investigation, the main purpose of which is to ensure effective enforcement of the law safeguarding the right to life and to ensure that those who are responsible for the deaths account for them, has been fulfilled, the followings are necessary:

- Investigation authorities need to act *ex officio* as soon as they are informed of the incident and collect all evidence which can shed light on the death incident and lead to the identification of those responsible (see *Serpil Kerimoğlu and Others*, § 57);

- It must be ensured that the investigation is open to public scrutiny and that the victims can effectively participate in the investigation to the extent necessary (see *Serpil Kerimoğlu and Others*, § 58);

- Investigation into the deaths and fatal injuries caused as a result of the use of force by the public officials must be conducted independently (see *Cemil Danışman*, § 96); and

- Investigations must be conducted with reasonable diligence and expedition (see *Deniz Yazıcı*, no. 2013/6359, 10 December 2014, § 96).

ii) Application of Principles to the Present Case

170. In the present case, it was claimed that no effective investigation had been conducted into the incident. The applicant reached this conclusion with reference to two main complaints. The first complaint

concerned the prevention of the applicant's effective involvement in the proceedings due to the transfer of the case to another province for public safety reasons. The second main complaint was related to the fact that within the scope of the investigation the purpose of which should have been to ensure the effective implementation of the legal rules concerning the protection of the right to live and to ensure that those who were responsible account for properly, the competent authorities failed to punish the accused properly as well as they suspended the pronouncement of the judgment, with a view to mitigating the consequences of the act constituting a heavy offence.

171. The applicant did not complain about the fact that the investigation had not been launched *ex officio* and without delay; that the investigation had not been conducted independently and promptly; or that all evidence capable of clarifying the incident and leading to the identification of those who had been responsible had not been collected. Nor has there been any information or document pointing to the fact that the principles pertaining to the obligation to conduct an effective investigation in the present case had been contravened.

172. Accordingly, the present application will primarily be examined from the standpoint of whether the transfer of the case had precluded the applicant's involvement in the case to the extent necessary for the protection of his legitimate interests.

173. At this point, in particular, hearing of a case in the place where the competent court is located may, in some cases, lead to incidents, which may prevent the State form fulfilling its obligation to conduct an effective investigation; which may lead to serious threats to the parties; and which may have some consequences that may impair or completely eliminate the procedural guarantees granted to the parties under the Constitution and pose a clear and imminent danger to the public safety.

174. Accordingly, it may be concluded that hearing of a case concerning the right to life in the place where the competent court is located poses a danger to the public safety, regard being had to the social events that may

occur in the relevant place and to the other similar factors. Therefore, it is possible that the case may be transferred to another district on such grounds.

175. In this case, what should be taken into consideration while transferring a case to a court of the same instance located in another place is the fact that the main purpose of the effective investigation should not be jeopardized with the transfer of the cases carried out within the scope of the right to life and that there should be no consequences contrary to the principles falling into the scope of the impugned right.

176. In this context, it should be noted that the transfer of the case must not impair the essence of the rights of the individuals, whose right to life has been violated, to request that they are provided with the opportunity to participate in the proceedings to the extent necessary to protect their legitimate interests.

177. In addition, in the assessment of whether the transfer is necessary in cases where hearing of the case in a certain place may pose a threat to the public safety, not only the general security problems should be taken into account, but also whether the said risk to the security has negative effects on the proceedings concerning the present case must be evaluated. In addition, after reaching the conclusion that initiation or continuation of the proceedings in the relevant place would pose a clear and imminent danger to the public safety, not only the purpose of preventing the deterioration of the public peace but also eliminating the risk of preventing the parties' use of their constitutional rights concerning the proceedings should be taken into consideration.

178. However, the decisions on the transfer of the case must have relevant and sufficient grounds not only in relation to whether it would pose a danger to the public safety if the case was heard in the place where the competent court is located but also to the criteria taken into consideration -in the particular circumstances of the case- in determination of the place where the case will be referred to. This is of crucial importance so as not to shake the confidence in justice, to maintain faith in the rule of

law and, most importantly, to prevent the public (in general terms) and the victims (in particular terms) from having the perception that the case has been transferred for the purpose of preventing the public scrutiny on accountability and preventing the effective participation of victims in the proceedings.

179. The incident subject to the present case had occurred in Hakkari, and following a set of proceedings, the case was heard in Isparta for public safety reasons. At the time where the proceedings were carried out in Hakkari, the applicant repeatedly stated that it was not necessary to transfer the case to another place and that the conditions had not been satisfied in that respect. Having seen that the competent authorities considered to the contrary, he requested that the case be transferred to a place close to Hakkari, including Elazığ where the accused lived, in order to ensure his participation.

180. The applicant stated that, if the case was transferred to a place far away from Hakkari, he would not be able to participate in the proceedings for reasons such as transportation difficulties and economic inadequacies. The applicant filed an objection to the decision to transfer the case to Isparta and stated that he would not be able to participate in the proceedings to be carried out in Isparta due to the distance between Isparta and Hakkari, the lack of direct air transportation between the two cities and the lack of sufficient economic opportunity to travel.

181. As a matter of fact, the applicant did not participate in the proceedings carried out in Isparta and reiterated his requests, through his representatives, that the case be transferred to a place close to Hakkari or even another place not close but easier transportation facilities were available, such as Ankara, putting forward the same grounds that he had submitted before the Hakkari Court.

182. Firstly, the proceedings pertaining to the present case were carried out for a period of more than 5 months in Hakkari; however, during this period no incident indicating that public safety was or could be in danger occurred. The accused left Hakkari after the incident and started to live in Elazığ and his defence submissions were taken there. Moreover, the other

procedural proceedings concerning the case could be duly carried out, and there was no situation where the public safety was jeopardized and the procedural safeguards granted to the applicant or the accused were impaired.

183. Secondly, the decision on the transfer of the case provided no explanation as to why Isparta was chosen. In addition, there was no information in the case file that could enable making an assessment that Isparta had been preferred for reasons such as the workload in other courthouses, insufficient number of judges and public prosecutors in these courthouses or previous transfer of similar cases to other places.

184, The applicant did not absolutely object to the transfer of the case in his submissions to the inferior courts. He requested that the case be heard in cities with relatively easy access for him, including Elazığ where the accused lived. However his request was not replied and the case was transferred to Isparta without any justification.

185. As a result, the proceedings into the case were carried out in Isparta, about 1,500 kilometers away, not in a city located in a reasonable distance to Hakkari, without any justification. This meant for the applicant and his relatives who lived in Hakkari and wished to pursue the case that they had to go several kilometers during the period of several months while the proceedings were being carried out (six hearings in total). Unquestionably, in addition to convenient and adequate time as well as physical and mental strength, sufficient economic power was also needed. However, it was not reasonable to expect the victims of the right to life to endure such a situation in order to protect their legitimate interests, even without any justification.

186. It may be argued that the applicant pursued the case through his representatives and was informed of the relevant documents and developments in this way and had the opportunity to appeal against the relevant decisions and processes, and even appealed against the decision rendered at the end of the proceedings, and thus he could participate in the proceedings.

187. However, the effectiveness of the said participation may vary according to the particular circumstances of the investigation and prosecution. In any case, the victims should be provided with the opportunity to attend the hearings where statements of the accused are taken, witnesses are heard, expert reports are discussed, complaints about the incident are raised and other evidence are adduced and examined, in order to protect their legitimate interests. Otherwise, it might mean that the participation is only theoretically accepted, not ensured in practice and thus the essence of the right is impaired.

188. On the other hand, while the applicant was in this way deprived of the opportunity to participate in the proceedings, the accused police officer could participate in the proceedings carried out in Isparta and gave a different defence than the one he had given during the proceedings carried out in Hakkari. In addition to the fact that the relevant defence submissions were relied on by the Isparta Criminal Court of General Jurisdiction in its decision, it was observed that the accused was given a discount on his sentence on the basis of his respectful attitude during the hearing, and that even the pronouncement of this sentence was suspended on the same and similar grounds.

189. As a result, it was considered that the effectiveness of the investigation was impaired by preventing the applicant's participation in the case in order to protect his legitimate interests through the transfer of the case, which was considered to pose a danger to the public security if carried out in Hakkari, to Isparta, about 1,500 kilometers away from Hakkari, without any justification. This situation brought about the possibility of the impression that the transfer of the case was carried out in order to prevent effective participation of the public in general and of the applicant in particular. This situation caused the possibility that the public (in general terms) and the applicant (in particular terms) might have the perception that the case was transferred for the purpose of preventing effective participation in the proceedings.

190. Another important point that should considered in the present case in terms of the effectiveness of the investigation, the main purpose

of which was to ensure the effective implementation of the legal rules for the protection of the right to life as well as to ensure the accountability of those responsible, is whether the deterrence with regard to similar violations of the right to life was ensured.

191. The suitability and adequacy of the sentence for the accused's act was evaluated in detail (whether the applicant's victim status had been removed) in the section where the alleged violation of the substantive aspect of the right to life was examined. In this respect, it was underlined that within the scope of the State's obligation to conduct an effective investigation that was capable of ensuring deterrence, it was necessary not to leave unpunished the severe attacks against life and to impose sufficient punishment on those who were responsible, in order to ensure the maintenance of public safety, rule of law and prevention of the impression that unlawful acts were tolerated.

192. Accordingly, here only the capacity of the decision of suspension of the pronouncement of the judgment to ensure deterrence in terms of the prevention of similar violations of the right to life will be examined in detail, and it will then be assessed whether both situations preclude the important role in preventing similar violations of the right to life.

193. At this point, first of all, it should be noted that the relevant legislation allows the inferior courts to suspend the pronouncement of the judgment. However, this is not an obligation and the judge enjoys full discretion in this regard. At the discretion of the judge, if the accused does not commit a new crime within the five-year period, the judgment cannot be executed for a period of time, as well as, the relevant case may be discontinued automatically in accordance with the relevant law. Accordingly, it means that the sentence imposed may disappear together with its all consequences.

194. In the present case, the trial court suspended the case for a period of time (five years) by suspending the pronouncement of the judgment, even though it had full discretion in this respect. As stated above, as a result of this decision, even the inadequate punishment that had been

imposed on account of an act constituting a heavy offence was not executed for some time, as well as, at the end of the prescribed period the case would be discontinued in accordance with the relevant law and therefore the sentence imposed would disappear together with its all consequences.

195. The trial court therefore created the impression that, instead of using its discretion in terms of the suspension of the pronouncement of the judgment in order to demonstrate that the acts in question would never be tolerated, it preferred to use its discretion to mitigate or eliminate the consequences of an act constituting a heavy offence.

196. Taken together with the imposition of inadequate punishment for an act constituting a heavy offence, the trial court's such attitude clearly contradicts with the State's obligation to ensure the conduct of an effective criminal investigation capable of ensuring the imposition of appropriate and adequate punishment on those who are responsible, for the purpose of ensuring deterrence in order to prevent the violations of the right to life.

197. Consequently, the Constitutional Court has found a violation of the procedural aspect of the right to life concerning the obligation to conduct an effective investigation.

C. Application of Article 50 of Code no. 6216

198. Article 50 §§ 1 and 2 of Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."

199. The applicant requested 100,000 Turkish liras (TRY) for non-pecuniary damages.

200. It has been concluded that the applicant's right to life was violated under both its substantive and procedural aspects.

201. There is a legal interest in conducting retrial in order to redress the consequences of the violation of the procedural aspect of the right to life. Therefore, a copy of the judgment must be sent to the Ministry of Justice to have the necessary actions taken for the transfer of the case to a place in a reasonable distance to Hakkari, where hearing of the case will not pose a threat to the public safety and the applicant will be able to participate in the proceedings effectively.

202. It has been considered that finding of a violation of the procedural aspect of the right to life, as well as sending of a copy of the judgment to the Ministry of Justice to have the necessary actions taken has sufficiently redressed the violation in this respect; however, the applicant will be awarded TRY 35,000 as non-pecuniary compensation for the violation of the substantive aspect of his right to life.

203. The total court expense of 2,006.10 Turkish liras (TRY) including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 9 November 2017 that

A. 1. Alleged violations of the right to life and the prohibition of treatment incompatible with human dignity, with respect to the applicants

Mehmet Turan and Ayşe Turan, be DECLARED INADMISSIBLE for incompatibility *ratione personae*;

2. Alleged violation of the prohibition of treatment incompatible with human dignity, with respect to the applicant Seyfullah Turan, be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

3. Alleged violation of the applicant Seyfullah Turan's right to life, safeguarded by Article 17 of the Constitution, be DECLARED ADMISSIBLE;

B. The applicant Seyfullah Turan's right to life was VIOLATED;

C. A copy of the judgment be SENT to the Ministry of Justice to have the necessary actions taken for the redress of the consequences of the violation of the procedural aspect of the right to life;

D. The applicant Seyfullah Turan be AWARDED TRY 35,000 in respect of non-pecuniary damages for the violation of the substantive aspect of his right to life, and his other claims for compensation be REJECTED;

E. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be REIMBURSED to the applicant;

F. The payment be made within four months as from the date when the applicants apply 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; and

G. A copy of the judgment be SENT to the 3rd Chamber of the Isparta Criminal Court of General Jurisdiction.

RIGHT TO PROTECT AND IMPROVE ONE'S CORPOREAL AND SPIRITUAL EXISTENCE (ARTICLE 17 § 1)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

T. A. A.

(Application no. 2014/19081)

1 February 2017

On 1 February 2017, the Second Section of the Constitutional Court found violations of the right to protection of one's corporeal and spiritual existence and the right to respect for private life safeguarded respectively by Articles 17 and 20 of the Constitution in the individual application lodged by *T. A. A.* (no. 2014/19081).

THE FACTS

[5-47] On 14 February 2005, the applicant started to work as a pipe profile manufacturing operator in a company operating in the field of plastic pipe and profile manufacturing. He was diagnosed with the human immunodeficiency virus (HIV) in December 2006.

The on-site doctor asked the Medical Faculty of the Ege University, where the applicant being suspended from work for six months in spite of being paid was receiving treatment, whether his situation constituted an impediment to work. In the response given it was noted that the health condition of the applicant did not constitute any obstacle to work at any job and he had no disabilities in respect thereof.

On 26 January 2009, the applicant left work by submitting a resignation letter, and signed a certificate of quittance declaring he had no receivables from the relevant workplace.

By his petition of 5 November 2009, the applicant filed an action of debt against the company he used to work before the 2nd Chamber of the Karşıyaka Labour Court ("the Labour Court"). The Labour Court qualified the action as an action for debt and compensation for non-pecuniary damage based on Article 5 of the Law No. 4857.

By the decision of the Labour Court dated 24 February 2011, it was noted that the applicant's allegation that his private life had been violated was not substantiated and accordingly rejected his claim for non-pecuniary compensation. In terms of the compensation claimed for the prohibition of discrimination, the Labour Court indicated in its decision that it was found established that the applicant was paid his salary although he was not caused to work for five or six months, and that the applicant's being precluded from performing his obligation to

work and being suspended from work, as well as in employment relation the employer's liability to pay salary, were discriminatory in nature. It was consequently held that the employer had contravened the obligation of equal treatment, and the compensation claimed was partially accepted.

The decision was quashed, upon the appeal of the parties, by the judgment of the 9th Civil Chamber of the Court of Cassation dated 1 October 2013, by considering that "the employer acted with the motive of protecting his other employees…"

Upon the retrial held following the quashing judgment, the Labour Court complied with the quashing judgment and dismissed the action with its decision of 20 March 2014.

This decision was upheld by the 9th Civil Chamber of the Court of Cassation by its judgment of 24 September 2014.

IV. EXAMINATION AND GROUNDS

48. The Constitutional Court, at its session of 1 February 2017, examined the application and decided as follows.

A. The Applicant's Allegations

49. The applicant alleged;

i. That he was primarily suspended from his workplace and subsequently dismissed from work wrongfully on the ground of his health condition and that this situation constituted a discriminatory treatment; that his disease did not have an adverse effect on his business life and that it had also been supported with medical reports that it did not pose a risk for the others working in the same office with him; that despite these medical reports, the grounds on which the judicial authorities relied in their decisions dismissing the action would pose an obstacle for him to find work, which might cause serious problems to be in breach of the right to life and the right to have access to treatment with respect to the treatment of his disease requiring a high cost; and that therefore his rights enshrined in the Articles 10, 17, 20, 35, 36, 40 and 49 of the Constitution were violated;

ii. That in case of a public trial, his business life would end up permanently and that he accordingly requested that his trial be held closed to third parties due to his fear that his case, which was not common in nature, may attract attention of the public especially of the journalists; however, his request was rejected by the domestic court without any justification, which was in breach of Articles 20 and 36 of the Constitution; and

iii. That there was a breach of his right to a fair trial as his trial was not concluded within a reasonable time. The applicant requested that a violation be found and retrial be conducted, as well as 2,260 Turkish liras (TRY) and TRY 20,000 be awarded to him for respectively pecuniary and non-pecuniary damages, for redress of the consequences of the violation found. The applicant also requested that his identity be kept confidential in public documents.

B. The Court's Assessment

1. Request for Confidentiality

50. Regard being had to difficulties experienced by the persons carrying HIV (+) due to the lack of adequate knowledge by the society about the said disease, the applicant requested that his identity be kept confidential in public documents. Since the reasons specified by the applicant were considered appropriate, it was necessary to accept the applicant's request for confidentiality.

2. Determination of the Norms Applicable in the Case

51. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). Given the abovementioned allegations as a whole, it is seen that the applicant had been forced to quit on the ground that he was carrying HIV virus, which was allegedly in breach of the principle of equality and the prohibition of discrimination.

52. Pursuant to the provisions of Article 148 § 3 of the Constitution and Article 45 § 1 of the Code no. 6216 on Establishment and Rules of

Procedures of the Constitutional Court dated 30 March 2011, in order for the merits of an individual application lodged with the Constitutional Court to be examined, the right claimed to have been interfered with by the public power must, in addition to being guaranteed in the Constitution, fall within the scope of the European Convention on Human Rights ("the Convention") and the additional protocols to which Turkey is a party. In other words, it is not possible to declare admissible an application which contains a claim as to the violation of a right falling outside the common protection area of the Constitution and the Convention (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18). Therefore, while determining the content of the rights within the scope of individual application, the provisions of the Constitution and the Convention must be considered together and their common protection area must be determined.

53. Article 10 § 1 of the Constitution, titled "*Equality before the law*", reads as follows:

> *"Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds."*

54. Regard being had to the provisions above, the applicants' claim within the scope of the prohibition of discrimination cannot be examined abstractly; it must be examined in conjunction with the other fundamental rights and freedoms enshrined in the Constitution. In other words, in order for a discussion as to whether there has been a violation of the prohibition of discrimination, an allegation in this respect must be able to answer the questions as to the fundamental right and freedom on the basis of which the individual has been subject to discrimination (see *Onurhan Solmaz*, § 33).

55. Article 17 § 1 of the Constitution, titled "Personal inviolability, corporeal and spiritual existence of the individual", in so far as relevant, provides as follows:

> *"Everyone has … the right to protect and improve his/her corporeal and spiritual existence."*

56. Article 20 of the Constitution, titled "Privacy of private life", provides as follows:

"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.

Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms 16 of others, or unless there exists a written order of an agency authorized by law, in cases where delay is prejudicial, again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall automatically be lifted.

Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."

57. While any legal interest falling into the scope of private life shall be safeguarded by Article 8 of the Constitution, it appears that the legal interests in question shall fall under the protection of different articles of the Constitution. In this context, while it is specified in Article 17 § 1 of the Constitution that everyone has the right to protect and improve his/her corporeal and spiritual existence, the right to protect and improve corporeal and spiritual existence laid down therein corresponds to the right to physical and moral integrity as well as to the rights to self-fulfilment and self-determination, safeguarded within the scope of the right to respect for private life under Article 8 of the Convention (see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 30).

58. One of the legal interests safeguarded within the scope of the right to respect for private life is the right of privacy. However, right of privacy does not only represent the right to be left alone, but it also covers the individual's legal interest of controlling the information about him. An individual has an interest in the fact that any information concerning himself is not disclosed or disseminated without his consent, that such information is not accessed by the others and is not used without his consent, in other words, that such information remains confidential. This points out the individual's right to determine the future of the information about him (see *Serap Tortuk*, no. 2013/9660, 21 January 2015, § 32). Right to protection of personal data covered by the right to respect for private life is clearly defined in Article 20 of the Constitution.

59. As set out in the Constitutional Court's judgments, personal data covers all information concerning a person, provided that he is a specific and identifiable person. It is noted that not only the personal identifying information such as name, surname, date and place of birth, but also any information such as phone number, motor vehicle plate number, social security number, passport number, cv, photo, footage, voice records, fingerprints, statements of health, genetic information, IP address, e-mail address, shopping habits, hobbies, preferences, persons interacted with, group memberships and family information, which lead to direct or indirect identification of the person, are regarded as personal data (see the Court's judgment nos. E.2014/74, K.2014/201, 25 December 2014; E.2013/122, K.2014/74, 9 April 2014; E.2014/149, K.2014/151, 2 October 2014; E.2013/84, K.2014/183, 4 December 2014; E.2014/74, K.2014/201, 25 December 2014; and E.2014/180, K.2015/30, 19 March 2015). Accordingly, the applicant's statement of health is to be regarded as personal data safeguarded by Article 20 of the Constitution.

60. Besides, the right to respect for private life also contains the right to establish and develop relationships with other human beings. The professional life and private life commune with each other, therefore the activities carried out within the scope of professional life cannot be excluded from the notion of "private life". Accordingly, where the matters concerning an individual's private life are taken as a basis for the actions

taken with respect to his profession, then the right to respect for private life will be at stake (see *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 62; and *Ata Türkeri*, no. 2013/6057, 16 December 2015, § 31; for similar judgments of the European Court of Human Rights (ECHR), see *Özpınar v. Turkey*, no. 20999/04, 19 October 2010, § 45; and *Niemietz v. Germany*, no. 13710/88, 16 December 1992, § 29).

61. There is no doubt that the state of health concerns the right to protect and develop corporeal and spiritual existence. Besides, for persons with HIV positive, this disease is not only a health problem, but it also affects the other aspects of their private lives by leading to problems such as facing prejudices and stigmatizations in social life and being excluded from the society. The effects on people can be much more destructive if such exclusions, stigmatizations and prejudices are present especially in business life. Dismissal of the persons with HIV positive for solely this reason will make it very difficult for them to find a new job, as well as it may make it difficult for them to have access to the treatment required to be undergone for a life time which is quite expensive, hence cause serious problems on their health. In addition, it can hardly be said that an individual deprived of his financial independence as a result of being deprived of his salary is able to fully enjoy his rights to self-realization and self-determination.

62. In the present case, while it is established that the applicant had submitted a petition for resignation, it is understood that the applicant had first been suspended from work for a few months by receiving his salary and subsequently been dismissed after he had become HIV virus carrier and this situation had been learnt by his employer. As a matter of fact, it is stated in the reasoning of the judgments of the Court of Cassation and the labour court that "Considering that the plaintiff's current disease is of contagious nature and that where he is allowed to continue his work despite his disease, it might cause inconvenience for the other employees, it is understood that the employer aimed at protecting his other employees."; thus, it was accepted that the applicant had been dismissed due to his being HIV positive. There is no reason for the Constitutional Court to depart from the inferior courts' acknowledgement in this respect.

Accordingly, in the present case, the applicant's having been subject to a process affecting his professional life on account of his "health condition" concerns, in addition to his right to protect and develop his corporeal and spiritual existence, his right to respect for his private life safeguarded by Article 20 of the Constitution.

63. In this framework, it has been concluded that considering the applicant's complaints mentioned above, his allegation under Article 10 of the Constitution must be examined in conjunction with his right to protect and develop his corporeal and spiritual existence as well as his right to respect for his private life, which are safeguarded by the Constitution and the Convention.

64. In addition, the applicant maintained that the grounds on which the judicial authorities relied in their decisions were of a nature which might cause serious problems in breach of the right to life and the right to have access to treatment with respect to the treatment of his disease requiring a high cost. However, the medical reports submitted by the applicant pertaining to the fact that he was a carrier of the HIV virus stated that his health status did not prevent him from working in any business and that nor did he have any disability. Moreover, the subject matter of the action brought by the applicant before the labour court had related to his claim for compensation for discrimination, not to the alleged failure to cover his treatment costs. In addition, the treatment costs of the patients with HIV can be covered by the General Health Insurance in our country. Besides, there is no allegation or finding in the case file that the applicant had been prevented from making use of such an opportunity. For all these reasons, it has been concluded that it is not necessary to examine these allegations within the scope of the right to life. However, the said grounds relied on by the judicial authorities must be examined within the scope of the right to protect and develop corporeal and spiritual existence as well as the right to respect for private life.

65. Similarly, the applicant's allegation that he had requested that his trial be held closed to third parties; however, his request had been rejected by the labour court without any justification must also be examined under his right to respect for his private life within the scope of his right

to control the information about him and to the protection of personal data, which constitutes one of the elements of the right to privacy.

66. Besides, the applicant's allegation concerning the excessive length of the proceedings has been examined within the scope of the right to be tried within a reasonable time, which constitutes one of the elements of the right to a fair trial.

3. Admissibility

67. The present application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

4. Merits

a. Alleged violation of the right to respect for private life and the right to protect and improve corporeal and spiritual existence assessed in conjunction with the principle of equality due to the dismissal of the action brought for seeking compensation for discrimination

i. General Principles

68. The applicant claimed that he had been primarily suspended from his workplace and subsequently dismissed from work wrongfully on the ground of his health condition and that this situation constituted a discriminatory treatment.

69. The grounds of discrimination such as "language, race, colour, sex, political opinion, philosophical belief, religion and sect" which are set out in Article 10 of the Constitution, which provides "*Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.*", are important discrimination grounds which are also specified in many international regulations. However, the phrases "everyone" and "such grounds" stated in the relevant provision points out that a limited approach is adopted in view of the persons protected against discrimination and the grounds of discrimination, and the grounds specified therein are exemplary (see *Hüseyin Kesici*, no. 2013/3440, 20 April 2016, § 56).

70. Within the context of the interpretation of the phrase "such grounds", the Constitutions Court states that "*…One of the most important concepts set out in the Constitution regarding freedoms is the principle of equality before the law… The issues that cannot be subject to discrimination is not limited to those listed in the provision. With the phrase "such grounds", the scope of the issues where no discrimination is allowed have been extended; thus the provision has been clarified also in practice…*", where it clearly specified that the grounds of discrimination is not limited to those listed in the relevant provision (see the Court's judgment no. E.1986/11, K. 1986/26, 4 November 1986).

71. In this scope, the principle of equality and the prohibition of discrimination also ensure that individuals are not subject to discrimination on the basis of sex, race, language, religion as well as on the basis of "health condition" which is part of the private life (for similar judgments of the ECHR, see *Kiyutin v. Russia*, no. 2700/10, 10 March 011, §§ 56-57; and *I.B. v. Greece*, no. 552/10, 3 October 2013, § 73).

72. The ECHR has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, the persons in relevantly similar situations. It is also specified in the ECHR's case-law; that while Article 14 of the Convention provides guarantee against any discrimination in terms of the enjoyment of rights and freedoms safeguarded by other provisions, all different treatments are not in breach of this article; that it is necessary to prove that other individuals in similar situations have been subject to a privileged treatment, constituting a discrimination; that in order for a different treatment to be in breach of Article 14 of the Constitution, it must not have an objective and reasonable justification; that existence of such a justification will be assessed in accordance with the principles which prevail in a democratic society; and that accordingly, a different treatment in terms of enjoyment of a right safeguarded by the Convention must pursue a legitimate aim, as well as there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (for similar judgments of the ECHR, see *D.H and Others v. the Czech Republic* [GC], no. 57325/00, 13 November 2007, § 175; and *Burden v. the United*

Kingdom [GC], no. 13378/05, 29 April 2008, § 60, and *Ünal Tekeli v. Turkey*, no. 29865/96, 16 November 2004, §§ 49-53).

73. While the Contracting States enjoy a certain margin of appreciation in determining the cases in which differences in otherwise similar situations justify a different treatment, weighty reasons have to be put forward (for a similar judgment of the ECHR, see *Ünal Tekeli v. Turkey*, no. 29865/96, 2 February 2009, §§ 49-53). In addition, if a restriction applies to a particularly vulnerable group in society, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons to demonstrate that the restriction in question has been in compliance with the Constitution and the Convention (for similar judgments of the ECHR, see *Kiyutin v. Russia*, § 63; and *I. B. v. Greece*, no. 552/10, 3 October 2013, § 79).

74. The ECHR identified a number of vulnerable groups that suffered different treatment on account of their sex, sexual orientation, race or ethnicity, mental faculties or disability (for similar judgments of the ECHR, see *Abdulaziz, Cabales, Balkandali v. the United Kingdom*, nos. 9214/80, 9473/81 and 9474/81, 28 May 1985, § 78; *Burghartz v. Switzerland*, no. 16213/90, 22 February 1994, § 27; *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, § 97; *Smith and Grady v. the United Kingdom*, nos. 33985/96, 33986/96 and 27/9/1999, § 90; *Timishev v. Russia*, nos. 55762/00 and 55974/00, 13 December 2005, § 56; and *Kiyutin v. Russia*, § 63).

75. The ECHR has also underlined; that people living with HIV/AIDS have suffered from widespread stigma and exclusion, including within the Council of Europe region; that, in the early years of the epidemic when HIV/AIDS diagnosis was nearly always a lethal condition and very little was known about the risk of transmission, people were scared of those infected due to fear of contagion; that ignorance about how the disease spreads has bred prejudice which, in turn, has stigmatised or marginalised those who carry the virus; that as the routes of transmission of HIV/AIDS became better understood, it was recognised that HIV infection could be traced to specific behaviours – such as same-sex sexual relations, drug injection, prostitution or promiscuity – that were already stigmatised in many societies, thereby creating a false nexus between the

infection and personal irresponsibility and reinforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny; that despite the recent considerable progress in HIV prevention and improved access to HIV treatment, stigma and related discrimination against people living with HIV/AIDS have remained a subject of great concern for all international organisations active in the field of HIV/AIDS; that therefore, people living with HIV are a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status (see *Kiyutin v. Russia*, § 64; and *I. B. v. Greece*, § 81).

76. In the present case, the dispute is related to the termination of the employment contract between real persons. Accordingly, there has been no alleged interference on the part of the public authorities. However, the State has a positive obligation to effectively protect and respect the corporeal and spiritual existence of individuals and their right to respect for their private lives. This obligation also involves taking necessary measures to protect these rights in terms of the individuals' acts against each other (see *Adnan Oktar (3)*, no. 2013/1123, 2 October 2013, § 32; and *Marcus Frank Cerny* [Plenary], no. 2013/5126, 2 July 2015, § 36). Accordingly, the dispute in question must be examined within the scope of the State's positive obligation.

77. The State's positive obligation primarily requires the establishment of a legal infrastructure that effectively protects the right to protect and improve corporeal and spiritual existence and the right to respect for private life in terms relations between individuals (see *Ömür Kara and Onursal Özbek*, no. 2013/4825, 24 March 2016, § 46).

78. In addition, the disputes falling into the scope of the right to protect and improve corporeal and spiritual existence and the right to respect for private life must be examined by the judicial authorities within the scope of proceedings where constitutional safeguards concerning the fundamental rights in question as well as guarantees concerning fair trial are respected. These requirements stem from the obligation of the public authorities not to tolerate the unjust interferences by third parties with the rights and

freedoms of individuals. As a matter of fact, the inferior courts play a role in the protection of safeguards by delivering binding decisions for the resolution of disputes between private persons. At this point, bringing the disputes before the judicial authorities and the resolution of them through fair proceedings constitute a part of the positive obligations incumbent on the public authorities (see *Ömür Kara and Onursal Özbek*, § 47).

79. Although the necessary structural measures have been taken by public authorities, in cases where individuals are not provided with protection against the interference by third parties in the decisions of the courts conducting the proceedings in dispute, their obligations mentioned above shall not be deemed to have been fulfilled. This means that the rights and freedoms of individuals are left unprotected through the courts, which are public authorities (see *Ömür Kara and Onursal Özbek*, § 49).

80. Accordingly, in cases where the disputes concerning alleged interferences with the rights, safeguarded by the Constitution, of individuals working within the scope of private law employment relationship, the inferior courts must not ignore these safeguards, a fair balance must be struck between the competing interests of employer and employees, it must be examined whether the interference with the applicant's fundamental rights was proportionate to the legitimate aim pursued by the employer and relevant and sufficient justifications must be submitted while delivering the judgment (see *Ömür Kara and Onursal Özbek*, § 50).

ii. Application of Principles to the Present Case

81. The applicant claimed that he had been primarily suspended from his workplace and subsequently dismissed from work wrongfully on the ground of his health condition and that this situation constituted a discriminatory treatment. In this regard, the applicant brought an action before the labour court seeking compensation for discrimination and thus non-pecuniary damages.

82. Accordingly, it must be underlined that the action brought by the applicant was not an action for reinstatement. The applicant, maintaining that he had been dismissed from work as a result of being subject to

discriminatory treatment, sought compensation in accordance with Article 5 of Law no. 4857, titled "principle of equal treatment" and defined through the judicial decisions as "compensation for discrimination" in the doctrine.

83. As is known, Article 5 § 1 of Law no. 4857 provides that no discrimination based on language, race, sex, political opinion, philosophical belief, religion and sex or similar reasons is permissible in the employment relationship; while Article 5 § 6 provides that if the employer violates the above provisions in the execution or termination of the employment relationship, the employee may demand compensation (compensation for discrimination) up to his four months' salaries plus other claims of which he has been deprived.

84. In the present case, it must be proven whether the applicant had been subject to a different treatment. There are two acts that the applicant described as discriminatory treatment. The first one is the applicant's having allegedly not been allowed to work despite the payment of his salary and being suspended from work. The second one is his allegedly been dismissed from work wrongfully.

85. The applicant claimed; that he had been dismissed from work on account of his health condition; that making use of his difficult situation, he had been shown as if he had resigned and had been made to sign many documents in this respect; and that he had been made payment under the name of premium, despite not existence of such a procedure in his workplace. Stating that he reserved his rights as regards severance and notice pay, the applicant claimed compensation for discrimination. The documents submitted to the case file by the labour court stated that the applicant had resigned by submitting a letter of resignation. However, according to the relevant documents, the applicant was paid 4,416.75 Turkish liras (TRY) after resignation.

86. The expert report dated 15 December 2010 which was requested by the labour court stated; that although the applicant had submitted a letter of resignation and signed a voucher, these documents would not be valid because the contents of the documents and the defense of the

employer contradicted with each other; that although it was indicated that the applicant had been paid TRY 4,416.75 as premium, the witness of the defendant stated that the relevant payment had been severance payment; and that accordingly, it must be accepted that the applicant's employment contract had been terminated by the employer.

87. Besides, it was found established by the inferior courts that after the applicant's health condition had been learnt by his employer, his salary was paid to him for a few months without working. It was also indicated by the inferior courts that the employer had not provided the applicant with another position appropriate for his health condition. According to the documents included in the case file as well as to the court decisions, the applicant had been made payment for a few months but he had not been allowed to work, and afterwards, he submitted a letter of resignation.

88. In view of all these points, it has been understood; that after the applicant's health condition had been learnt by his employer, he was first suspended from work for a few months but his salary was paid to him; that subsequently, he was made a payment under the name of premium and then made to submit a letter of resignation; and that thus he was forced to resign from work.

89. In the initial decision of the labour court, "payment of the applicant's salary without working" and "his being suspended from work" was considered to be contrary to the principle of equality. It was stated in the Court of Cassation's judgment quashing the labour court's decision that the applicant's employment contract had explicitly been terminated with his resignation. According to the decisions of the labour court and the Court of Cassation, the act attributable to the employer was the fact that the applicant had not been allowed to work despite the payment of his salary to him for a few months.

90. Accordingly, it is seen that the inferior courts made no assessments as to the applicant's allegedly been forced to resign and thereby his actually having been dismissed by his employer. It has therefore been understood that the inferior courts failed to address the applicant's

claims and demands which constituted the basis of the applicant's case and might have an impact on the outcome of the proceedings, and that accordingly, the justifications of the decision were not sufficient and relevant in terms of the applicant's right to protect his corporeal and spiritual existence as well as his right to respect for his private life.

91. In addition, the grounds relied on by the inferior courts as to the fact that the applicant's not having been allowed to work despite the payment made to him did not constitute a discrimination must also be assessed.

92. It was found established by the inferior courts and the Court of Cassation that after the applicant's health condition had been learnt by his employer, he was suspended from work for a few months, while his salary was still paid to him. This practice was classified by the labour court in its initial decision as a different treatment. On the other hand, whether this practice had been of a different nature was not specified in the Court of Cassation's judgment, and only the motive of the employer was focused on. In its judgment, the Court of Cassation relied on the ground that the employer aimed at protecting the other employees working in the same place with the applicant and that therefore the employer's act could not be regarded as discriminatory. Accordingly, the grounds relied on by the inferior courts regarding the motive of the employer must also be assessed.

93. In the present case, it must be acknowledged that the applicant had reasonably expected that he would legally continue working, unless he committed an act leading to his dismissal from work, as regulated by the labour law. However, it has been found established that the applicant was not allowed to work for a few months after his health condition had been learnt by his employer.

94. Even if it may be asserted that the applicant was subject to a different treatment which was not shown to any of his workmates and which was more convenient and even advantageous for him given the fact that he was paid salary during the period he was not allowed to work and could get his receivables when he left work, it must in the first place

be recalled that the applicant, who has been in need of a continuous and regular income to cover his lifelong treatment, has lost his job by which he could obtain this income not due to the legal reasons stipulated in Law no. 4857 but for suffering from HIV positive. Therefore, it turns out that the applicant was subject to a different treatment in a negative sense.

95. It was stated in the Court of Cassation's judgment quashing the labour court's decision and in the labour court's subsequent decision on the dismissal of the case that the employer had taken such a measure with a view to protecting the other employees, which could not be regarded as a discriminatory act.

96. Indeed, there is no doubt that in workplaces where sharp objects are used and labour accidents and injuries may occur, the risk of infection of HIV disease –even if it is a slight probability- should be taken seriously. In this respect, it must be acknowledged that the employer was concerned about protecting other employees in his company and that therefore the measure taken by him pursued a legitimate aim.

97. In the present case, there has been conflict between the benefits to be obtained by the employer by protecting the others employees and thereby ensuring peace and discipline in his company within the frame of the rules set by him and the applicant's right to respect for his private life as well as his right to protect and improve his corporeal and spiritual existence. Accordingly, the judicial authorities must hold the balance between the interests of the employer and the employee who was the weak party of the employment contract as well as included in the weak group of the society due to his being HIV positive.

98. Whether the termination of the employment contract by the employer on account of the health status of the employee constitutes a violation of the obligation of equal treatment must be assessed, in the particular circumstances of each case, in terms of the elements such as the nature of the employee's disease, the effects of the disease on work attendance, working conditions, performance and efficiency, whether it poses a danger to the other employees and the measures to be taken in order to prevent such danger.

99. In their decisions, the Court of Cassation and the Labour Court focused on the "contagious" nature of the applicant's disease and therefore considered that the only solution to prevent this risk from occurring was to suspend the applicant from work. However, in the relevant decisions, it was not taken into consideration whether the employer had the obligation to assess the opportunity to allow the applicant to work in another position that would not pose a risk to the other workers. Whereas according to witness statements, the on-site doctor gave suggestions to the employer to employ the applicant in another position, as well as the manager of the staff and financial affairs informed the employer that the applicant may be tasked with performing sales calls in an outside position. It was also indicated in the report of the expert assigned by the court that the employer's duty was to employ the applicant in another position which was not risky for his health condition. However, it appears that the employer failed to make an assessment as to whether there was such a position at the workplace and if any, whether the applicant's qualifications were sufficient for this position. Besides, it has been observed that in the decisions of the Court of Cassation and the Labour Court, no assessment as to the obligation to look for alternative positions at the workplace was done and no fair balance was therefore struck between the conflicting interest of the employer and the employee.

100. Consequently, it has been established in the first place that the applicant's allegation that he had been unjustly forced to leave work was never examined by the first instance court and in the second place that the incumbent court's decisions included no assessment concerning the obligation to look for alternative positions at the workplace. It has therefore been concluded that the public authorities failed to fulfil their positive obligations to protect the applicant's corporeal and spiritual existence as well as his right to respect for his private life.

101. For the reasons mentioned above, the Constitutional Court has found violations of the applicant's right to protect his corporeal and spiritual existence as well as his right to respect for private life, which are respectively safeguarded by Articles 17 and 20 of the Constitution.

b. Alleged violation of the right to respect for private life due to rejection of the applicant's request for holding of his trial closed to third parties

102. The applicant claimed that his right to respect for his private life was violated due to the rejection of his request for holding of his trial closed to third parties by the labour court.

103. As specified in the previous judgments of the Constitutional Court, personal data covers all information concerning a person, provided that he is a specific and identifiable person (see the Court's judgments nos. E.2014/74, K.2014/201, 25 December 2014; E.2013/122, K.2014/74, 9 April 2014; E.2014/149, K.2014/151, 2 October 2014; E.2013/84, K.2014/183, 4 December 2014; E.2014/74, K.2014/201, 25 December 2014; and E.2014/180, K.2015/30, 19 March 2015). Data concerning individuals' health condition is also regarded as personal data.

104. Considering that people with HIV infection are a weak group that has been exposed to prejudice and condemnation for a long time, respecting the confidentiality of health data of such individuals is of vital importance. Appropriate measures for preventing the disclosure of medical data should be taken in order to prevent any condemnation against these individuals and ensuring that they make use of medical services without being subject to discrimination (for similar judgments of the ECHR, see *I v. Finland*, no. 20511/03, 17 July 2008, § 38; and *Y v. Turkey* (dec.), no. 648/10, 17 February 2015, § 73).

105. In the present case, the applicant requested that his trial be conducted closed to third parties, stating that otherwise it would have negative effects on his working life due to his being HIV virus carrier. The labour court dismissed the applicant's request for confidentiality due to the nature of the petition of complaint. Thus, it has been understood that there was an interference with the applicant's right to request the protection of personal data within the scope of his right to respect for his private life due to the dismissal by the judicial authorities of his request for the conduct of his trial closed to third parties on account of his health condition.

106. In determination of whether the said interference constituted a violation, an examination should be carried out in accordance with the principles of being prescribed by law, relying on the grounds specified in the relevant articles of the Constitution, and not being contrary to the requirements of the democratic order of the society and to the principle of proportionality, which are laid down in Article 13 of the Constitution and applicable to the present case.

107. Judicial authorities may hold hearings closed to third parties in cases specified in Article 28 of Law no. 6100. It is therefore understood that the interference in the present case had a legal basis.

108. The principle of publicity of proceedings is safeguarded within the scope of the right to a fair trial. The purpose of this principle is to ensure the transparency of the trial proceedings and avoid arbitrariness in the trial by means of exposing the functioning of the judicial mechanism to the public scrutiny. From this aspect, it is one of the most significant means to achieve a state of law (see *Nevruz Bozkurt*, no. 2013/664, 17 September 2013, § 32). Accordingly, the said principle pursues the legitimate aim of public interest.

109. However, within the scope of the right to respect for private life as in the present case, in cases where personal data that is of particular sensitivity is to be protected, the public authorities must show particularly significant grounds in order to prove that the interference with the said fundamental right has been justified.

110. In the present case, as concerns the applicant's request for a trial closed to third parties, the labour court stated in its minutes of hearing dated 9 February 2010 that by the nature of the petition of complaint the applicant's request for confidentiality was dismissed. As stated above, considering that people with HIV infection are a weak group that has been exposed to prejudice and condemnation for a long time and that in case of being subject to exclusion, stigmatization and prejudice especially in the business life, its effects on people may be much more devastating, the applicant's request for confidentiality is of reasonable and defensible nature within the scope of the right to respect for private life. Although it is

clear that the judicial authorities enjoy discretion in the assessment of the parties' claims and requests, in cases where the requests concerning the matters that may have significant effects with respect to the individual's confidentiality and thus his private life are dismissed, the grounds relied on must be specified in detail in the decision, as a requirement of the right to a fair hearing.

111. Although it is stated by the Labour Court that the request for confidentiality is denied due to the nature of the complaint petition, the relevant statement is ambiguous and is far from explaining the concrete reasons why the confidentiality decision was not given. It appears that although same allegations were put forth at the appellate stage, any justification on these matters was not included in the appellate judgment. In this sense, it must be accepted that the decision and judgment in question did not include relevant and sufficient justification on the matter.

112. Consequently, the Constitutional Court has found a violation of the applicant's right to protection of personal data, which is one of the elements of the right to respect for private life safeguarded by Article 20 of the Constitution.

c. Alleged violation of the right to a fair trial due to the unreasonable length of proceedings

113. The applicant claimed that his right to a fair trial had been violated, stating that the action he had brought before the 2nd Chamber of the Karşıyaka Labour Court was not concluded within a reasonable period.

114. In determination of the length of the administrative proceedings concerning the disputes related to civil rights and obligations, the starting date shall be taken as the date on which the action was brought, while the ending date shall be taken as the date on which the proceedings are concluded (usually covering the execution stage) and, as regads the pending cases, the date of the Constitutional Court's judgment on the alleged violation of the right to a fair trial (see *Güher Ergun and Others*, no. 2012/13, 2 July 2013, §§ 50 and 52).

115. In the assessment of whether the length of the administrative proceedings concerning civil rights and obligations was reasonable, the issues such as the complexity of the proceedings and the level of jurisdiction, the attitudes shown by the parties and the relevant authorities in the proceedings and the nature of the applicant's benefit in expeditious conclusion of the proceedings are taken into consideration (see *Güher Ergun and Others*, §§ 41-45).

116. In view of the principles mentioned above and the judgments rendered by the Constitutional Court in similar applications, it has been concluded that the length of proceedings which lasted 4 years and 10 months in the present case (from 5 November 2009 on which the action was brought until 24 September 2014 on which the Court of Cassation upheld the decision) was not reasonable.

117. Consequently, the Constitutional Court has found a violation of the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution.

C. Application of Article 50 of Code no. 6216

118. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

119. The applicant requested a retrial, as well as 2,260 Turkish liras (TRY) corresponding to his four salaries and TRY 20,000 for respectively pecuniary and non-pecuniary damages.

120. It has been concluded that the applicant's right to respect for his private life and his right to protect and improve his corporeal and spiritual existence, which have been examined in accordance with the principle of equality, have been violated.

121. As there is a legal interest in holding a retrial for redress of the consequences of the violation, a copy of the judgment must be sent to the 2nd Chamber of the Karşıyaka Labour Court in order to hold a retrial. The applicant's request for pecuniary damages must be dismissed since it is the subject matter of the retrial to be held.

122. It has also been concluded that the applicant's right to respect for his private life has been violated due to the rejection of his request for holding his trial closed to third parties. The applicant must be awarded TRY 8,000 for non-pecuniary damages that cannot be redressed solely with the finding of a violation.

123. The action for compensation brought by the applicant was concluded within a period of five years which was not reasonable; therefore, the applicant must be awarded TRY 4,800 for non-pecuniary damages that cannot be redressed solely with the finding of a violation.

124. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

V. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 1 February 2017 that

A. The applicant's request for keeping his identity confidential in public documents be ACCEPTED;

B. 1. Alleged violation of the applicant's right to respect for his private life and his right to protect and improve his corporeal and spiritual

existence, which have been examined in accordance with the principle of equality, be DECLARED ADMISSIBLE;

2. Alleged violation of the applicant's right to respect for his private life due to the rejection of his request for holding his trial closed to third parties be DECLARED ADMISSIBLE;

3. Alleged violation of the applicant's right to be tried within a reasonable time be DECLARED ADMISSIBLE;

C. 1. The principle of equality enshrined in Article 10 of the Constitution, the applicant's right to protect and improve his corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution, and his right to respect for his private life safeguarded by Article 20 of the Constitution were VIOLATED;

2. The applicant's right to respect for his private life safeguarded by Article 20 of the Constitution was VIOLATED, due to the rejection of his request for holding trial closed to third parties;

3. The applicant's right to be tried within a reasonable time safeguarded by Article 36 of the Constitution was VIOLATED;

D. A copy of the judgment be SENT to the 2nd Chamber of the Karşıyaka Labour Court (Decision of the 2nd Chamber of the Karşıyaka Labour Court, dated 20 March 2014 and numbered E.2013/337, K.2014/90) in order to hold a retrial for redress of the consequences of the violation;

E. Although the applicant sought compensation for pecuniary and non-pecuniary damages for the alleged violations of his right to respect for his private life and his right to protect and improve his corporeal and spiritual existence, which have been examined in accordance with the principle of equality, sending the case file to the 2nd Chamber of the Karşıyaka Labour Court for holding retrial will constitute a sufficient redress for the applicant's allegations in this respect; therefore his request for compensation regarding his mentioned rights be REJECTED;

F. 1. The applicant be AWARDED TRY 8,000 for non-pecuniary damages he had sustained due to the rejection of his request for holding

his trial closed to third parties; and his other requests for compensation be REJECTED;

2. The applicant be AWARDED TRY 4,800 for non-pecuniary damages he had sustained due to the length of the judicial proceedings; and his other claims for compensation be REJECTED;

G. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be REIMBURSED to the applicant;

H. 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; and

I. A copy of the judgment be SENT to the Ministry of Justice.

PROHIBITION OF TORTURE AND ILL-TREATMENT (ARTICLE 17 § 3)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ÜMİT ÖMÜR SALAR

(Application no. 2014/187)

23 March 2017

On 23 March 2017, the Second Section of the Constitutional Court found a violation of the procedural aspect of the prohibition of torture and ill-treatment safeguarded by Article 17 § 3 of the Constitution in the individual application lodged by *Ümit Ömür Salar* (no. 2014/187).

THE FACTS

[8-32] Having been graduated from the Kuleli Military High School, the applicant dropped out the Air Force Academy on 24 May 2010 of his consent, alleging that some military officers and some 4th class students defined as leader students at the camp of student selection flight which he had attended in August 2009 had put physical and psychological pressure on him.

Then the applicant filed a criminal complaint with the Ankara Chief Public Prosecutor's Office against some military officers in charge at the camp and during the school term and some 4th class students due to the physical and psychological pressure put on him. The Chief Public Prosecutor's Office referred the file to the Military Prosecutor's Office of the Northern Sea Area Command, stating that the subject matter of the complaint falls within the scope of military justice.

The applicant alleged that E.A. who was a student of the 4th class at the camp of student selection flight applied on him various methods of physical pressure such as leaning his face against the pole again and again, holding him for hours in the chair position called "Chinese sitting", making him somersault for 3 kms, and methods of psychological pressure in such manners that "You are not a decent person, you are unprincipled, why are you so assertive and resistant? You will end up leaving even if you go to school…". He also maintained that porno cds and ladies underwear were put in his case that no action was taken even though he had informed the administration of these issues, and that the commanders unjustly imposed disciplinary punishments on him.

Many of the persons whom the applicant requested to be heard as witnesses confirmed some statements of the applicant. The witnesses

İ.A, H.B. and C.O.K alleged that they had been also subject to similar pressures.

On the other hand, it appears from the documents in the investigation file that fifteen persons including the applicant voluntarily dropped out the Air Force Academy during 2009 – 2010 educational year.

The Military Prosecutor's Office decided not to prosecute, considering that in some parts of the applicant's allegations there was no witness, that no complaint had been available in the records of the Air Force Academy and that there has been no report of battery, and stating that even if some alleged actions had been performed, the criminal complaint was not filed in due time in respect of the injury and defamation. The Military Prosecutor's Office emphasized that there was no superior-subordinate relationship among the military students, and in this context the applicant was not under the obligation to carry out the instruction of the upper class students. In the decision rendered by the Military Prosecutor's Office, it was stated that no evidence was found as to expression of the defamatory words with the intent to make the applicant leave school. In addition, it was recalled that in the disciplinary punishments imposed on the applicant, no evidence was found as to defamation made with criminal intent and that administrative remedies might be resorted against administrative disciplinary punishments.

In the decision of non-prosecution, it was stated that no evidence could be found as to the fact that the actions, which were assessed individually, were the output of a common will and part of a criminal intent aiming at causing the applicant to leave school, and also that the statements of the witnesses who had been called by the applicant and who had left the Military Academy for various reasons could not go beyond abstract assessments. In conclusion, the Military Prosecutor's Office rendered a decision of non-prosecution in respect of all the suspects on 30 September 2013, stating that the applicant exercised his right to resign without being under pressure and that no concrete fact and evidence could be found as to the fact that there was a systematic sequence of actions covering the command echelon to ensure the applicant's leave from the school.

The objection made against the decision of the Military Prosecutor's Office was rejected by the judgment rendered on 11 November 2013 by the Military Court of the 1st Army Command.

It was included in the report drawn up upon the submission of numerous petitions of similar content to the Petition Committee of Grand National Assembly of Turkey that there were complaints regarding the understanding which aims to decrease the number of military staff systematically after having recruited excessive number of personnel for the Air Force Academy. It was also indicated that it was a negative situation for public interest that the distinguished human resource who had been carefully selected in high school years and whose placement had been under the initiative of the administration in all aspects could not be integrated into the profession at high rates.

V. EXAMINATION AND GROUNDS

33. The Constitutional Court, at its session of 23 March 2017, examined the application and decided as follows.

A. The Applicant's Allegations and the Ministry's Observations

34. The applicant maintained that having graduated from the Kuleli Military High School, he had attended the cadet selection flights camp of the Air Force Academy; that subsequently, he had continued his education at the Air Force Academy; that however, in the camp and during his subsequent education at the Air Force Academy, he had been subject to physical and psychological pressure by some military officers and some 4th class students defined as "leader" students; that he had voluntarily left the school since he could not stand the psychological and physical pressure put on him and he had not wanted others to say "He was dismissed from school"; that the treatment and punishments towards him had been degrading; that he had had to undergo a psychological treatment due to the incidents he had experienced in civilian life as well; and that his complaints regarding this issue remained inconclusive. He therefore claimed pecuniary and non-pecuniary compensation.

35. The Ministry, in its observations, primarily made an assessment as to admissibility and stated that the Court had no jurisdiction *ratione temporis*, specifying that the acts complained of by the applicant had occurred approximately two years before the introduction of the mechanism of individual application to the Constitutional Court. The Ministry, in its observations on the merits, reiterated that in order for an act to fall into the scope of Article 17 § 3 of the Constitution, it must attain the minimum level of severity. In addition, reference was made to the case-law of the Constitutional Court, and it was specified that given the alleged physical and moral effects of the alleged acts, their duration and intensity, the minimum level of severity had not been exceeded, and that therefore the application must be examined from the standpoint of Article 17 § 1 of the Constitution. In this context, it was stated that the applicant's complaints must be regarded as mobbing and that the individual application lodged after the exhaustion of only criminal remedies, instead of filing an action for compensation, must be declared inadmissible for non-exhaustion of legal remedies.

B. The Court's Assessment

36. Article 17 of the Constitution, titled "*Personal inviolability, corporeal and spiritual existence of the individual*", provides as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> *…*
>
> *No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity."*

37. Article 5 of the Constitution, titled "*Fundamental aims and duties of the State*", in so far as relevant, provides as follows:

> *"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the*

individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."

1. Admissibility

a. Jurisdiction *ratione temporis*

38. Pursuant to Provisional Article 1 § 8 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, the start of the Constitutional Court's jurisdiction *ratione temporis* shall be 23 September 2012 and it shall examine the individual applications to be lodged against the last actions and decisions that were finalized after that date (see *Zafer Öztürk*, no. 2012/51, 25 December 2012, § 17).

39. In terms of the examination of the alleged violations of the prohibition of torture and ill-treatment within the scope of Article 17 § 3 of the Constitution, the Constitutional Court has continued to examine the applications, even if the incidents had occurred before 23 September 2012 when the individual applications were started to be received, in the event that the investigation or the prosecution process was concluded after that date (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014; and *Ali Rıza Özer and Others* [Plenary], no. 2013/3924, 6 January 2015). Accordingly, it has been concluded that the application has been within the temporal jurisdiction of the Constitutional Court.

b. Alleged Violations of the Prohibition of Torture and Ill-treatment

40. Article 17 of the Constitution safeguards everyone's right to protect and improve their corporeal and spiritual existence. Paragraph 3 thereof provides that no one shall be subjected to "torture" or "mal-treatment" and that no one shall be subjected to "penalties or treatment incompatible with human dignity". The relevant paragraph specifically ensures the protection of human dignity (see *Cezmi Demir and Others*, § 80).

41. In this scope, the prohibition of torture, mal-treatment, as well as the prohibition of penalties or treatment incompatible with human

dignity prescribed in Article 17 of the Constitution is absolute, and in this context, the officials who resort to the use of force by exercising the public authority entrusted to them are not allowed to harm the physical and mental integrity of the individuals in any way (see *Cezmi Demir and Others*, § 81).

42. In addition, Article 17 of the Constitution, when read in conjunction with Article 5 of the Constitution, also imposes on the State an obligation to take measures to prevent individuals from any torture and mal-treatment or any treatment incompatible with human dignity. This obligation is also applicable to the acts committed by third persons. Accordingly, the State's obligation may arise in case of any failure to take the reasonable measures to prevent any ill-treatment that is known or ought to be known by the authorities (see *Cezmi Demir and Others*, § 82).

43. In the examination of complaints concerning the prohibition of torture and ill-treatment, the material and procedural aspects of the prohibition should be considered separately, taking into account the negative and positive obligations of the State. In this context, the material aspect of the prohibition does not only include the obligation not to subject individuals to torture, inhuman or degrading treatment or punishment (negative obligation). There also exists a positive obligation to establish effective preventive mechanisms to prevent individuals from being subjected to such treatments.

44. The procedural aspect of the prohibition of torture and ill-treatment includes the obligation to conduct an effective investigation capable of leading to the identification and punishment of those responsible for the alleged violations of this prohibition, which are "arguable" and "raise reasonable suspicion" (positive obligation).

45. However, all allegations of ill-treatment shall not avail of the protection specified in Article 17 § 3 of the Constitution as well as of the positive obligations it imposes on the State. In this scope, allegations of ill-treatment should be supported by appropriate evidence. In order to establish the authenticity of the alleged incidents, reasonable evidence is needed rather than a suspicion based on an abstract allegation. Any

evidence within this scope may consist of serious, clear and consistent indications or certain presumptions that have not been proven otherwise. In this regard, the attitudes of those involved in the process should also be taken into consideration when evaluating the evidence (see *Cezmi Demir and Others*, § 95).

46. Regard being had to the fact that the applicant's allegation that he had been subject to physical and psychological pressure by some military officers and some 4th class students to leave the Air Force Academy was partly supported by witness statements and that such allegations in military academies have increased according to the report issued by the General Assembly of the Petition Committee of Grand National Assembly of Turkey, there is no doubt that the applicant's allegations are arguable. It must also be taken into consideration that it is very difficult to raise allegations of ill-treatment and to support these allegations by evidence and witness statements during studentship in the Air Force Academy where there is a chain of command. Accordingly, it is clear that the available findings have been sufficient to classify the alleged violation as arguable.

47. In addition, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 17 § 3 of the Constitution. This minimum threshold is relative and must be determined in accordance with the particular circumstances of each case. In this scope, certain factors such as duration of the treatment, its physical and psychological effects and the victim's sex, age, and health condition are of importance. In addition, reason and purpose of the said treatment must also be taken into account. Whether the alleged ill-treatment had been imposed during an excited and strong emotional situation should be taken into consideration, as well (see *Cezmi Demir and Others*, § 83).

48. In the present case, the fact that the alleged treatment against the applicant had affected his physical and psychological values and resulted in stress, sorrow and similar situations for him evoked the concept of degrading treatment in view of especially these aspects. However, in order for the alleged treatment to be regarded as torture, mal-treatment or degrading treatment or punishment, it should have attained an important

severity in terms of its manner and method and in particular its physical and physiological effects, in addition to the applicant's subjective qualifications (see *Yusuf Burak Çelik*, no. 2013/2538, 20 November 2014, § 24).

49. In the light of the findings above, it has been understood that the applicant had been subject to physical and psychological pressure by some military officers and some 4th class students to leave the Air Force Academy, and that therefore the applicant lodged an application for the alleged violation of Article 17 of the Constitution in this regard. The applicant's claim that he had been systematically subject to the alleged treatments which had not been based on individual incidents is the most important element to be taken into consideration in the assessment of the minimum threshold. In particular, the hierarchical order and the content of the military training practices may lead to an environment of ill-treatment on account of the existing military structure and systematic continuity or may be perceived by students as such. However, such a possibility should not lead to the questioning of the difficulties inherent in the military profession and the methods and content of the training applied to accustom individuals to these difficulties. Given that the applicant's allegations concerned his having been systematically and deliberately intimidated and forced to leave the school, it has been understood that there was a situation that transcended the specific training and difficulties of the military profession.

50. As a result of the evaluation of the physical and moral effects, duration and intensity of the acts alleged by the applicant, it has been understood that the alleged acts against the applicant referred to a systematic treatment and that they were not individual incidents. In view of the manner and method of the alleged treatment and in particular its physical and physiological effects on the applicant, it has been concluded that given the fact that the incidents alleged by the applicant had been beyond the difficulties inherent in the military profession as well as beyond an attempt to accustom the applicant to these difficulties and particularly given the applicant's success in the Kuleli Military High School and sports, his allegations should be examined within the scope of Article 17 § 3 of the Constitution.

51. In the examination of complaints concerning individual applications, the Constitutional Court's role is of secondary nature; and in certain circumstances, our Court is required to act very meticulously in cases where it is inevitable for it to assume the role of the first instance court and the Chief Public Prosecutor's Office –in the present case, the Military Prosecutor's Office. There is a risk of encountering such a situation in the examination of complaints made under Article 17 of the Constitution. In cases of alleged violations of the right to life and the prohibition of ill-treatment safeguarded by the same article, the Constitutional Court is expected to carry out a thorough examination on the matter. However, as it is, in principle, for the public prosecutors (military prosecutors) and the inferior courts to assess the evidence during the investigation and prosecution processess, the Constitutional Court's duty is not to substitute its assessment for that of the mentioned authorities on the material facts. Therefore, the first thing to be done is to assess whether the allegations included in the individual application file and the evidence adduced in the investigation and/or prosecution files are sufficient in view of the substantive aspect of the allegations. Accordingly, the Constitutional Court has no duty to reach any finding of crime or innocence in the context of criminal responsibility. In addition, although the findings of the inferior courts are not binding for the Constitutional Court, under normal circumstances, there must be strong reasons to depart from the conclusions of the inferior courts regarding the material facts.

52. There is no sufficient evidence in the investigation file to carry out an examination as to the substantive aspect of the alleged acts to which the applicant had been subject to systematically and considered to have exceeded the minimum threshold of severity. Although there have been arguable allegations to the effect that the said acts had been inflicted systematically to intimidate the applicant, the information and findings in the investigation file are not sufficient to examine the substantive aspect of the allegations. However, it has been concluded that the allegations defined as arguable should be examined under the procedural aspect of the prohibition of ill-treatment

53. The alleged violation of the procedural aspect of the prohibition of torture and ill-treatment must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

54. It is stressed in Article 17 § 3 of the Constitution that the prohibition of ill-treatment should not be violated, regardless of the acts of the victims or the inducement of the authorities. No matter how great the importance of the inducement, torture, mal-treatment or treatment incompatible with human dignity is not allowed even in the most difficult circumstances such as the right to life. Pursuant to Article 15 § 2 of the Constitution, this prohibition cannot be suspended even in times of war, mobilization, martial law or a state of emergency. The philosophical basis that reinforces the absolute nature of the said right does not allow for any exceptions or justifying factors or interests to be weighed, regardless of the individual's act and the nature of the offense (see *Cezmi Demir and Others*, § 104).

55. The positive liabilities of the State within the scope of the prohibition of ill-treatment also have a procedural aspect. Within the framework of this procedural liability, the State is obliged to conduct an effective investigation capable of identifying and punishing, if any, those responsible for any physical and psychological ill-treatment. The main aim of such an investigation is to ensure the effective implementation of law that protects human dignity and to hold the public officials or other individuals accountable for their actions constituting ill-treatment (see *Cezmi Demir and Others*, § 110).

56. The aim of the criminal investigation is to ensure the effective enforcement of the legislation provisions protecting the corporeal and spiritual existence of an individual and to hold those responsible accountable. This is not an obligation of result, but of means. In addition, the assessments included herein do not mean, under any circumstances, that Article 17 of the Constitution grants the applicants the right to have third parties tried or punished for a criminal offence or imposes an obligation to conclude all proceedings in a verdict of conviction

or a specific penalty (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, § 56).

57. In order for a criminal investigation to be effective, it is required that the investigative authorities act *ex officio* and gather all the evidence capable of clarifying the incident and identifying those responsible. They must take an action as soon as a complaint is made. Even in case of no complaint, they must launch an investigation if there exist sufficient indications that there had been torture or ill-treatment (see *Cezmi Demir and Others*, §§ 114, 116).

58. In the present case, the applicant, having graduated from the Kuleli Military High School, attended the cadet selection flights camp of the Air Force Academy and subsequently continued his education at the Air Force Academy. The applicant maintained that during this period, he had systematically been subject to physical and psychological pressure by some military officers and some 4th class students and that therefore he had voluntarily left the Air Force Academy since he could not stand the psychological and physical pressure put on him. Afterwards, the applicant filed a complaint with the Ankara Chief Public Prosecutor's Office due to the acts he had been subjected to at the cadet selection flights camp and the Air Force Academy. The file was sent to the Military Prosecutor's Office at the Northern Sea Area Command for lack of jurisdiction.

59. During the investigation, the military prosecutor's office took statement of a number suspects, including the applicant, as well as those witnesses. However, the military prosecutor's office specified that the time limit for filing a complaint regarding the offences against the applicant such as insult, threat and actual bodily harm had expired. Thus, the military prosecutor's office examined the applicant's allegations separately on a case-by-case basis. It was stated in the decision of non-prosecution issued by the military prosecutor's office that even if it was accepted that some words had been used against the applicant, which might be taken into consideration in terms of crime theory if within the scope of an act intended to cause a general psychological attrition, there was no evidence to the effect that those words had been used against the applicant to make him leave the school. It was also reminded that

there was no evidence that the disciplinary punishments imposed on the applicant pursued no criminal intention and that administrative remedy could be availed of against the disciplinary actions as administrative acts.

60. Some witnesses heard by the Military Prosecutor's Office within the scope of the investigation asserted that the 4th class students did not call each other by their real names and that they acted like an organization to make the students from the military high school be dismissed from the school by applying pressure. In addition, the witnesses declared that an effort was made to cause not only the applicant but also some other targeted students to leave school voluntarily through extremely harsh words, treatments and the imposed punishments. Likewise, similar assertions were included in the report of the General Assembly of the Petition Committee of Grand National Assembly of Turkey published on 27 June 2012 prior to the decision of non-prosecution rendered on 30 September 2013 by the Military Prosecutor's Office. No assessment on the mentioned report was made in the decision rendered by the Military Prosecutor's Office.

61. Given the allegations included in the report of the General Assembly of the Petition Committee of Grand National Assembly of Turkey, it is understood that the Military Prosecutor's Office failed to take into account that it was very difficult for the applicant to allege that he was exposed to ill-treatment and to defend himself by witnesses or evidence that proved these allegations while he was a student at the Air Force Academy where a strict hierarchical structure prevailed. No assessment was made as well in the said decision as to whether or not the practices exercised on the applicant were by reason of the ordinary difficulties caused by being a student of the military school, and whether or not such practices were training methods applied with the purpose of familiarization of the military students with these difficulties. Without any hesitation, physical and psychological pressure can be put to a certain degree in respect of the practical requirements of some trainings in the military discipline with a view to enabling the students to become familiar with the difficulties arising from the very nature of the military career. However, within the scope of the applicant's allegations and the witness statements, such an

impression has been left as to the fact that unlike the training provided for all the students in the context of the military training, the treatments established to have been inflicted upon the applicant aimed deterring him. It is an expected situation that particularly the applicant leaving the Air Force Academy after having been a student at the military high school for four years was more resistant to the military training, compared with the students from civilian highs schools, for not being unfamiliar with the military trainings and for foreseeing the difficulties he would face during the training at the Air Force Academy. With regard to the investigation into the incident, it should also be taken into account that the applicant being a graduate of the Kuleli Military High School had to leave the Air Force Academy.

62. In this context, it was not considered either that the complaints that some students from the Military School had been pressed up to drop out the Military Academy increased intensively due to the fact that those students were subject to harassment applying systematically and to physical and psychological ill-treatments, which was incompatible with the training requirements, in the course of their trainings. This situation which is also shown by the statistics reveals the significance of the allegations.

63. On the other hand, it cannot be said that the Military Prosecutor's Office investigated in detail whether or not the actions against the applicant had also been carried out against the other students within an organizational structure and in a prevalent way. The fact that the allegations of ill-treatment regarding the actions carried out against many people and extending over a period of time within an organizational structure, in line with a certain aim, were handled by the investigating authorities as isolated allegations of ill-treatment is one of the most significant obstacles before the efficiency of the investigation. Given the incident as a whole, finding the concrete data, through which connections could be established and which could be interpreted, insufficient in terms of separate incidents and not deepening the investigation in the light of concrete data may lead to the non-execution of specific procedures for the examination of evidence that could be resorted to in respect of

organized crimes. The military prosecutor, considering that some actions which could be accepted as normal when the requirements of the military discipline are at issue may constitute ill-treatment when they are carried out by specific motivation other than this aim, should be more willing to examine the evidence supported by concrete data as well; should use all the necessary means of evidence collection and should deepen the investigation, handling it beyond being an individual claim.

64. The failure to investigate such allegations in due course and in a detailed manner also prevents the structures likely to organize within the Turkish Armed Forces from being revealed. This situation may lead to the continued violation of the individuals' fundamental rights and freedoms implicitly and systematically and also to problems in respect of national security due to the fact that the actions were carried out at a military training institution.

65. Thus, it should be also examined the allegation that some persons, who were the suspects of the impugned incident and of the coup attempt taking place on 15 July subsequent to the decision of non-prosecution rendered by the Military Prosecutor's Office, were the members of the terrorist organization known as "the Fethullahist Terrorist Organization" and "the Parallel State Structure" ("the FETÖ/PDY") and that whether the organization which is asserted to be existent in the witness statements but which could not be foreseen in the investigation procedure was "FETÖ/PDY".

66. Consequently, the Constitutional Court concluded that Article 17 § 3 of the Constitution was violated under its procedural aspect, since the allegations in the concrete case were not carefully and diligently discussed at the investigation stage even if the applicant had a defensible allegation of torture and ill-treatment together with the other evidence in the investigation.

67. For the reasons explained above, the Constitutional Court has found a violation of the procedural aspect of the prohibition of torture and ill-treatment safeguarded by Article 17 § 3 of the Constitution.

c. Application of Article 50 of Code no. 6216

68. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

69. The applicant requested 40,000 Turkish liras (TRY) and TRY 500,000 respectively for pecuniary and non-pecuniary compensation.

70. It has been concluded that the prohibition of torture and ill-treatment had been violated under its procedural aspect.

71. As there is a legal interest in conducting retrial in order to redress the consequences of the violation of the prohibition of torture and ill-treatment, a copy of the judgment must be sent to the Military Prosecutor's Office at the Northern Sea Area Command of the Turkish Naval Forces Command for retrial.

72. The applicant must be awarded TRY 24,000 for his non-pecuniary damages that cannot be redressed with the sole finding of a violation of the prohibition of torture and ill-treatment.

73. In order for the Court to award pecuniary compensation, a causal link must be established between the pecuniary damages allegedly

sustained by the applicant and the violation found. As the applicant failed to submit any document to substantiate his claim for pecuniary damages, his claim must be rejected.

74. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicants jointly.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 23 March 2017 that

A. Alleged violation of the procedural aspect of the prohibition of torture and ill-treatment be DECLARED ADMISSIBLE;

B. The procedural aspect of the prohibition of torture and ill-treatment safeguarded by Article 17 § 3 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the Military Prosecutor's Office at the Northern Sea Area Command of the Turkish Naval Forces Command to conduct retrial in order to redress the consequences of the violation of the prohibition of torture and ill-treatment;

D. The applicant be AWARDED TRY 24,000 for non-pecuniary damages, and his other claims for compensation be REJECTED;

E. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be REIMBURSED to the applicant;

F. The payments be made within four months as from the date when the applicants apply 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; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

AZIZJON HIKMATOV

(Application no. 2015/18582)

10 May 2017

On 10 May 2017, the Second Section of the Constitutional Court found a violation of the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution in the individual application lodged by *Azizjon Hikmatov* (no. 2015/18582).

THE FACTS

[8-36] The applicant is a citizen of Uzbekistan, who entered into Turkey through legal means in 2009. He requested to be granted international protection from Turkey by maintaining that he had become a target in his country for involving in political protests against the government during the period when he was a university student and that the opponents were exposed to duress and oppression in his country. The applicant, who was referred to Gaziantep for the completion of the necessary procedures concerning his request, got married with another citizen of Uzbekistan, S.K., with whom he had got acquainted there. They have two children who were born in 2011 and 2012. The applicant and his family were granted a temporary residence permit until the conclusion of their request for international protection, on condition of not leaving Gaziantep without permission. On 30 June 2010, the applicant was granted temporary refugee status by the Office of the United Nations High Commissioner for Refugees ("the UNHCR") upon his application for asylum.

On 15 March 2015, the applicant was arrested while travelling in a vehicle with a Syrian plate which was stopped by the police teams of the Kilis Security Directorate. It was revealed that he did not have any identity card with him. The security officers considered that the applicant, in company with four other persons, tried to enter into certain regions of Syria, where clashes were taking place, through illegal means. However, the applicant maintained that as there was limited number of job opportunities in Gaziantep, he was going not to the region where the clashes were going on but to the safe area, with a view to selling some objects. As a result of the vehicle-search conducted, the police officers found a camouflage (winter coat) owner of which was not known. The applicant submitted documents and certificates indicating that he knew Arabic and that he received trainings in the field of marketing.

Upon these incidents, the applicant's request for granting international protection was dismissed by the Immigration Authority of the Batman Governorship. A ban on entering into the country was imposed on him, and his deportation was ordered on 14 May 2015 for posing a threat to public safety.

The action brought by the applicant for annulment of the deportation order was dismissed by the Batman Administrative Court (the Administrative Court) on 4 November 2015. This decision did not include any examination or assessment as to the applicant's allegation that in case of his deportation, he might be killed or would be ill-treated in Uzbekistan.

The applicant became aware of this decision on 4 December 2015. Thereupon, the applicant lodged an individual application for an interim measure on the same date. The Second Section of the Constitutional Court decided to suspend the deportation order, as a measure, pursuant to Article 73 of the Internal Regulations of the Court.

V. EXAMINATION AND GROUNDS

37. The Constitutional Court, at its session of 10 May 2017, examined the application and decided as follows.

A. Request for Legal Aid

38. It has been understood that the applicant has been unable to afford to pay the litigation costs. Therefore, in accordance with the principles set out in *Mehmet Şerif Ay* judgment of the Constitutional Court (no. 2012/1181, 17 September 2013), in order not to cause financial difficulties to the applicant, his request for legal aid should be accepted for not being manifestly ill-founded.

B. Alleged Violation of the Prohibition of Ill-treatment

1. The Applicant's Allegations

39. The applicant maintained; that when he had been a student in his home country Uzbekistan, he had attended youth movements and had been targeted by the government for displaying opposing conduct; that

it was not possible for the members of the Islamic religion to live their religion openly or secretly; and that he had fled from his country and taken refuge in Turkey in 2009 as he had been under the threat of being oppressed.

40. The applicant also stated that he got married in Turkey and had two children and had been living in Gaziantep together with his family since 2010 and that he had never been subject to any criminal or administrative investigation.

41. The applicant further indicated; that he had got marketing and trading education and had been engaging in trade to earn his living; that he had been planning to trade through Azez that was very close to the border of Turkey and a safe area; and that he had never been in the conflict regions.

42. In addition, the applicant referred to the human right reports issued by organizations such as the Human Rights Watch and the Amnesty International concerning Uzbekistan, as well as the statements of the former British Ambassador to Uzbekistan on human rights violations in the country.

43. The applicant lastly maintained that violations of human rights were very common in Uzbekistan where there were systematic tortures in prisons; and that in case of being deported to his country, he would face with the risk of being killed or ill-treated. He accordingly claimed pecuniary and non-pecuniary compensation and requested legal aid.

2. The Court's Assessment

44. Article 17 §§ 1 and 3 of the Constitution, titled "*Personal inviolability, corporeal and spiritual existence of the individual*", provides as follows:

> *"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*
>
> …
>
> *No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity."*

45. Article 5 of the Constitution, titled "*Fundamental aims and duties of the State*", in so far as relevant, provides as follows:

> *"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."*

46. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant's allegations that he would face the risk of being killed or being subject to ill-treatment if returned to his home country have been examined within the scope of the prohibition of ill-treatment and no separate assessment has been needed under the right to life.

a. Admissibility

47. Alleged violation of the prohibition of ill-treatment must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

48. The Constitution does not entail any arrangement concerning the foreigners' entry into the country, their residence and deportation from the country. As is also acknowledged in the international law, this issue falls within the scope of the State's jurisdiction. It is therefore undoubted that State has a margin of appreciation in accepting the foreigners into the country or in deporting them. However, it is possible to lodge an individual application in the event that such procedures constitute an interference with the fundamental rights and freedoms guaranteed in the Constitution (see *A.A. and A.A.* [Plenary], no. 2015/3941 , 1 March 2017, § 54).

49. Article 17 § 1 of the Constitution also safeguards the right to protect and improve corporeal and spiritual existence, as well as the right to life. Article 17 § 3 provides that no one shall be subjected to "torture or maltreatment" and that no one shall be subjected to penalties or treatment "incompatible with human dignity". As can also be understood from the systematic of the relevant article, the corporeal and spiritual existence of the individual that is generally safeguarded by the first paragraph is specifically protected against ill-treatment in the third paragraph (see *A.A. and A.A.*, § 55).

50. The relevant article does not include any exceptions to the State's obligation (negative) not to impose ill-treatment. It is also specified in Article 15 of the Constitution allowing for the suspension of the exercise of the fundamental rights and freedoms in times of war, mobilization, martial law or a state of emergency that the integrity of the corporeal and spiritual existence cannot be impaired. This is a clear indication that the prohibition of ill-treatment is absolute (see *A.A. and A.A.*, § 56).

51. However, in order to consider that the rights protected by this prohibition are actually guaranteed, it is not sufficient that the State does not impose ill-treatment. The State is also expected to protect the individuals against any ill-treatment by its own officials and third parties (see *A.A. and A.A.*, § 57).

52. As a matter of fact, pursuant to Article 5 of the Constitution, it is among the aims and duties of the State "to provide the conditions required for the development of the individual's material and spiritual existence". When Articles 17 and 5 of the Constitution are considered together, it is understood that the State also has an obligation (positive) to protect the individuals against the prohibition of ill-treatment (see *A.A. and A.A.*, § 58).

53. When Articles 17, 5 and 16 of the Constitution are interpreted in conjunction with the relevant provisions of the international law and especially the Geneva Convention to which Turkey is a party, the protection of foreigners who are under the State's jurisdiction and likely to be subject to ill-treatment in the country where they are sent against

the risks directed towards their physical and spiritual entity is one of the positive obligations of the State (see *A.A. and A.A.*, § 59).

54. Within the scope of this positive obligation, the person to be deported must be provided with the "opportunity to raise an objection" to the deportation order, for offering a real protection against the risks he may face in his own country. Otherwise, it will not be possible to mention that a real protection has been provided to a foreigner who has claimed to be at risk of ill-treatment if deported and who has more limited opportunities than the State to prove his claim (see *A.A. and A.A.*, § 60).

55. Accordingly, the positive obligation to protect against ill-treatment –by the very nature of the rights protected by the said prohibition- undoubtedly includes the procedural guarantees providing a foreigner to be deported with the opportunity to "make his allegations investigated" and "have the deportation order against him examined on an equitable basis" (see *A.A. and A.A.*, § 61).

56. In this scope, if it is claimed that the prohibition of ill-treatment would be breached in the country where the foreigner would be sent through deportation, the administrative and judicial authorities must inquire in detail whether there is a real risk of ill-treatment in that country. As required by the above-cited procedural safeguards, the deportation orders taken by the administrative authorities must be examined by an independent judicial organ; during this examination period, the deportation orders must not be enforced, and the parties must be ensured to effectively take part in the proceedings (see *A.A. and A.A.*, § 62).

57. However, the obligation to protect the individuals from ill-treatment does not necessarily require carrying out such inquiry in every case of deportation. For this obligation to be at stake, the applicant must primarily assert a defendable (ascertainable/questionable/worth to be investigated/ causing reasonable suspicion) allegation. In this sense, the applicant must explain what the risk of ill-treatment alleged to occur in the country to which he would be sent, in a reasonable manner; he must submit (if any) relevant information and documents in support the allegation; and such allegations must attain a certain level of severity. However, as the

assertion of an arguable allegation may vary by characteristics of each case, an assessment must be made in the specific circumstances of each case (see *A.A. and A.A.*, § 63).

58. Accepting an allegation as arguable does not necessarily mean that a violation judgment will be rendered at the end of the proceedings. This acceptance solely means that the applicant's allegations worth to be investigated. The authenticity of the applicant's allegations about the risks he may face due to the circumstances of the country he will be sent to or his personal situation and the reasonableness of his explanations should be rigorously investigated. When investigating the accuracy of the allegation and/or the existence of risk, it is possible to make use of reports issued by national or international institutions and organizations or other sources that may provide information about the concrete case (see *A.A. and A.A.*, § 64).

59. In order to conclude that the prohibition of ill-treatment may be breached in case of the enforcement of the deportation order, it must be proven that existence of a risk in the country where the person would be sent is beyond a probability and attains a level of "real risk". The burden of proof in this respect may be on the public authorities and/or the applicant, by the very nature of the allegation. The following criteria for burden of proof should also be taken into account in the assessment of whether an allegation is arguable or not (see *A.A. and A.A.*, § 65).

60. First, the applicant may claim that he would be subject to ill-treatment due to the long-standing general political instability in the receiving country or internal disturbance throughout the country. In this case, it must be established by the public authorities that the general conditions of the country in question will not objectively violate the prohibition of ill-treatment (see *A.A. and A.A.*, § 66).

61. Secondly, it may be claimed that the public authorities of the receiving country have systematically ill-treated people for reasons such as ethnic origin, religious beliefs, political views or membership in a particular group. In such a case, public authorities are required to investigate whether persons or groups of the specified characteristics

have been subjected to ill-treatment in their country. On the other hand, the applicant must prove that he belongs to or a member of such groups alleged to be at risk (see *A.A. and A.A.*, § 67).

62. Thirdly, the risk alleged to be prevailing in the receiving country may directly arise from the applicant's personal situation, irrespective of his membership of or belonging to any group. In this case, the applicant must explain why he would be subjected to ill-treatment in the receiving country and should clearly put forth the facts that would prove his allegation (see *A.A. and A.A.*, § 68).

63. In the event that the risk in the country where the person would be sent is alleged to arise from persons or groups that are not public officers, the applicant must prove both the existence of this risk and the fact that the public authorities of the relevant country would remain insufficient to afford sufficient protection for the elimination of the said risk (see *A.A. and A.A.*, § 69).

64. As a rule, the circumstances at the date of the deportation decision should be taken into account when investigating the existence of material facts relating to the existence of a real risk. However, in case of significant developments that may directly affect the outcome of the assessment, the new situation should also be taken into account (see *A.A. and A.A.*, § 70).

65. The primary role of the Constitutional Court in the individual applications lodged in this context is to examine whether the administrative and judicial authorities have provided the procedural safeguards within the scope of the said prohibition in cases where there is an arguable allegation as to the existence of the risk of ill-treatment in the receiving country. Where the Constitutional Court considers that the procedural safeguards have not been provided, it shall, as a rule, render a judgment finding a violation to have a retrial conducted. Where procedural safeguards have been provided, it is also assessed whether there is a real risk of ill-treatment in the receiving country (see *A.A. and A.A.*, § 71).

66. However, the Constitutional Court may, exceptionally, examine at first-hand whether there is a real risk of ill-treatment in the receiving country where it deems it necessary in the particular circumstances of the

case. In such a case, the Court may make an assessment as to whether the substantive aspect of the prohibition of ill-treatment would be violated, if the deportation took place (see *A.A. and A.A.*, § 72).

ii. Application of Principles to the Present Case

67. In the present case, the applicant who had tried to cross the border of Turkey illegally was decided to be deported on the grounds that he posed a threat to the public safety, that he had been banned to enter the country and that his request for international protection had been rejected.

68. The applicant alleged that in case of being deported to his country, he would face the risk of being killed or ill-treated.

69. In the present case, it will primarily be examined whether there has been an arguable allegation as to the existence of the risk of ill-treatment in the receiving country, and if any, whether the administrative and judicial authorities have provided the procedural safeguards within the scope of the prohibition of ill-treatment.

70. Regard being had to the information and documents submitted by the applicant, the ECtHR's assessments as to the conditions of the country where the applicant was deported, that fact that the applicant had entered into Turkey and had requested to be granted international protection at a date before the clashes took place in Syria (2009) and that the UNHCR granted the applicant temporary refugee status in 2010, it has been observed that the applicant's allegations that he might be exposed to ill-treatment in his country are worth of being investigated.

71. At the subsequent stage, it will be examined whether the applicant's arguable claim has been investigated, by the administrative and judicial authorities, in a comprehensive manner; in other words, whether the procedural safeguards within the scope of the prohibition of ill-treatment have been afforded in the course of the proceedings.

72. In the impugned incident, the administrative court indicated that the applicant was among the persons posing a threat to public safety; that he was banned from entering into Turkey; and that his request for

granting international protection was dismissed. It accordingly held that the applicant's deportation was not unlawful.

73. However, the allegations which had been consistently put forth by the applicant since 2009 primarily before the UNHCR and the Immigration Authority and subsequently during the proceedings before the Administrative Court were not taken into consideration. In the course of the proceedings, no investigation was conducted into the accurateness applicant's allegations which have also been discussed in the ECtHR's judgments and in the reports of the non-governmental organizations carrying out researches in the field of human rights. Nor did the Administrative Court's decision include an assessment as to why these allegations were not relied on.

74. Accordingly, the obligation to conduct an investigation into and make an assessment as to the risk likely to be faced by the applicant in case of being deported to Uzbekistan was not fulfilled in the course of the administrative proceedings.

75. Consequently, the Constitutional Court has found a violation of the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

c. Application of Article 50 of Code no. 6216

76. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."

77. Pursuant to Article 50 of Law no. 6216, where a judgment finding a violation is rendered at the end of the examination on the merits of the case, then compensation may be awarded or retrial may be ordered to redress the consequences of the violation or other solutions may be ordered according to the particular circumstances of the case.

78. In the present case, it has been concluded that the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution has been violated.

79. As there is a legal interest in conducting retrial, in order to redress the consequences of the violation, for the purpose of investigating and assessing whether there is a real risk of ill-treatment in the receiving country, a copy of the judgment must be sent to the trial court.

80. However, following the amendment made to Article 53 § 3 of Law no. 6458 with the Decree Law no. 676, certain exceptions have been introduced to the provision which provided that a foreigner could not be deported within the period where he could challenge the deportation order or until the conclusion of the proceedings.

81. In accordance with the said amendment, the provision which provided that a foreigner could not be deported within the period where he could challenge the deportation order or until the conclusion of the proceedings shall not be applicable to i) those heads, members or supporters of terrorist organizations or benefit-oriented criminal organizations, ii) those posing a threat to the public order, public safety or public health, and iii) those who are considered to have relations with the terrorist organizations defined by the international institutions and organizations.

82. In the present case, a deportation order was issued against the applicant on the ground that he posed a threat to the public safety.

Therefore, there is no obstacle to the applicant's deportation during the retrial to be held before the administrative court after the violation judgment of the Constitutional Court (see YT [Interlocutory Injunction], no. 2016/22418, 1 November 2016). If the applicant is deported during the investigation period of whether he will face a real risk of ill-treatment in the receiving country, a serious danger to his material or moral integrity may arise.

83. In such a case, holding a retrial will not be sufficient to redress the consequences of the violation. In addition, the applicant should not be deported until the conclusion of the retrial.

84. The applicant claimed pecuniary and non-pecuniary compensation.

85. As there is a prospect of redressing the violation and its consequences, sole finding of a violation is sufficient, therefore the applicant's claim for non-pecuniary compensation should be rejected.

86. In order for the Court to award pecuniary compensation, a causal link must be established between the pecuniary damages allegedly sustained by the applicant and the violation found. As the applicant failed to submit any document to substantiate his claim for pecuniary damages, his claim must be rejected.

87. The counsel fee of 1,800 Turkish liras (TRY) must be reimbursed to the applicant.

VI. JUDGMENT

For the reasons explained above, the Constitutional Court UNANIMOUSLY held on 10 May 2017 that

A. The applicant's request for legal aid be ACCEPTED;

B. Alleged violation of the prohibition of ill-treatment be DECLARED ADMISSIBLE;

C. The prohibition of ill-treatment safeguarded by Article 17 of the Constitution was VIOLATED;

D. A copy of the judgment be SENT to the Batman Administrative Court (E.2015/1142, K.2015/2394) to conduct retrial in order to redress the consequences of the violation of the prohibition of ill-treatment;

E. The applicant NOT BE DEPORTED until the conclusion of the retrial;

F. The applicant's claim for compensation be REJECTED;

G. The counsel fee of TRY 1,800 be REIMBURSED to the applicant;

H. The payments be made within four months as from the date when the applicants apply 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;

I. A copy of the judgment be SENT to the Directorate General of Migration Management of the Ministry of Interior; and

J. A copy of the judgment be SENT to the Ministry of Justice.

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AYDIN YAVUZ AND OTHERS

(Application no. 2016/22169)

20 June 2017

On 20 June 2016, the Plenary of the Constitutional Court found no violation of the right to personal liberty and security safeguarded by Article 19 of the Constitution in the individual application lodged by *Aydın Yavuz and Others* (no. 2016/22169).

THE FACTS

[10-162] During the coup attempt of 15 July, the campus of Turkish Satellite and Communication Company ("TURKSAT") located in Gölbaşı was occupied by the coup plotters on 16 July 2016 at around 00:47 a.m.

The applicants are electronic and computer engineers, and they reside outside Ankara. They arrived in Ankara at the evening hours on 15 July 2016 and went to TURKSAT campus by a car driven by the applicant Burhan Güneş on 16 July at around 2:00 am. The applicants were stopped at the entrance of the campus by police officers. They told the police officers that "they had been called in from inside the campus" and requested to enter to the campus. Thereupon, they were taken into custody.

On 18 July 2016, Gölbaşı Magistrate's Judge Office ordered the applicants' detention on remand for attempting to overthrow the constitutional order.

The Ankara Chief Public Prosecutor's Office charged the applicants with the offences of "attempting to overthrow the constitutional order, attempting to overthrow the Grand National Assembly of Turkey 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 being a member of an armed terrorist organization".

This action has been pending as of the date when this application was examined, and the applicants are still detained on remand.

V. EXAMINATION AND GROUNDS

163. At its session of 20 June 2017, the Constitutional Court examined the application and decided as follows.

A. Overview of the Emergency Administration Procedures

1. Definition and Characteristics

164. The emergency procedures are the administration regimes of temporary and exceptional nature which are applied in the case where a severe threat or danger to the existence of the state or the nation or to the public order cannot be avoided by use of the powers of ordinary period and which grant the public authorities broader powers in comparison with those of ordinary period, with a view to averting such threat or danger. In such administration procedures, there may be changes both in the distribution of authority among the legislative, executive and judicial organs and there may be departure from the ordinary legal system. The most significant reflection of such departure is the narrowing of the safeguards with respect to fundamental rights and freedoms.

165. The emergency administration procedures may be applied only in the event of severe threat or danger to the existence of the state or the nation or to the public order, such as state of war, outbreak of war threat, rebellion, domestic disturbance, increase in violent acts, terrorist attacks, natural disaster, epidemic, and severe economic crisis. It may be unavoidable to take certain emergency measures, with a view to averting such threat or danger. In this regard, such a necessity may require, on one hand, enlarging of the powers vested in the executive powers in order to avert the existing threat or danger immediately and, on the other hand, restricting of fundamental rights and freedoms to the extent which cannot be justified in the ordinary period. Therefore, the emergency administration procedures arise from an exigency.

166. Besides, the emergency administration procedures are exceptional and temporary in nature. These procedures may be resorted to only when there is a severe threat or danger to the existence of the state or nation or to the public order and as long as such threat or danger continues to exist. In this sense, aim of the emergency administration procedures is to eliminate the reasons necessitating the implementation of these regimes and to revert to ordinary legal order. Therefore, temporariness and exceptionality are underlies the legitimacy of the emergency administration procedures.

167. The emergency administration procedures are legal regimes. Incidents posing a threat or danger to the existence of the state or the society or to the public order constitute factual basis for transition to the emergency administration regime. However, whatever the scope, gravity and effects of such incidents, measures directed at the elimination of the existing threats must comply with the law.

168. In order to ensure compliance with the law in emergency periods, it is necessary to determine under which circumstances the emergency administration procedures may be applied and the procedure to be followed, as well as to set the limits of the likely measures in such periods in a way that would ensure legal certainty. Thereby, before the emergency administration procedures are applied, the individuals may foresee what kind of measures may be taken and to what extent fundamental rights may be restricted by state organs during such a period.

2. Emergency Administration Procedures in the International Texts

169. In certain international instruments regarding the human rights, states are allowed to depart from legal regime of the ordinary period and to resort to measures contrary to the international obligations of the ordinary period, in the event of a war or emergency cases threatening the existence or life of the nation.

170. Within this framework, it is set out in Articles 4 and 15 of the ICCPR and the ECHR, respectively, that measures contrary to the obligations set forth in these instruments may be taken under certain circumstances during such periods (see, §§ 132, 147 above).

3. Emergency Administration Procedures in the Turkish Law

171. In the Turkish law, the first legal arrangement with respect to the emergency administration procedures was made in the Ottoman Basic Law in 1876. In Article 113 of the Basic Law, the proclamation of martial law was set out, whereas Article 36 thereof vested the administration with the authority to make certain legal arrangements with respect to emergency periods, under the name of the "Provisional Law". By virtue of the Law on Treason and Fugitives introduced in 1920, certain legal arrangements

were made with respect to emergency periods. Besides, in the period when the Constitution of 1921 was in force, the executive body had to resort to certain emergency measures during the Independence War. Articles 74, 78 and 86 of the Constitution of 1924 embodied the provisions as to emergency administration regimes. The Law on the Maintenance of Order enacted in 1925 and the National Security Law enacted in 1940 vested the government with certain powers specific to emergency periods. Article 123 of the Constitution of 1961 included provisions setting out the states of emergency, whereas Article 124 thereof related to the martial law and states of war. According to this provisions, martial law may be proclaimed in case of state of war, outbreak of any incident requiring a war, rebellion or existence of certain evidence indicating a serious insurrection against the Republic.

172. The emergency administration procedures are embodied in the current Constitution (currently in force) introduced in 1982. Arrangements with respect to these procedures are provided in the Chapter Two —relating to executive power— of the Part Three setting out the fundamental organs of the Republic. In this scope, Articles 119, 120 and 121 of the Constitution set out "the states of emergency", and Article 122 sets out "martial law, mobilization and state of war".

173. Two forms of emergency administration procedure are envisaged in the Constitution depending on the reason of proclamation. Accordingly, a state of emergency —as set out in Article 119 of the Constitution— may be resorted to in cases of "natural disasters, dangerous epidemic diseases or a serious economic crisis", whereas a state of emergency —as set out in Article 120— may be resorted to in cases of "serious indications of widespread acts of violence or serious deterioration of public order due to acts of violence". Martial law set out in Article 122 of the Constitution is an emergency administration procedure which may be applied in cases of "widespread acts of violence which are more dangerous than the cases necessitating a state of emergency, war, occurrence of a situation necessitating war, an uprising, or the spread of violent and strong rebellious actions against the motherland and the Republic, or widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation".

4. Its Relation with Fundamental Rights and Freedoms

174. The duties upon the state, in democracies, are to protect and improve fundamental rights and freedoms and to take measures which would ensure effective enjoyment of these rights and freedoms by everyone. Therefore, assurance of fundamental rights and freedoms is an indivisible element of a democratic society.

175. However, fundamental rights and freedoms are not unlimited. Even during ordinary periods in democratic social orders, it is allowed to impose restrictions on these rights and freedoms due to various reasons such as national security, public order, prevention of offences and the protection of the other individuals' rights. Besides, in periods where emergency administration procedures are in force as the existence of the state or society, or the public order is under serious threat or danger, it may be required to take measures resulting in wider restriction of fundamental rights and freedoms in comparison to ordinary periods or even suspension of these rights and freedoms, in order to avert the existing threat or danger.

176. However, the aim of resorting to an emergency administration regime is not to prevent enjoyment of fundamental rights and freedoms but to re-establish the disturbed public order and to reinstate the ordinary administration procedure as immediate as possible, by means of averting threats or dangers towards the state and the society and thereby to ensure the re-enjoyment of denied rights and freedoms in a safe environment.

B. Examination of Individual Applications during the Periods when Emergency Administration Procedures are in Force

1. Authority to Examine Individual Applications

177. Article 148 § 1 and the first sentence of Article 148 § 3, which set out the "*functions and powers* of the Constitutional Court" of the Constitution provide as follows:

> *"The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decree laws and the Rules of Procedure of the Grand National Assembly of Turkey, and adjudicate on individual applications.*

Constitutional amendments shall be examined and verified only with regard to their form. However, decree laws issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court, alleging their unconstitutionality as to form or substance.

(…)

Everyone may apply to the Constitutional Court on the grounds that one of 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."

178. Article 45 § 1, titled *"the right to individual application"*, of the Code on the Establishment and Rules of Procedures of the Constitutional Court dated 30 March 2011 and no. 6216 ("Law no. 6216") reads as follows:

"Everyone may apply to the Constitutional Court based on the claim that any of fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto —to which Turkey is a party— which are guaranteed by the Constitution has been violated by public force."

179. By Article 148 § 1 of the Constitution, the Constitutional Court is invested with the duty and power to conclude individual applications. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of Law no. 6216, everyone is entitled to lodge an application with the Constitutional Court with the allegation that any of the fundamental rights and freedoms safeguarded in the Constitution and falling into the scope of the ECHR and the additional protocols thereto –to which Turkey is a party– has been violated by public force.

180. On the other hand, whereas it is set out in Article 148 of the Constitution that decree laws issued during a state of emergency, martial law and state of war cannot be brought before the Constitutional Court for their alleged unconstitutionality as to form or substance (for interpretation and implementation of this provision, see the Court's judgment no. E.2016/166 and K.2016/159 and dated 12 October 2016, §§ 12-23), there is no provision prescribing that an individual application

cannot be lodged due to an interference with fundamental rights and freedoms during such emergency periods. Nor do other articles of the Constitution or the relevant laws include any provision envisaging that an individual application cannot be lodged with the Constitutional Court during a period when emergency administration procedures are in effect, by alleging that any of the fundamental rights and freedoms falling into the scope of the individual application has been violated.

181. Accordingly, in period of times when emergency administration procedures are in effect, the Constitutional Court has the authority to examine the applications lodged with the allegation that out of the fundamental rights and freedoms safeguarded in the Constitution, any of those falling into the scope of the ECHR or its additional protocols to which Turkey is a party has been violated by public force.

2. Examination Process of Individual Applications

a. In General

182. Article 13 of the Constitution, titled "*Restriction of fundamental rights and freedoms*", reads as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

183. Article 15 of the Constitution entitled "*Suspension of the exercise of fundamental rights and freedoms*" reads as follows:

> *"In times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures which are contrary to the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.*

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling."

184. The criteria to be taken into consideration in imposing a restriction on fundamental rights and freedoms during an ordinary period are set out in Article 13 of the Constitution. According to this, the interference with fundamental rights and freedoms must be in compliance with the criteria of "lawfulness", "legitimate aim", "compliance with the letter and spirit of the Constitution", "not infringing the essence", "being in conformity with the requirements of the democratic order", "being in conformity with the requirements of the secular republic" and "the principle of proportionality".

185. The restriction of fundamental rights and freedoms in ordinary times are laid out in Article 13 of the Constitution, whereas the restriction or suspension of the exercise of the rights and freedoms in times of "war", "mobilization", "martial law" and "a state of emergency" are set out in Article 15 of the Constitution.

186. According to the relevant article, in times of war, mobilization, martial law or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended or measures which are contrary to the guarantees embodied in the Constitution may be taken. However, Article 15 of the Constitution does not entrust the public authorities with an unlimited power in this respect. The measures which are contrary to the guarantees embodied in other provisions of the Constitution must not infringe upon the rights and freedoms provided in Article 15 § 2 of the Constitution, must not be contrary to the obligations stemming from the international law and must be within the extent required by the exigencies of the situation.

187. Accordingly, in examining the individual applications against emergency measures, the Constitutional Court is to take into account the

protection regime set out in Article 15 of the Constitution with respect to fundamental rights and freedoms.

b. Conditions as to the Applicability of Article 15 of the Constitution

i. Existence and Declaration of Emergency Case

188. For the application of Article 15 of the Constitution, there must exist "war", "mobilization", "martial law" or "state of emergency" and subsequently, the proper legal institution must be proclaimed by the state authorities empowered by the Constitution. Pursuant to Article 119 of the Constitution, in the event of "natural disaster, dangerous epidemic diseases or a serious economic crisis" and pursuant to Article 120 of the Constitution, in the event of "serious indications of widespread acts of violence or serious deterioration of public order because of acts of violence", the Council of Ministers, meeting under the chairmanship of the President of the Republic, may proclaim a state of emergency; and pursuant to Article 122 of the Constitution, in the event of "widespread acts of violence which are more dangerous than the cases necessitating a state of emergency; or in the event of war, the emergence of a situation necessitating war, an uprising, the spread of violent and strong rebellious actions against the motherland and the Republic or widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation", the Council of Ministers, meeting under the chairmanship of the President of the Republic, may declare martial law.

189. The Constitution-maker vested the Council of Ministers, meeting under the chairmanship of the President of the Republic, with the discretion of assessing whether there exists an emergency situation that is a precondition for the applicability of Article 15 and other relevant articles. The Constitution does not contain any provision empowering the Constitutional Court to review this discretionary power. However, the nature of the facts leading to proclamation of an emergency case will be taken into consideration in assessing whether the measures taken in the presence of such cases are within the extent required by the exigencies of the situation.

ii. The Measure must be related to Emergency Case

190. The main objective in applying emergency procedures is to eliminate the existing threat or danger which requires the application of these administrative regimes. For this reason, for the application of Article 15, it does not suffice that an impugned measure is taken during an emergency period but this measure must also be related to the elimination of the threat or danger leading to the declaration of the emergency case.

191. In case of failure to establish such a relation, Article 13, not Article 15, is to be applied in reviewing impugned measures even if it is taken in the emergency period. There is no doubt that the public authorities have a wide margin of appreciation as to which measure is related to the elimination of the threat or danger leading to the declaration of the emergency case. However, the final evaluation of whether this discretionary power has been exceeded or not will be made by the Constitutional Court.

c. Examination pursuant to Article 15 of the Constitution

i. Whether the Measure is in breach of the Safeguards Enshrined in the Constitution

192. The use of emergency administration procedures in emergency cases where there is a serious threat or danger to the existence of the state, community or public order does not necessarily require that any measure taken at this time be beyond the criteria allowed in the ordinary period. Public authorities may also take measures to prevent the existing danger or threat by using the means provided by the ordinary legal order in emergency cases. Therefore, an interference with fundamental rights and freedoms during emergency periods may be compatible with the guarantees set out in the Constitution for ordinary times.

193. Accordingly, in the individual applications against a measure interfering with fundamental rights and freedoms during an emergency period, the first examination under Article 15 of the Constitution will be made for determining whether the relevant measure complies with the guarantees set out in the Constitution according to the criteria of the ordinary period. This is also required by Article 15 of the Constitution

which reads as "…*measures which are contrary to the guarantees embodied in the Constitution may be taken.*"

194. In such review, other provisions of the Constitution, being in the first place the provision where the interfered right is set forth, and of course, Article 13 of the Constitution which is of main importance in restricting rights and freedoms during the ordinary period, will be relevant. If this review result in a finding that the measure is in compliance with the guarantees set out in provisions of the Constitution other than Article 15, naturally no further examination will be made with respect to the criteria set out in Article 15 of the Constitution, and it will be concluded that the interference has not led to a violation of any fundamental right or freedom.

195. If the relevant interference is found to be in breach of the safeguards prescribed in the Constitution with respect to fundamental rights and freedoms, then a further examination will be made for determining whether it is justified by Article 15 of the Constitution, in which the restriction or suspension of the exercise of fundamental rights and freedoms in times of "war", "mobilization", "martial law" and "a state of emergency" are set out. Where it is determined that the interference is in compliance with the criteria set out in the relevant Article, it will be concluded that the right or freedom raised in the individual application has not been violated. Otherwise, in the case that the interference is found to be contrary to one or more criteria set out in Article 15 of the Constitution, it will be concluded that the right or freedom raised in the individual application has been violated.

ii. Whether a Measure in Breach of the Non-emergency Safeguards is Legitimate in time of Emergency Period

(1) Whether the Measure has a bearing on the Core Rights

196. In order to accept that the measure, which constitutes an interference with fundamental rights and freedoms during the emergency administration procedures and is contrary to the safeguards provided in the Constitution, is legitimate, in the first place it must not infringe upon the rights and freedoms provided in Article 15 § 2 of the Constitution.

Accordingly, even in emergency cases, the individual's right to life and the integrity of his/her corporeal and spiritual existence shall be inviolable except in cases of death that occurs through acts in conformity with the law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.

197. If the measure which is contrary to the safeguards set out in the Constitution is related to the enlisted core rights, it cannot be regarded as legitimate within the meaning of Article 15 of the Constitution, and it will be concluded, without any further examination, that the relevant right or freedom has been violated.

(2) Whether the Measure is in breach of the Obligations Stemming from the International Law

198. The second examination to be made under Article 15 of the Constitution aims at determining whether the measure is in breach of the obligations stemming from the international law. The primary obligations among these obligations are those stemming from the international conventions on human rights to which Turkey is a party.

199. The main conventions on human rights to which Turkey is a party are the ICCPR and the ECHR. According to Article 4 of the ICCPR and Article 15 of the ECHR, in time of public emergency which threatens the life of the nation, the States may take measures derogating from their obligations under these conventions. However, the rights and freedoms that cannot be suspended are set out in Article 4 § 2 of the ICCPR, Article 15 § 2 of the ECHR, Article 4 of the Protocol No. 7 to the ECHR, Article 3 of the Protocol No. 6 of the ECHR and Article 2 of the Protocol No. 13 to the ECHR. A substantial portion of these rights and freedoms are embodied in Article 15 § 2 of the Constitution. Accordingly, within the scope of the second examination, no separate assessment is required with respect to the common rights and freedoms set out in the Constitution, the ICCPR and the ECHR, which cannot be suspended.

200. However, it is regulated in Article 4 § 2 of the ICCPR, Article 15 § 2 of the ECHR and Article 4 of the Protocol No. 7 to the ECHR that certain rights and freedoms that are not enlisted in Article 15 of the Constitution cannot be suspended. In this respect, even in emergency cases, no one shall be held in slavery or servitude, no one shall be imprisoned for not fulfilling their obligations stemming from the convention, and no one shall be tried or punished again for an offence for which he/she has already been finally acquitted or convicted. Furthermore, even during this period everyone shall have the right to recognition everywhere as a person before the law. Lastly, the measures to be taken during an emergency period must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

201. Accordingly, the measures interfering with the above-mentioned rights and freedoms ─though they are not among the core rights provided in Article 15 of the Constitution─ cannot be considered as legitimate due to non-compliance with the obligations stemming from the international law.

(3) Whether the Measure is within the extent required by the Emergency Case

202. The last examination to be made for establishing whether the measure constituting an interference with fundamental rights and freedoms during a period when emergency administration regimes are in force is legitimate or not pursuant to Article 15 of the Constitution is directed at determining whether it is "within the extent required by the emergency case".

203. The principle of proportionality is also set forth in Article 13 of the Constitution where the criteria set for restricting fundamental rights and freedoms during the ordinary period are regulated. However, the proportionality pointed out in Article 15 of the Constitution refers to the proportionality in a situation leading to the implementation of emergency administration procedures. In this respect, the proportionality set forth in Article 15 of the Constitution allows for much more interference with fundamental rights and freedoms when compared to the proportionality

criteria provided in Article 13 of the Constitution. This point is also supported by the very fact that the criterion set forth in Article 15 of the Constitution can only be applied in cases where a measure derogating from the safeguards regarding fundamental rights and freedoms for ordinary times is in consideration (see also §§ 192–195 above).

204. The principle of proportionality set out in Article 15 of the Constitution represents that the means used for restricting or suspending the use of fundamental rights and freedoms are appropriate and necessary for achieving the aim, and that the means and the aim are proportionate to each other (see the TCC, E.1990/25, K.1991/1, 10 January 1991). According to this, the measure must be appropriate for achieving the aim of eliminating the threat or danger causing the emergency case and must be necessary for achieving this aim; furthermore, there must be no disproportionality between the public interest in the aim to be achieved and the negative effect of the measure restricting fundamental rights and freedoms on the individual (see, among many other authorities, the TCC, E.2013/57, K.2013/162, 26 December 2013).

205. In determination of the elements of the proportionality, all conditions of the emergency period in which the measure is taken must be assessed together. In this scope, the nature of the threat or danger leading to the adoption of emergency administration procedures must primarily be taken into consideration in the assessment of the elements concerning the proportionality of the emergency measure constituting an interference with fundamental rights and freedoms.

206. The nature of the interfered right or freedom is also important in determination of the proportionality. For example, depriving an individual of his/her liberty and restricting his/her freedom of organization or right to property will not have the same adverse effect. As a matter of fact, restriction of an individual's liberty makes the exercise of many rights and freedoms considerably difficult in itself and makes it even impossible in some occasions.

207. The period of the time when the measure is taken must also be taken into account in determination of the proportionality. In this respect,

measures taken during a time when the events constituting the emergency case has occurred or when the concrete danger is obvious and measures taken during a period when the danger or the threat has considerably been eliminated must be assessed in different ways. Here, especially the conditions of the period of the time when the measure was implemented must be taken into account. In this regard, the fact that the public authorities impose certain measures in a less strict manner in progress of time during the state of emergency cannot be construed to mean that the relevant measures were disproportionate at the time when they were employed initially. The gradual implementation of measures based on the emergency administration regime is within the discretion of the public authorities.

208. On the other hand, the duration, scope and weight of the measure which interferes with fundamental rights and freedoms should be taken into consideration in determining the proportionality. As a matter of fact, as the duration of the interference prolongs, the burden on individual increases. However, a short term measure may also affect fundamental rights and freedoms very seriously due to its scope or weight. Thus, the weight of the measure can cause individual to bear an excessive burden independently of its duration.

209. On the other hand, it is necessary to provide individuals with procedural safeguards to challenge disproportionate or arbitrary interferences with fundamental rights and freedoms. Accordingly, individuals' being deprived of these safeguards considerably will be incompatible with the principle of proportionality.

210. There is, of course, a wide margin of appreciation for the public authorities, who are primarily responsible for combating it, in the issues as to whether a measure is appropriate to eliminate the threat or danger that constitutes the emergency case and whether the measure is proportionate to the aim to be achieved. However, it is within the scope of the duties of the Constitutional Court to examine whether the measure that is subject to an individual application goes beyond this margin of appreciation.

211. Lastly, in addition to taking measures which are contrary to the guarantees embodied in the Constitution in terms of fundamental rights

and freedoms in emergency cases, it is also set out in Article 15 of the Constitution that the exercise of fundamental rights and freedoms may be suspended partially or entirely. However, the notion of "suspension" here does not mean that the relevant right become completely unusable, it rather means that it is suspended temporarily. The measures in the form of suspending the exercise of fundamental rights and freedoms must be in compliance with the abovementioned aspects of the principle of proportionality.

C. Assessment as to the Current Emergency Case in Turkey

212. The incident led to the emergency case in Turkey is the coup attempt that took place on 15 July 2016. Those behind the coup attempt attacked the nation, the legitimate government, the media outlets and the security forces. During the attack, they used war arms such as fighter jets, helicopters, vessels and tanks and heavy weapons, which were entrusted to them for protecting the very people they attacked. This barbaric attempt left behind more than 250 deaths and thousands of injured. The coup attempt aimed at overthrowing the constitutional order was prevented by the decisive resistance of all legitimate elements of the democratic society (see §§ 15-19 above).

213. In assessing the magnitude of the threat posed by the coup attempt against the democratic constitutional order, it is not sufficient to take into consideration the damage caused by this prevented attempt alone. In addition to this, the risks that might have occurred if the coup attempt had not been prevented in a short time or if the coup had occurred must also be assessed. If the nation that is the owner of the sovereignty and all elements of the democratic constitutional order had not prevented the coup attempt in a short time by their decisive resistance, they would either have accepted the absolute sovereignty of a group of rebels and surrendered to their will which is not subject to a democratic supervision or they would have continued their resistance. The first possibility would have resulted in the death of a nation democratically. The latter would have led to the prolongation of the clashes as well as their becoming widespread, thereby leading to, as an imminent, serious and explicit threat, the emergence of the risk of overthrowing the state authority and even the state completely.

214. On the other hand, the fact that this coup attempt took place at a time when Turkey was under fierce attack of many terrorist organizations made the country even more vulnerable to such attacks and therefore considerably increased the gravity of threat it posed against the existence of the nation (see §§ 42-43, 46 above).

215. Given all these assessments, there is no doubt that the coup attempt of 15 July has posed an existing and severe threat not only to the democratic constitutional order but also to the "individuals' fundamental rights and freedoms" and "national security", both of which are indeed closely associated with one another. This is the most severe attack in the history of the country, targeting the national security and the lives of the people and even existence of the whole nation.

216. The investigations initiated by the authorities following the coup attempt, the statements of suspects and witnesses, the material facts (see §§ 27-35 above), and pre-coup attempt investigations on the FETÖ/PDY (the Fetullahist Terrorist Organization/Parallel State Structure) (see § 25 above), when considered as a whole, indicate that the public authorities' assessment as to the FETÖ/PDY being the plotter/perpetrator of the coup attempt has sufficient factual basis. As a matter of fact, as stated in the reports of international organizations, these findings of the relevant authorities are accepted by a vast majority of Turkish society (see § 161 above).

217. On the other hand, Turkey has faced many coups or coup attempts since the date on which the multi-party system was adopted in the country. The following characteristics of the FETÖ/PDY increase the gravity of the threat it has posed to the democratic social order even more: the FETÖ/PDY has been organized in all public institutions and organizations, notably the Turkish Armed Forces, security directorates, the judiciary, public institutions of education and religion, the political parties, trade and labour unions, non-governmental organizations and business companies; it has national and international alliances; it has been operating in over 150 countries in many fields; it adopts a mentality attributing holiness to the organization and to its actions without questioning; its members act in full obedience and devotion to the organizational will, and it is made

up of hierarchical and cell-type structure; it has been using confidential/ covert means of communication; it ultimately aims at taking control of the constitutional institutions of the state, re-designing the society and the individuals in line with its own ideology, and governing the country through an oligarchic rule (see § 26 above).

218. Considering the principles set forth in the Preamble of the Constitution, the characteristics of the State —set out in Article 2—, the sovereignty and the manner it is exercised —set out in Article 6—, and the systematic of the Constitution as a whole, it is understood that there is an indissoluble link between "sovereignty", "the manner the sovereignty is exercised, "the will of the nation", "democracy", "state of law" and "human rights".

219. Accordingly, the source of sovereignty will be the nation, as in all civilized societies, the sovereignty will be exercised —directly or indirectly— by the organs authorized by the nation's will, the nation's will shall be exercised within a democratic order, and the sovereignty will be exercised by the authorities in compliance with the principles of democracy, being in the first place the principle of the state of law and respect for human rights.

220. Coup attempt is an attempt by a group, which is not authorized to exercise the nation's sovereignty, to overthrow or change the democratic constitutional order by use of coercion and violent means. Where the coup occurs, the democratic constitutional order and the superiority of the will of the nation will cease to exist, and the sovereignty belonging to the nation —thus to each individual— in the democratic order will be overtaken by a group. In this case, there can be no mention of democracy and the state of law. Naturally, in such an order, there will not be a mechanism that will safeguard fundamental rights and freedoms of individuals. As a matter of fact, fundamental rights and freedoms can in the real sense be protected in the presence of an effective democracy.

221. In view of the reasons explained above, it is beyond dispute that the coup attempt constitutes an open and serious attack on the principles of "sovereignty belong to the nation", "sovereignty shall be exercised through the authorized organs", "the exercise of sovereignty shall not be

delegated by any means to any individual, group or class", "democracy", "state of law", and "respect for human rights" which are the indispensable principles of the democratic social order set forth in the Constitution. In this respect it can be said that one of the most serious threats that a democratic society may face, and maybe the severest one, is coup attempts.

222. In Article 5 of the Constitution, "protecting the Republic and democracy", "ensuring the welfare, peace and happiness of the individual and society", "striving for the removal of obstacles which restrict fundamental rights and freedoms of the individuals" and "providing the conditions required for the development of the individual's material and spiritual existence" are set out among the fundamental aims and duties of the State. Preventing the coup attempts, which are the most serious attacks on the democratic constitutional order, fundamental rights and freedoms and national security, or completely eliminating the danger posed by the coup attempt that took place and the threat leading to the coup attempt is not only an issue within the authority of the State, but also a responsibility and duty of the State which cannot be disregarded pursuant to Article 5 of the Constitution.

223. According to Article 120 of the Constitution, "In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months." The Constitution restricted the declaration of a state of emergency and its extension to certain periods, in accordance with the temporary and exceptional nature of the emergency administration procedures. The state of emergency which might be declared for a period not exceeding six months under Article 120 of the Constitution might be extended for a maximum of four months each time under Article 121 of the Constitution.

224. As a matter of fact, following de facto prevention of the coup attempt, the Council of Ministers, meeting under the chairmanship of the

President of the Republic in accordance with Articles 120 and 121 of the Constitution, after consultation with the National Security Council (see § 47 above), declared a state of emergency throughout the country for a period of ninety days starting from 21 July 2016 01.00 a.m. At the end of this period, the state of emergency was extended three times for three months respectively (see §§ 48-49 above). Within state of emergency, various measures were taken against the relevant persons, such as launching criminal investigations and applying preventive measures in this respect, dismissal from the public service, closing private education institutions and appointing trustees for companies (see §§ 51-66 above).

225. The state of emergency which was declared after the coup attempt has been discussed in international reports and documents as well. The Council of Europe Commissioner for Human Rights indicated in his Memorandum that if the coup attempt of 15 July had reached its goal, the democracy in Turkey would have been overthrown, as well as, all underlying values of the Council of Europe would have been eliminated. The report of the Venice Commission clearly states that as the coup attempt has posed a threat to the existence of the Turkish democracy, it constitutes a general danger threatening the life of the nation and that following the coup attempt, Turkey has had the right to defend its democratic institutions and its people. The Venice Commission and the Commissioner for Human Rights have acknowledged that it is both natural and necessary to give an immediate and decisive response to the open threat posed by the coup attempt against the Turkish democracy and the Turkish State (see §§ 161-162 above).

226. The coup attempt made on 15 July 2016 lies behind the declaration of state of emergency on 21 July 2016. This was noted in the recommendation of the National Security Council and was also underlined by the Minister of Justice who took the floor on behalf of the Government during a meeting held at the General Assembly of the GNAT on the approval of the declaration of state of emergency (see §§ 23, 48 above).

227. On the other hand, it was pointed out in the general preamble of the Decree Law no. 667, which was issued immediately after the declaration of state of emergency, that for "*protecting the constitutional order, national*

order, rule of law, democracy and fundamental rights and freedoms, terminating the last coup attempt in our country completely, and avoiding the reoccurrence of such a coup attempt", as well as for "maintaining the *fight against terrorism in a more effective manner"*, it became necessary to take some urgent measures during the state of emergency. The aim of the Decree Law in question was stated in Article 1 of the Decree Law as *"to establish measures that must necessarily be taken within the scope of attempted coup and fight against terrorism under the state of emergency and to determine procedures and principles relating to these measures."* Accordingly, in addition to the fact that the coup attempt made on 15 July 2016 lies behind the declaration of the state of emergency, the intense terror attacks against Turkey also have a bearing in this regard. In addition to the coup attempt, "other terrorist attacks" were also referred to in the declarations of derogation submitted by Turkey to the Secretary General of the Council of Europe.

228. As a matter of fact, after the coup attempt was defeated and the state of emergency was declared, Turkey continued to face intense terrorist attacks. In this context, bombed and armed terrorist attacks occurred in many cities including Ankara, İstanbul, İzmir, Kayseri, Diyarbakır, Mardin, Gaziantep, Elazığ, Van, Bingöl, Antalya, Hakkâri and Şırnak; and many security officers and civilians lost their lives or got injured during these attacks. Given those terrorist attacks, it is understood that the threat of terrorism in Turkey is not limited to a specific region of the country and that it is of a size and intensity which severely affects the whole population (see § 44 above).

229. It is understood that the measures implemented during the state of emergency, considered in parallel with the public authorities' above mentioned assessments on the facts leading to the declaration of state of emergency, aims at eliminating the threats and dangers arising from terrorism and the FETÖ/PDY that is revealed to be the perpetrator of the coup attempt of 15 July.

230. However, it appears that the public authorities imposed the measures in a less strict manner during the period following the declaration of state of emergency. Within this framework, some of the detainees were released, the measures pertaining to the dismissal of the judicial members

and public officials from office and pertaining to the dismissal of some students and the closure of some institutions have been partially revoked. Furthermore, "Commission on Examination of the State of Emergency Procedures" was decided to be established with a view to examining and adjudicating the applications concerning the actions directly instituted by emergency decree laws. In this sense, the opportunity to bring an annulment action against the decisions of the relevant Commission has also been introduced. Lastly, it was stated in the Decree Law no. 685 that the judicial members and those who deemed as such may file an action with the Supreme Administrative Court as the first-instance court within sixty days as from the date the decision become final (see *Murat Hikmet Çakmakcı,* no. 2016/35094, 15 February 2017, §§ 27-28; and *Hacı Osman Kaya,* no. 2016/41934, 16 February 2017, §§ 28-29).

D. Examination of the Applicants' Allegations

1. Alleged Unlawfulness of the Applicants' Detention

a. The Applicants' Allegations and the Observations of the Ministry

231. The applicants maintained that on the date of incident they acted together with the convoys formed by the groups resisting the coup attempt and went to the campus where TURKSAT was located, that their act was not associated with any activity related to the coup attempt, that they did not have any connection with the imputed offences; and that they nevertheless were detained. In this respect, the applicants alleged that their right to fair trial, right to an effective remedy, right to personal liberty and security, as well as, the principle of equality had been violated. They requested their release and sought compensation in this connection.

232. In its observations, the Ministry reiterated the similar judgments of the Constitutional Court and the ECtHR on detention and pointed out that for a detention to be lawful, it must comply with the requirements of the national legislation and that the national legislation must be in compliance with the ECHR and must not be arbitrary. Accordingly, for a person to be deprived of his liberty, there must be reasonable suspicion or convincing reasons indicating that he has committed the imputed offence.

For the existence of reasonable suspicion —regard also being had to the evidence obtained and to the circumstances of the case—, there must be sufficient evidence to convince an objective observer. On the other hand, it is not necessary to have sufficient evidence to charge a person with an offence at the time of taking the person into custody or during the custody.

233. The Ministry considers that as a criminal case was initiated against the applicants, there has been sufficient suspicion, beyond reasonable doubt, of their having committed the offence, which justified their being taken into custody. Besides, the applicants' statements are incompatible with each other. In addition, the applicant Aydın Yavuz was the user of "ByLock" which is the cryptographic communication application through which the members of the FETÖ/PDY members communicated with each other for organizational communication.

234. The Ministry pointed out that the charges against the applicants were based on concrete evidence and that, given the emergency case following the coup attempt during which the applicants were arrested, taken into custody and detained, those measured cannot be considered as arbitrary. Accordingly, given the incidents that occurred on the night of 15 July, the applicants' statements, the incident scene investigation report and all other relevant information and documents, there is no reason to depart from the judicial authorities' conclusions (detention). Therefore, the applicants' complaints in this respect are manifestly ill-founded.

b. The Constitutional Court's Assessment

235. Article 19 § 1 and the first sentence of Article 19 § 3 of the Constitution 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."

236. The Constitutional Court is not bound with the legal characterization of the facts by the applicants, but the Court makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). As the gist of the applicants' allegations are related to the fact that they have not been involved in the offence they are charged with and therefore their detention was unlawful, this part of the application must be examined within the scope of the right to personal liberty and security within the meaning of Article 19 of the Constitution.

i. Enforceability

237. The accusations on basis of which the applicants were detained was their having gone to the TURKSAT campus which was occupied by the coup plotters in order to cease the broadcasting as part of the coup attempt on 15 July 2016. The applicants were detained on 18 July 2016 within the scope of the investigation conducted on the basis of this accusation. On the date when the applicants were detained, a state of emergency had not been declared yet in Turkey. The state of emergency was declared three days after the applicants' detention (see § 48 above).

238. However, the charges against the applicants were related to an action within the scope of the coup attempt of 15 July which led to the declaration of a state of emergency in Turkey. The applicants were arrested on the night of the coup attempt on the basis of the allegation that they were involved in an activity within the scope of the coup attempt, and they were detained two days after their arrest. In this case, it appears that the charges on the basis of which the applicants were arrested were directly related to the incidents leading to declaration of the state of emergency.

239. Emergency administration procedures are exceptional administration regimes that are applied in cases where the State, the community life or the public order is under a serious threat or danger. This administration regime can be adopted after the fulfilment of certain procedural requirements. According to Articles 120 and 121 of the Constitution and Article 3 of Law no. 2935, in the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental

rights and freedoms, or serious deterioration of public order because of acts of violence, firstly the National Security Council must meet and submit an opinion to the Government in this respect; then, the Council of Ministers must meet under the chairmanship of the President of the Republic and proclaim a state of emergency in one or more regions or throughout the country, and lastly the proclamation must be published in the Official Gazette. Furthermore, after the proclamation of a state of emergency, this must immediately be submitted to the GNAT for approval (see §§ 107-108, 111).

240. The measures applied by public authorities against the incidents leading to state of emergency before its proclamation may be reviewed under Article 15 of the Constitution. In this regard, when a severe incident affecting the whole country such as the coup attempt is experienced, it is not possible to immediately take above-mentioned procedural steps for declaring a state of emergency. Considering the incidents occurred during the coup attempt of 15 July, such as the armed raid carried out at the hotel where the President was staying, the armed harassment conducted against the Prime Minister's convoy, and taking hostage of the Chief of the General Staff and the Commanders-in-chief of Armed Forces, the meeting of the National Security Council —consisting of the President, the Prime Minister, the Chief of the General Staff, the Deputy Prime Ministers, the Minister of Justice, the Minister of National Defence, the Minister of Interior, the Minister of Foreign Affairs, the Commanders of the Turkish Land, Naval and Air Forces and the Commander of the Turkish Gendarmerie Forces— and subsequently the meeting the Council of Ministers under the chairmanship of the President, and the publication of proclamation of state of emergency took some days (until 21 July 2016).

241. At the time when the incidents leading to the declaration of a state of emergency occurs, which poses a threat against the national security and the public order, the public authorities cannot be expected to remain inactive to eliminate this threat until the declaration of a state of emergency. For this reason, the effect of the measures taken by the public authorities until the completion of the procedural processes concerning the declaration of a state of emergency in the event of an unexpected situation having severe effects, such as coup attempt necessitating the

declaration of a state of emergency, on fundamental rights and freedoms must be examined under Article 15 of the Constitution (for the ECtHR's similar judgments on the practices prior to the notification of derogation, see § 160).

242. In this respect, the lawfulness of the applicants' detention will be reviewed under Article 15 of the Constitution. Prior to such review, whether the applicants' detention violated the guarantees set forth in Articles 13, 19 and in other Articles of the Constitution must be determined.

ii. General Principles

243. The Constitutional Court examined the alleged unlawfulness of detention in many judgments and set out the principles concerning the examination methods (see *Mustafa Ali Balbay*, no. 2012/1272, 4/12/2013, §§ 71-75; *Hanefi Avcı*, no. 2013/2814, 18/6/2014, §§ 45-49; *Hikmet Kopar and Others*, §§ 77-84; *Günay Dağ and Others* [the Plenary], no. 2013/1631, 17/12/2015, §§ 154-163; *Erdem Gül and Can Dündar* [the Plenary], no. 2015/18567, 25/2/2016, §§ 62-69; and *Süleyman Bağrıyanık and Others*, cited above, §§ 203-215).

244. It is set forth in Article 19 § 1 of the Constitution that everyone has the right to personal liberty and security. In addition to this, the circumstances in which individuals may deprived of liberty with due process of law laid out in Article 19 §§ 2 and 3 of the Constitution. Accordingly, the right to personal liberty and security may be restricted only in cases where one of the situations laid out in this Article exists (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

245. Similar to the rules provided in the Constitution, it is set out in Article 5 § 1 of the ECHR that everyone has the right to liberty and security and that no one shall be deprived of his liberty save in the cases stated in Article 5 § 1 (a)-(f) (see *Mehmet İlker Başbuğ*, no. 2014/912, 6 March 2014, § 42).

246. The interference with the right to personal liberty and security will lead to a violation of Article 19 of the Constitution in the event that it does not comply with the conditions prescribed in Article 13 of the Constitution

where the criteria for restricting fundamental rights and freedoms are provided. For this reason, it must be determined whether the restriction complies with the conditions set out in Article 13 of the Constitution, i.e., being prescribed by law, relying on one or more of the justified reasons provided in Article 19 § 3 of the Constitution, and not being in breach of the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53-54).

247. Article 13 of the Constitution provides that fundamental rights and freedoms may be restricted only by law. On the other hand, it is set out in Article 19 of the Constitution that the procedures and conditions under which the right to personal liberty and security may be restricted must be prescribed by law. Accordingly, the requirement of "lawfulness" as regards the restriction of all fundamental rights and freedoms, which is provided in Article 13 of the Constitution, is also set out in Article 19 in terms of the right to personal liberty and security. In this respect, it is necessary in accordance with Articles 13 and 19 of the Constitution, which are compatible with each other, that the measure of arrest as an interference with personal liberty must have a legal basis (see *Murat Narman*, cited above, § 43; and *Halas Aslan*, cited above, § 55).

248. On the other hand, it is provided in Article 13 of the Constitution that fundamental rights and freedoms may be restricted only in conformity with the reasons mentioned in the relevant articles of the Constitution. The individuals who may be detained as a restriction to their personal liberty and security, the cases in which a detention order may be given, and the authorities who may give a detention order are explained in Article 19 § 3 of the Constitution. According to the Article, individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge for the purposes of preventing escape or preventing tampering with evidence, as well as in other circumstances prescribed by law and necessitating detention (see *Halas Aslan*, cited above, § 57).

249. Accordingly, detention of a person primarily depends on the presence of a strong indication of having committed a crime. This is a *sine qua non* sought for detention. For this, it is necessary to support an allegation with plausible evidence which can be considered as strong.

The nature of the cases and information which can be considered as convincing evidence is to a large extent based on the peculiar conditions of the concrete case (see *Mustafa Ali Balbay*, cited above, § 72).

250. For an initial detention, it may not always be possible to present all evidence indicating that there is a strong suspicion of having committed offence. Another purpose of detention is to take the criminal investigation or prosecution forward by means of verifying or refuting the suspicions against the relevant person (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87). Therefore, it is not absolutely necessary to require that the sufficient evidence have been collected in the course of arrest or detention. The facts which will form a basis for criminal charge must not be assessed at the same level with the facts that will be discussed at the subsequent stages of the criminal proceedings and constitute a basis for conviction (see *Mustafa Ali Balbay*, cited above, § 73).

251. It is also provided in Article 19 of the Constitution that an individual may be detained for the purpose of preventing "escape" or "tampering with evidence". However, the Constitution-maker, by using the expression of "…*as well as in other circumstances prescribed by law and necessitating detention*", points out that the grounds for detention are not limited to those set forth in the Constitution and sets forth that the grounds for detention other than those provided in the relevant Article can only be prescribed by law. Accordingly, the Constitution grants discretion to the legislator to determine the legal grounds for detention (see *Halas Aslan*, cited above, § 58).

252. Article 100 of Law no. 5271, where the grounds for detention are regulated, provides that individuals may only be detained if there are facts indicating that there is a strong suspicion of having committed an offence and there is a ground for detention. The grounds for detention are also set out in the same Article. According to this, detention may be ordered in cases where the suspect or accused escapes or hides or there are concrete facts which raises the suspicion of escape or where the behaviours of the suspect or accused tend to show the existence of a strong suspicion of tampering with evidence or attempting to put an unlawful pressure on witnesses, victims or other individuals. In the relevant Article, the

offences regarding which the ground for arrest may be deemed to exist *ipso facto* are enlisted, provided that there exists a strong suspicion of having committed those offenses (see *Ramazan Aras*, no. 2012/239, 2 July 2013, § 46; and *Halas Aslan*, cited above, § 59).

253. It is also set out in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms cannot be contrary to the "principle of proportionality". The expression of "*requiring detention*" set out in Article 19 § 3 of the Constitution points out that detention must be proportionate. In parallel with the constitutional provisions, it is provided in Article 100 of Law no. 5371 that no detention shall be ordered if the detention is not proportionate to the significance of the case, expected punishment or security measure (see *Halas Aslan*, cited above, § 72).

254. The aim of the principle of proportionality is to prevent the unnecessary restriction of fundamental rights and freedoms. In accordance with the judgments of the Constitutional Court, the principle of proportionality, which requires that there must be a reasonable relation between the aim and the means, in other words, a fair balance must be struck between the restriction and the interest it provides, has three sub-principles in the examination of the relation between the restrictive measure and the purpose of the restriction: "appropriateness" that is to determine whether the measure is appropriate for reaching the purpose of the restriction, "necessity" that seeks to determine whether the restrictive measure is necessary for reaching the purpose of the restriction and for the democratic social order; and "proportionality" that determines whether the purpose and the means are proportionate to each other and in this respect whether they impose a disproportionate obligation or not (see E.2013/57, K.2013/162, 26 December 2013).

255. It is primarily the duty of the judicial authorities, which implements the detention measure, to respect the "principle of proportionality" set forth in Article 13 of the Constitution. Therefore, whether a detention measure implemented within the scope of a criminal investigation or prosecution is proportionate or not can primarily be determined on the basis of the grounds of the detention order (see *Murat Narman*, cited above, § 62). The detention of a person through a court order which is completely

devoid of statement of reasoning is unacceptable. A suspect or accused may be detained by showing justifications which legitimize detention, however, giving a detention order through extremely short justifications and without relying on legal provisions cannot be considered as such (see *Hanefi Avcı*, cited above, § 70).

256. In the justifications of the decisions on detention, the prerequisite of the detention which is "existence of a strong indication that the person committed the imputed offence", as well as, "the grounds for detention" must be set forth. This is also set out in Article 101 § 2 of Law no. 5271 where detention orders are regulated. Accordingly, the evidence showing that there is a strong suspicion of having committed an offence, that there are grounds for detention, and that the detention measure is proportionate will be justified with concrete facts and must be expressly stated in detention orders (see *Halas Aslan*, cited above, § 75).

257. For an initial detention, it may be sufficient, by the very nature of the case, to present abstract grounds for detention set forth in the Constitution and the Law (see *Halas Aslan*, cited above, § 77). On the other hand, it must be examined whether the preventive measures alternative to detention are sufficient in accordance with the principle of proportionality, in the most general sense, for ensuring the legitimate purpose of the proper administration of justice. The obligations imposed by virtue of conditional bail, which are set forth in Article 109 of Law no. 5271, are the preventive measures that have less effects on fundamental rights and freedoms compared to detention. Accordingly, for a detention to be proportionate, it must be set forth in detention orders why the measures of conditional bail are not sufficient in terms of the legitimate aim to be achieved by detention. This issue is set forth in Article 101 § 1 of Law no. 5271 concerning the detention measures (see *Halas Aslan*, cited above, § 79).

iii. Application of Principles to the Present Case

258. Within the scope of an investigation conducted on the basis of the allegation that the applicants took part in an activity as part of the coup attempt, they were detained for the offence of attempting to overthrow the constitutional order under Article 100 of Law no. 5271. In this respect, the

applicants' detention that amounts to an interference with their right to personal liberty and security has a legal basis.

259. When the detention orders in respect of the applicants are examined (see 81 above), it is understood that detention of the applicants —an interference with their right to personal liberty and security— ordered by the Judge's Office on the basis of the strong suspicion of having committed an offence and on the grounds for detention has a legitimate aim as set forth in the Constitution and the Law.

260. Within the scope of the right to personal liberty and security of person, the most significant element of the judicial review of the first detention is the existence of "strong indication" of having committed an offence, which is specified as one of the requisite conditions of having recourse to detention measure in Article 19 § 3 of the Constitution. In that regard, the existence of serious indication of having committed an offence suffices for the first detention of a person (see *Hikmet Kopar and Others*, cited above, § 84).

261. When the coups and coup attempts against Turkey are examined, it appears that the places mass media and communications platforms are among the first places seized or wanted to be seized by the coup plotters. That is because, taking under control the mass media and the communication is of vital importance for a successful coup attempt.

262. As a matter of fact, on 15 July 2016 many attacks were carried out by the coup plotters for the purpose of seizing the places which provided mass media and communication services. In this respect, the coup plotters occupied the TRT and issued a coup declaration on behalf of the "Peace at Home Council", as well as, they occupied or attempted to occupy some of the private television channels, and they also carried out attacks against the places from where television broadcasts and internet access were provided. As a matter of fact, the coup plotters who were assigned with the duty of seizing the TURKSAT and the TIB could not reach those places as they were prevented by the people (see § 69 above). The coup plotters occupied the TURKSAT through the military officers whom were dispatched by helicopters and they forced the staff working there to cease

the satellite broadcastings, and as they could not succeed, they bombed the TURKSAT campus by fighter aircrafts (see §§ 70-72, 76 above).

263. The fact that the television broadcasting or internet access could not be cut off by the coup plotters during the coup attempt carries a great importance in the failure of the coup. Almost all TV channels made anti-coup broadcastings. Through these broadcastings, many segments of society realized that a coup attempt was being carried out by the members of the FETÖ/PDY that infiltrated into the TAF and that the legitimate State authorities made efforts to suppress this coup attempt. The President invited people, connecting through a videophone system to a number of private TV channels, to take to the streets to prevent the coup, one of the private TV channels broadcasting this speech of the President live was occupied by the coup plotters in the late hours of the night while the live broadcasting was still continuing, and the broadcasting was ceased, and the Turkish people watched this attempt of occupation live. In addition, the statements, images or videos of state and security officials resisting the coup attempt and the images and videos of brutal attacks of coup plotters were disseminated among the people through social media, and the resistance of people against the coup attempt in an organized manner via communicating social media accounts/groups became significantly effective in the failure of the coup.

264. As regards the existence of suspicion of having committed an offence in the present case, the detention order referred to the incident scene, the investigation report, and the applicants' statements (see 81 above). According to the determinations of the investigation authorities, the applicants wanted to enter the campus of TURKSAT occupied by coup plotters, and they were stopped by the police officers at the entrance of the campus. They were arrested after the applicant Burhan Güneş, who had been driving the car, had stated that "they had been called by those inside the campus" and had tried to delete the records on his mobile phone in rush (see § 75 above). The authorities considered "being called by those who were inside the campus" to be a call by the military officers occupying TURKSAT.

265. In addition to that, the applicants stated that they had been residing in various regions outside Ankara and had met at the bus station

in Ankara at the evening hours on 15 July and that they had borrowed the car they were driving from a person whose name they did not want to disclose. Although they also stated that they had been moving to join the convoys fighting against the coup, they in fact went to the campus of TURKSAT (located in the Gölbaşı district) which was tens of kilometres away from the provincial centre where anti-coup demonstrations took place (see §§ 73-74 above).

266. Moreover, the suspect U.O. (owner of the car by which the applicants went to TURKSAT) stated to the investigation authorities that *"he met with the applicants at a home on the incident day, the applicants left the home by his vehicle, and later on, the applicants were reported in the news that they raided TRT ("the Turkish Radio and Television Corporation") building together with the coup-plotter military officers for interrupting its broadcasting at the night of the coup attempt."* One of the military officers occupying TURKSAT, E.U., said in his statement that "*as the TURKSAT personnel did not assist us to stop broadcasting, we were told by our superiors that civilian technicians would arrive from outside to assist us to stop broadcasting"* (see §§ 97, 100). Accordingly, there are strong reasons substantiating the investigation authorities' suspicion that the applicants committed the imputed offences.

267. In addition, it has been established that the applicants, Burhan Güneş and Aydın Yavuz, were users of the "ByLock" application (app), which is the digital platform through which the FETÖ/PDY members maintained secure communication among themselves. Taking into account the technical features of this app, it is comprehensible that the fact that the applicants have and use this app is considered by authorities as a strong indication for their connection with the FETÖ/PDY. As a matter of course, the degree of this indication may vary by concrete incidents, depending on the factors such as whether this app has been actually used by the individual concerned, the manner and frequency of its use, the position of and importance attached to the contacts within the FETÖ/PDY, and the content of messages communicated via this app. Moreover, the competent authorities' assessment that the use of ByLock or having it in electronic/mobile devices constitutes a strong indication of having committed an offence cannot be considered as unfounded or arbitrary. Therefore, it must be concluded that there is, also in this respect, a strong

suspicion that the applicants Burhan Güneş and Aydın Yavuz, who are users of this app, had committed the imputed offences.

268. On the other hand, although the pre-requisite of strong suspicion of having committed an offence for detention may exist, it must also be determined whether the impugned detention measure is proportionate or not. The constitutional review on this matter must be made with regard to the detention process and the grounds thereof (see *Erdem Gül and Can Dündar*, cited above, § 79; *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, § 136; and *Süleyman Bağrıyanık and Others*, cited above, § 226). At this stage, the Constitutional Court's duty is not to find out the most appropriate measure or means best serving the establishment of justice but to review the constitutionality of the impugned interference (the detention measure in the present case). In this connection, in determining whether the detention measure implemented during the investigations was proportionate or not within the meaning of Articles 13 and 19 of the Constitution, all circumstances of the case including the general conditions when the detention order was given must be taken into account.

269. In the first place, investigation of the terror offences exposes the public authorities to serious difficulties. Therefore, the right to personal liberty and security must not be interpreted as to make it excessively difficult for the judicial and investigation authorities to deal effectively with crimes—particularly organized ones—and the criminals (see *Süleyman Bağrıyanık and Others,* cited above, § 214).

270. Thousands of military officers were involved in the coup attempt during which extremely brutal attacks were carried out, such as armoured attacks against the GNAT and the Presidential Complex by fighter aircrafts and helicopters, armoured attack against the hotel where the President was staying, the firing against the convoy which the Prime Minister's vehicle was in, the hostage of the many senior military officers among whom there was also the Chief of the General Staff, the occupation of many public institutions by force of arms, the recital of the coup declaration on the TRT, the attacks carried out to cut off the television broadcasting or internet access across the country, and the killing or injuring of the persons who took to the streets to resist the coup attempt. In this respect,

it can be said that a strong wave of violence and fear spread throughout the country.

271. Considering the fear atmosphere created by the severe incidents that occurred during the coup attempt, the complexity of the structure of the FETÖ/PDY that is regarded as the perpetrator of the coup attempt and the danger posed by this organization, orchestrated criminal or violent acts committed by thousands of FETO/PDY members in an organized manner, the necessity to immediately launch investigations against thousands of people including public officials although they might not be directly involved in the coup attempt, the preventive measures other than detention may not be sufficient for ensuring the gathering of evidence properly and for conducting the investigations in an effective manner.

272. The possibility of escape of the persons who are involved in the coup attempt or who are in connection with FETÖ/PDY— the terror organization behind the coup attempt— by taking advantage of the turmoil in its aftermath, and the possibility of tampering with evidence are more likely when compared to the crimes committed during the ordinary times. Besides, the fact that the FETÖ/PDY has organized in almost all public institutions and organizations within the country, that it has been carrying out activities in more than one hundred and fifty countries, and that it has many important international alliances will greatly facilitate the escape and residence abroad of the persons who are subject to investigation with respect to this organization (for similar assessments, see *Yıldırım Ataş*, no. 2014/4459, 26 October 2016, § 60). As a matter of fact, many suspects who are subject to investigation in this respect have escaped abroad in the course of the investigation process.

273. It is clear that this situation concerning the general conditions after the coup attempt of 15 July does not require automatic detention of all the suspects investigated with respect to the said events. Moreover, the investigating authorities did not resort to the detention measure with respect to all suspects against whom they conducted investigations in relation to the FETÖ/PDY regardless of their involvement in the coup attempt. In this scope, a significant proportion of the suspects (about

2/3) have been released by conditional bail or without any preventive measures or they have not been subjected to any procedures restricting liberty. Similarly, thousands of suspects have been released after their detention (see § 52 above).

274. In the present case, while giving a detention order, the Judge's Office relied on the existence of the suspicion of tampering with evidence, the severity of the sanction set forth in the Law for the offence, the fact that the measure of conditional bail might be insufficient and that detention is proportionate.

275. According to their statements, the applicants residing in İzmir, İstanbul and Gebze arrived at Ankara on 15 July in the evening, one or two hours before the time when the activities within the scope of the coup attempt were started, and they were arrested while trying to enter the TURKSAT campus, which was occupied by the coup plotters, during the time when the clashes had just occurred. The car the applicants used on the night of the incident did not belong to them, and they were unable to provide a reasonable explanation about the person from whom they borrowed the car and the way they received it. It is understood that in the morning after the coup attempt, the accused U.Ö. who was the owner of the car took it from the incident scene by using the spare key of the car without informing the investigating authorities and without taking permission, and that the car was later found by through registry information. In addition to these, "the offence of attempting to overthrow the constitutional order" on the basis of which the applicants were detained requires "aggravated life imprisonment" which is the heaviest punishment set forth in the Turkish legal system. The gravity of the punishment set forth in the Law with respect to the imputed offence constitutes one of the cases where the suspicion of fleeing arises (see *Hüseyin Burçak*, no. 2014/474, 3 February 2016, § 61). Furthermore, it was understood that on the night of the incident the applicant Aydın Yavuz escaped from the car, where he was being held handcuffed, by taking advantage of the turmoil occurred due to the bombing of the TURKSAT by the fighter aircrafts and that the next day he was arrested by the gendarmerie at a petrol station and handed over to the police.

276. Considering the general circumstances in which the applicants were detained and the particular circumstances of the present case together, it is understood that the legal grounds for the applicants' detention, the risk of tampering with evidence and suspicion of fleeing have sufficient factual basis. Regard being had to the fact that the applicants were arrested while they were trying to enter the TURKSAT campus on the night when the coup attempt occurred and that they were held in custody for two days and then the Judge's Office ordered their detention, there is no reason to conclude that their detention during the investigation process was not "necessary" as an element of the principle of proportionality.

277. For the reasons explained above, as it is clear that there is no violation as regards the alleged unlawfulness of the applicants' detention, this part of the application must be declared inadmissible for being manifestly ill-founded.

278. Accordingly, as it is concluded that the interference with the applicants' right to personal liberty and security by means of detention does not constitute a violation of the guarantees set forth in the Constitution (Articles 13 and 19), no further examination is required with respect to the criteria provided in Article 15 of the Constitution.

2. Alleged Unreasonable Length of Detention

a. The Applicants' Allegations and the Ministry's Observations

279. The applicants maintained that the extension of their detentions lacked justification and that in this respect they continued to be deprived of their liberty arbitrarily. In this connection, the applicants alleged that their right to a fair trial, right to an effective remedy, right to personal liberty and security, and the principle of equality had been violated, and they requested their release and sought compensation in this respect.

232. In its observations, the Ministry did not make any explanations as to the applicants' allegations under this heading.

b. The Court's Assessment

281. Article 19 § 7 of the Constitution reads as follows:

"Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence."

282. The Constitutional Court is not bound by the legal characterization of the facts by the applicants, but the Court makes such assessment itself (see *Tahir Canan*, § 16). The applicants' allegations that the extension of their detention lacked justification and, in this respect, the alleged length of their detention must be examined within the scope of the right to personal liberty and security safeguarded in Article 19 of the Constitution.

i. Enforceability

283. The suspected offence resulting in the applicants' detention concerned an act relating to the coup attempt of 15 July, which was the primary incident that led to the declaration of the state of emergency in Turkey. The state of emergency was in force during the period when the applicants were detained on remand. In this respect, whether the length of the applicants' detention exceeded the reasonable period is to be examined under Article 15 of the Constitution. During this examination, it will be first determined whether the length of the applicants' detention was in breach of the safeguards enshrined in Articles 13 and 19 and the other Articles of the Constitution.

ii. General Principles

284. The Constitutional Court examined the alleged unreasonable length of detention in many judgments and set out the principles concerning the examination methods (see *Murat Narman*, cited above, §§ 60-66; *Mustafa Ali Balbay*, cited above, §§ 102-106; *Hanefi Avcı*, cited above, §§ 64-73; *Hüseyin Burçak*, cited above, §§ 42-61; and *Halas Aslan*, cited above, §§ 51-91).

285. According to Article 19 § 7 of the Constitution, persons detained within the scope of a criminal investigation shall have the right to request trial within a reasonable time and to the right to be released during investigation or prosecution process. "The right to request trial within a

reasonable time" and "the right to request to be released" safeguarded in the same paragraph must not be regarded as an alternative to each other but complementary. (see *Murat Narman*, cited above, § 60; and *Halas Aslan*, cited above, § 66).

286. In accordance with "the right to request to be released" safeguarded in Article 19 of the Constitution, persons detained within the scope of a criminal investigation or prosecution shall have the right to request from the relevant judicial authorities to be released. As a reflection of this right, it is provided in Article 104 § 1 of Law no. 5271 that the suspect or the accused is entitled to request to be released at any stage of the investigation and the prosecution proceedings. It is also set forth in Article 108 of the same Law that detention must be examined *ex officio* during the investigation and prosecution proceedings within certaim time intervals. It is also a requirement of Article 19 § 7 of the Constitution that the judicial authorities must explain the legal grounds of detention during the examinations carried out either *ex officio* or upon the request of the person to be released at any stage of detention (see *Halas Aslan*, cited above, § 67).

287. It is also stated in the Article that detained persons are entitled to request a "trial within a reasonable time". In general, not concluding a trial within a reasonable time falls under the scope of the right to a fair trial safeguarded in Article 36 of the Constitution. According to Article 19 of the Constitution in which the guarantees as to the restriction of the individuals' physical liberty are set out (see *Galip Öğüt* [the Plenary], no. 2014/5863, 1 March 2017, § 35), it is required in the first place that the length of detention must not exceed the reasonable time. The relevant Article also points out that detention pending trial must be concluded within a reasonable time. A person who is detained pending trial has much more interest, by its very nature, in the reasonable length of the proceedings when compared to others. In this connection, the "right to be tried within a reasonable time" of a detained person, which is set forth in Article 19 § 7 of the Constitution, provides a greater protection than the right to be tried within a reasonable time within the scope of the right to a fair trial guaranteed in Article 36 of the Constitution. Accordingly, the investigation and prosecution proceedings carried out while the suspect/accused is being

held in detention must be concluded swiftly. In this respect, all public authorities, being in the first place the public prosecutors' offices and the courts, must act in due diligence to conclude swiftly the investigation/prosecution proceedings carried out while the suspect/accused is being held in detention, in compliance with the guarantees arising from the right to a fair trial. The obligation to act in due diligence is also necessary for not being arbitrary of the continuation of a person's detention pending trial, and thereby maintaining the legitimate aim in the interference with the personal liberty. In this respect, the required due care concerning the investigation/prosecution proceedings in respect of detained persons is guaranteed by Article 19 § 7 of the Constitution (see *Halas Aslan*, §§ 68-71).

288. On the other hand, whether a detention measure is proportionate or not may be determined firstly on the basis of the grounds of the detention orders. The existence of "a strong indication of having committed the crime" as a prerequisite for detention and "the grounds for detention" must be set forth in the justifications of detention orders. As a matter of fact, according to Article 101 of Law no. 5271, the evidence showing that there is a strong suspicion of having committed an offence, that there are grounds for detention and that the detention measure is proportionate shall be justified with concrete facts and shall be explicitly indicated in the decisions on detention, continuation of detention, and rejection of a request to be released (see *Halas Aslan*, §§ 74-75).

289. The strong suspicion of having committed an offence is a prerequisite for detention and must exist at all stages of detention. Although for an initial detention it is not always possible to put forward the existence of a strong suspicion of having committed an offence, the evidence that will justify or eliminate the suspicion of having committed an offence will be accessed in the later stages of investigation/prosecution. For this reason, in the decisions on the continuation of detention after the passage of a certain period of time, the existence of a strong suspicion of having committed an offence must be explained with concrete facts. Where the facts showing that there is a strong suspicion of the suspects' having committed the imputed offence have disappeared at any stage of detention, the detention cannot be said to have a legitimate aim (see *Halas Aslan*, cited above, § 76).

290. Although for an initial detention, it may be sufficient, by the very nature of the case, to indicate abstractly the grounds for detention set forth in the Constitution and the Law, as the evidence is collected during investigation/prosecution proceedings, the possibility to tamper with evidence disappears or gets difficult. Furthermore, it can also be said that the risk of absconding of the suspect or accused diminishes since the detention term shall be deducted from the sentence to be imposed at the end of the proceedings. For these reasons, in the decisions on the continuation of detention exceeding a certain period, it is not sufficient to indicate the abstract grounds for detention (see *Hanefi Avcı*, cited above, § 70).

291. In such decisions, the grounds for detention must be explained on the basis of concrete facts, and it must also be explained why these reasons are necessary in the circumstances of the case. As the detention continues, the burden imposed on the individual increases whereas the legitimate aim of the detention weakens. Therefore, the general circumstances of the case as well as the particular situation of the detainee must be taken into account in the decisions on the continuation of the detention, and, in this sense, the grounds for detention must be personalized (see *Hanefi Avcı*, cited above, § 84). It is also necessary in the detention decisions to explain why the measures of conditional bail ─having less effect on fundamental rights and freedoms when compared to detention─ are insufficient. Despite the "presumption of innocence" which is one of the basic principles of the law and safeguarded in Article 38 § 4 of the Constitution as "*No one shall be considered guilty until proven guilty in a court of law*", the continuation of detention may only be justified in cases where it is demonstrated with evidence that the detention of the person for the purpose of proper administration of justice prevails the right to liberty and security (see *Halas Aslan*, cited above, § 78).

292. Thus, the question whether the length of detention is reasonable or not cannot be addressed under general principles. This examination must be made according to the particular circumstances of each case (see *Murat Narman*, cited above, § 61).

293. In the evaluation of the reasonable period, the beginning of the period is the date on which the applicant was arrested and taken into

custody for the first time; however, in cases where the applicant was directly detained, the date of detention in question is the beginning of the period. The end of the period is, as a rule, the date on which the person is released or the date on which the judgment is rendered by the first instance court (see *Murat Narman*, cited above, § 66).

294. In the individual applications lodged on the basis of the complaints that the detention has been prolonged or exceeded a reasonable period, it is the duty of the Constitutional Court to examine the grounds explained in the decisions of detention and the decisions on the continuation of the detention rendered by the inferior courts and to examine whether these grounds are relevant and sufficient in the particular circumstances of the case, also considering if the required due diligence ─explained above─ is respected or not. If such review leads to conclusion that the grounds for detention are not relevant and sufficient to justify the legal grounds for the restriction of the applicants' liberty or that investigation/prosecution proceedings are prolonged due to the lack of due care on the part of public authorities, it shall be found that length of detention has exceeded the reasonable period (see *Halas Aslan*, cited above, §§ 82-83).

iii. Application of Principles to the Present Case

295. On 16 July 2016 the applicants were taken into custody, and they were detained by the decision of the Gölbaşı Magistrate Judge's Office, dated 18 July 2016. As of the date of examination of the individual application, the applicants' detention on remand has been ongoing. Accordingly, the applicants have been detained for approximately 11 months.

296. The applicants, who have been accused of entering the TURKSAT campus that was occupied by the coup plotters within the scope of the coup attempt of 15 July in order to cease the satellite broadcasting, have been detained in this respect for the offence of "attempting to overthrow the constitutional order". It was clearly pointed out by the Magistrate Judges' Offices during the investigation and by the 14th Chamber of the Ankara Assize Court during the prosecution proceedings that there was a strong suspicion of the applicants' having committed the imputed

offence. In the examination of the alleged unlawfulness of the applicants' detention, the Constitutional Court has concluded that there are strong indications that the applicants have committed the offence (see §§ 264-267). Considering the content of the evidence referred to in the decisions on detention and continuation of detention with respect to the applicants, it is concluded that court decisions are explanatory and sufficient in terms of the existence of the strong suspicion of having committed offence, which is a prerequisite for detention.

297. Upon examination of those court decisions, it is concluded that these decisions were based on the factual and legal grounds such as the risk of absconding, the risk of tampering with evidence, the gravity of the sanction arising from the imputed offence, that the imputed offence is among the offences regarding which the ground for arrest may be deemed to exist *ipso facto* under Article 100 § 3 of Law no. 5271, that the measure of conditional bail will not be sufficient and that the detention measure is proportionate (see §§ 83, 86, 92; 102-104 above). Considering the nature of the charges and the circumstances of the facts examined during the investigation/prosecution proceedings as a whole, it has been also concluded that the reasons provided for the continuation of detention sufficiently demonstrates that it is based on legal grounds and legitimate aims at this stage of the proceedings.

298. On the other hand, in the investigation carried out into the attack aimed at ceasing the television broadcasting by seizing the TURKSAT, the investigation authorities took actions against 12 military officers who had allegedly occupied the TURKSAT, against the applicants, and against a suspect who was the owner of the car used by the applicants on the date of the incident. In this scope, besides the applicants, the defence of some other suspects who had not escaped were taken, the professional positions and the backgrounds of the suspects were investigated, evidence with respect to the bank records of the applicants and their use of secret communication programs were collected, and the statements of many complainants were taken. Furthermore, autopsy reports of those who had lost their lives during the incident and medical reports of those injured (indicating the type of injuries) were requested from the Forensic Medicine Institute, expert reports pertaining to the criminal examinations carried out on the evidence

collected from the incident scene were obtained, a footage was examined, suspects were identified, the signals received from the GSM lines used by the suspects were determined and examined, and the incident scene investigation reports were drawn up. Accordingly, the whole investigation process was concluded within approximately 5 months and 15 days after the coup attempt, the applicants were prosecuted by the indictment issued by the Ankara Chief Public Prosecutor's Office on 2 January 2017. Within the scope of the proceedings, the first hearing was held on 4 April 2017 and the applicants' defence were taken. Evidence were collected during the hearings held until 8 May 2017, and on this date the public prosecutor submitted to the Court his written opinion as to merits (see §§ 103-104 above). In this respect, it has been concluded that the investigation and prosecution proceedings are conducted with due diligence.

299. Regard being had to the fact that the reasoning of the decisions on the continuation of the applicants' detention are relevant and sufficient to substantiate the legal grounds for the applicants' being deprived of their liberties and that the investigation and prosecution proceedings did not lack due diligence, it has been concluded that the detention period of approximately 11 months is reasonable.

300. In view of the reasons explained above, as it is clear that there has been no violation with respect to the alleged unreasonable length of the applicants' detention, this part of the application must be declared inadmissible *for being manifestly ill-founded*.

301. Accordingly, as it is concluded that the interference with the applicants' right to personal liberty and security by ordering the continuation of their detention is not contrary to the safeguards provided in Articles 13 and 19 of the Constitution, no further examination is required under Article 15 of the Constitution.

3. Alleged Restriction of the Access to the Investigation File

a. The Applicants' Allegations and the Ministry's Observations

302. The applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy maintained that their right to defence was interfered due to the

restriction order given on account of the confidentiality of the investigation file. In this respect the applicants alleged that their right to a fair trial was violated.

303. In its observations, the Ministry submitted the judgments of the ECtHR and pointed out that the suspect or the accused or defence lawyers must have access to the main information and documents relied on for detention order. According to the Ministry, in the present case the Magistrate Judge's Office read out to the applicants the information and the documents in the case file on the basis of which they were detained, as well as, the investigation document. The Ministry also drew attention to the fact that the applicants gave detailed statements concerning the offences they were charged with at the police station. Accordingly, as the applicants had information about the evidence on the basis of which they were charged, they could object to these evidence effectively.

b. The Court's Assessment

304. Article 19 § 8 of the Constitution reads as follows:

> *"Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful."*

305. The Constitutional Court is not bound by the legal characterization of the facts by the applicants, but the Court makes such assessment itself (see *Tahir Canan*, § 16). In this respect, the applicants' allegations in this part must be examined within the scope of the right to personal liberty and security safeguarded in Article 19 of the Constitution.

i. Enforceability

306. As the restriction order against which the applicants complained was issued within the scope of an investigation conducted on the basis of their alleged participation in an activity as part of the coup attempt leading to the declaration of the state of emergency, the lawfulness of this order, in other words, its effect on the right to personal liberty and security

will be examined under Article 15 of the Constitution. Within this scope, it will be first established whether the restriction order and its enforcement are contrary to the guarantees provided in Article 19 of the Constitution.

ii. General Principles

307. The Constitutional Court examined in many judgments the effect of the restriction orders issued in accordance with Article 153 of Law no. 5271 on the right to personal liberty and security and, in particular, the right of objection of the detainees to their detention, and the Court determined in this judgments the general principles concerning the examination methods (see *Hikmet Kopar and Others*, cited above, §§ 121-122; *Günay Dağ and Others*, cited above, §§ 168-176; *Hidayet Karaca* [the Plenary], no. 2015/144, 14 July 2015, §§ 105-107; *Erdem Gül and Can Dündar*, cited above, §§ 46-48; *Süleyman Bağrıyanık and Others*, cited above, §§ 248-257).

308. It is provided in Article 19 § 4 of the Constitution that individuals arrested or detained shall be promptly notified in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge (*Günay Dağ and Others,* cited above, § 168).

309. Furthermore, pursuant to Article 19 § 8 of the Constitution, persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of the proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful. Under this procedure, although it is not possible to provide all safeguards of the right to a fair trial, the concrete safeguards complying with the conditions of the alleged detention must be set forth in a judicial decision (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, §§ 122-123).

310. At the investigation phase, access to certain evidence may be restricted for the reasons such as, in particular, protecting the fundamental rights of the third parties, protecting the public interest or securing the investigation methods. Therefore, restriction of the lawyer's right to examine the case file for securing the effectiveness of the investigation

proceedings cannot be considered necessary for the democratic social order. However, the restriction to be imposed on the right to access to the case file must be proportionate to the aim pursued and must not prevent the use of the right to defence adequately (see the Court, E.2014/195, K.2015/116, 23 December 2015, § 107).

311. Arrested persons must be told the legal and factual grounds for the arrest in a simple and nontechnical language that they can understand so that, if they deem necessary, they can to apply to the court to challenge its lawfulness in accordance with Article 19 § 8 of the Constitution. Article 19 § 4 of the Constitution does not require that the information provided during arrest or detention contains a full list of the offences the arrested or detained person is charged with. In other words, it does not necessitate that all evidence on the basis of which he is accused be notified or explained (see *Günay Dağ and Others*, § 175).

312. In the event that the applicant is questioned about the content of the restricted documents or that the applicant referred to the content of such documents within the scope of the objection to detention order, it must be accepted that the applicant had access to the documents on the basis of which the detention was ordered, that the applicant had sufficient information about the content of the documents and therefore could adequately challenge the the grounds for detention. In such a case, the detainee has sufficient information about the content of the documents that the detention is based on (see *Hidayet Karaca*, § 107).

iii. Application of Principles to the Present Case

313. Pursuant to Article 153 § 2 of Law no. 5271, Gölbaşı Magistrate Judge's Office ordered on 16 July 2016 the restriction of the applicants' lawyers' access to the investigation file on the ground that his review of the file or taking copies of the documents would endanger the purpose of the investigation.

314. By a petition dated 14 December 2016, the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy requested to be released and that the restriction order in question be lifted. However, while the applicants' request to be released was dismissed with the decision of the

Ankara 4th Magistrate Judge's Office, dated 26 December 2016, no decision was rendered with respect to their request for lifting the restriction order (see §§ 90-92 above). Although there is no document or information as to whether the restriction order was later lifted or not, on 13 January 2017 when the 14th Chamber of the Ankara Assize Court accepted the indictment, the restriction automatically ended in accordance with Article 153 § 4 of Law no. 5271.

315. The charges against the applicants are based on the fact that they went to the TURKSAT campus, which was occupied by the coup plotters during the coup attempt of 15 July, to cease satellite broadcasts. In the examination of the applicants' statements taken by the police, it was seen that the applicants were given information on the offences they were charged with and they were asked questions about the acts on account of which they were accused, that they submitted their defence against the imputed offences together with their lawyers, that the applicants denied the accusations against them and that they denied that they went to the TURKSAT to help cease the satellite broadcasting.

316. It was also understood that during the statement taking process before the Gölbaşı Magistrate Judge's Office, the investigation documents and the other information in the investigation file were read out to the applicants in the presence of their lawyers. After being informed about the information and documents pertaining to the charges against them, they made verbal defence before the judge in the presence of their lawyers. In their defence submissions, they denied the accusations once again.

317. Furthermore, it was understood that in their petitions to object to their detention, the applicants submitted their arguments in detail. Besides, the applicants did not complain about the restriction of their access to their records of statement, expert reports, and the records of other judicial proceedings during which they were entitled to be present and in this respect about the violation of Article 153 § 3 of Law no. 5271. Accordingly, it is understood that the applicants and their lawyers had access to the information on the basis of which they the detention is ordered.

318. In this respect, considering the fact that the main elements forming a basis for the accusations and the information on the basis of which the

lawfulness of detention was assessed were notified to the applicants or to their lawyers and that the applicants were provided with the opportunity to make their defence accordingly, it could not be accepted that the applicants could not effectively object to their detention due to the restriction order imposed during the investigation process that lasted a few months (for a similar assessment, see *Deniz Özfırat*, no. 2013/7929, 1 December 2015, § 91).

319. For the reasons explained above, as it is clear that there is no violation in terms of the alleged restriction of the right to defence of the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy in the context of the objection to their detention due to the restriction order, this part of the application must be declared inadmissible *for being manifestly ill-founded.*

320. Accordingly, as it is seen that the interference with the applicants' right to personal liberty and security by the restriction order within the investigation file is not contrary to the safeguards provided in the Constitution (in particular, Article 19), no further examination is required under Article 15 of the Constitution.

4. Alleged Review of Detention without Hearing

a. The Applicants' Allegations and the Ministry's Observations

321. The applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy maintained that the review of their detention and of their objection to detention was carried out without holding a hearing, which was in breach of their right to fair trial.

322. In its observations, the Ministry pointed out that in accordance with the Decree Laws nos. 667 and 668, decisions concerning the review of detention, the objection to detention and the request for release may be given without holding a hearing. The Ministry notes that given the notification of derogation made under Article 15 of the Constitution and Article 15 of the ECHR, the number of persons taken into custody after the coup attempt and against whom judicial action was taken, the high number of the investigations conducted and the fact that many members

of the judiciary were suspended from their duties due to their links with the FETÖ/PDY and/or that they were dismissed, these arrangements have been in compliance with the international obligations and within the extent required by the exigencies of the situation.

b. The Court's Assessment

323. The Constitutional Court is not bound by the legal characterization of the facts by the applicants, but the Court makes such assessment itself (see *Tahir Canan*, § 16). In this respect, the applicants' allegations in this part must be examined within the scope of Article 19 § 8 of the Constitution.

i. Enforceability

324. The accusation on the basis of which the applicants were detained is related to an act carried out within the scope of the coup attempt of 15 July that was the main incident leading to the declaration of the state of emergency in Turkey. During the applicants' detention period, the state of emergency was in force. In this respect, the effect of the review of the applicants' detention without holding a hearing on the right to personal liberty and security will be examined under Article 15 of the Constitution. In the course of this examination, it will be first established whether the manner in which the review of detention was carried out was in breach of the safeguards provided in Article 19 of the Constitution.

ii. Admissibility

325. This part of the application must be declared admissible for not being manifestly ill-founded and for lack of other grounds for inadmissibility.

iii. Merits

(1) General Principles

326. The Constitutional Court examined the allegations regarding the procedure to be applied in the review of detention and objections to detention in many judgments, and it indicated in these judgments the principles concerning the method of review (see *Firas Aslan and Hebat*

Aslan, no. 2012/1158, 21 November 2013, §§ 64-78; *Mehmet Haberal*, cited above, §§ 122-132; *Mehmet Halim Oral*, no. 2012/1221, 16 October 2014, §§ 50-54; *Ferit Çelik*, no. 2012/1220, 10 December 2014, §§ 51-52; *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, §§ 29-36; *Emrah Oğuz*, no. 2013/1755, 25 March 2015, §§ 43-54; *Ulaş Kaya and Adnan Ataman*, no. 2013/4128, 18 November 2015, §§ 53-73; and *Süleyman Bağrıyanık and Others*, cited above, §§ 265-270).

327. Pursuant to Article 19 § 8 of the Constitution, persons whose liberties are restricted are entitled to apply to the competent judicial authority for speedy conclusion of the proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful (see § 309 above). As no distinction was set forth in the relevant provision with respect to the grounds of restriction of liberty, the right to apply to the competent judicial authority naturally covers the deprivation of liberty by means of detention on account of the suspicion of having committed offence (see *Mustafa Başer ve Metin Özçelik*, cited above, § 165).

328. As an application for release must be lodged with the competent judicial authority, this right can only be enjoyed upon a request. Accordingly, the right to apply to the competent judicial authority is a guarantee for those deprived of their liberty due to criminal charge, and this guarantee must be afforded not only in terms of the request for release but it must also be afforded during the examination of the objections against detention, the continuation of detention and dismissal of the request for release (see *Mehmet Haberal*, cited above, § 123).

329. However, during an *ex officio* review of detention of the suspect or the accused without a request under Article 108 of Law no. 5271, no assessment shall be made within the scope of these persons' right to apply to the competent judicial authority. Therefore, such reviews do not fall into the scope of Article 19 § 8 of the Constitution (see *Firas Aslan and Hebat Aslan*, cited above, § 32; *Faik Özgür Erol and Others*, no. 2013/6160, 2 December 2015 § 24).

330. As it is set forth in Article 19 § 8 of the Constitution that the requests for release must be lodged with a judicial authority, it is, by its very nature, a judicial review. In this judicial review, safeguards of the

right to a fair trial that is compatible with the nature and conditions of detention must be available. In this respect, the principles of "equality of arms" and "adversarial proceedings" must be respected in reviewing the continuation of detention or the request to be released (see *Hikmet Yayğın*, cited above, §§ 29-30).

331. The principle of equality of arms means that parties of a legal action shall be subject to the same conditions in terms of procedural rights and that both parties shall be afforded equal opportunities to submit allegations and arguments without any favour to any. Even if an advantage afforded to one of the parties does not result in an unfavourable outcome against the other party, the principle of equality of arms is deemed to have been breached in such case (see *Bülent Karataş*, no. 2013/6428, 26 June 2014, § 70).

332. The principle of adversarial proceedings entails affording of the opportunity to the parties to have information about the case-file and to comment in respect thereof and therefore active involvement of the parties in the proceedings in its entirety. This principle is highly correlated with the principle of equality of arms, and these two rights are complementary in nature. This is because in case of breach of the principle of adversarial proceedings, the balance between the parties for defending their case shall be impaired (*Bülent Karataş*, cited-above, § 71).

333. One of the fundamental safeguards deriving from Article 19 § 8 is the right to request for an effective review of detention before a judge. Indeed, a very high importance must be attached to this safeguard considering that this is the primary legal tool for a person deprived of his liberty to effectively challenge his or her detention. In this way, a detained person is given the opportunity to discuss the reasons led to his/her detention and the assessment of the investigation authorities in person before a judge or a court. Therefore, a detained person should be able to exercise this right by being heard before a judge at certain reasonable intervals (see *Firas Aslan and Hebat Aslan*, cited-above, § 66¸and *Süleyman Bağrıyanık and others*, § 267).

334. As a reflection of this safeguard, Article 105 of Law no. 5271 sets out that while deciding on the suspect's or the accused's request for release at a hearing during the investigation or prosecution phases, the suspect, the

accused or the defence counsel and the public prosecutor shall be heard. Article 108 thereof also envisages that in the assessment of the question of continuation of the detention, the suspect or his defence counsel is to be heard. Moreover, decisions on detention that is rendered either e*x officio* or upon request within the scope of Article 101 § 5 or Article 267 may be challenged before a court (see *Süleyman Bağrıyanık and others*, § 269). As regards the review of detention orders, Article 271 sets forth that the challenge shall be in principle concluded without a hearing; however, if deemed necessary, the public prosecutor and subsequently the defence counsel may be heard. Accordingly, in case that a review of detention or objection to detention is made through a hearing, the suspect, the accused or the defence counsel must be heard.

335. However, holding a hearing for reviewing objections to detention orders or assessing every request for release may lead to congestion of the criminal justice system. Therefore, safeguards enshrined in the Constitution as to the review procedure do not necessitate a hearing for review of every single objection to detention unless the special circumstances require otherwise.

(2) Application of Principles to the Present Case

336. On 18 July 2016, the applicants were heard by the Gölbaşı Magistrate Judge's Office. At this stage, the applicants and their defence counsels orally submitted their defence arguments with respect to the accusations brought against them and to the detention request of the prosecutor's office.

337. It appears that at the investigation stage the reviews of the applicants' detention —*ex officio* and upon the applicants' request— were conducted without a hearing. The applicants' objections to detention orders and to continuation of detention were concluded by the competent authorities over the case-file. Nor does the observation submitted by the Ministry include any information indicating that reviews of detention were carried out, at the investigation stage, by holding a hearing.

338. In this respect, at the investigation stage, the applicants' detention was reviewed and their objections to detention were assessed without holding a hearing.

339. The indictment of 21 January 2017 issued by the Ankara Chief Public Prosecutor's Office in respect of the applicants was admitted by the 14th Chamber of the Ankara Assize Court on 13 January 2017. The court then *ex officio* reviewed the applicant's detention status in the preliminary examination carried out at the same date. This examination was also made over the case-file. Moreover, it appears that the court *ex officio* reviewed the applicants' detention status over the case-file on 9 February and 9 March 2017 and ordered the continuation of their detention.

340. Within the scope of the proceedings conducted against the applicants, the first hearing was held on 4 April 2017. The applicants and their defence counsels orally submitted their request for release during the hearing held on 6 April 2017. The court dismissed the applicants' request for release and ordered the continuation of their detention in the same hearing.

341. From 18 July 2016 when the applicants' detention was ordered to 6 April 2017, the applicants' detention status was ordered to continue by virtue of the decisions rendered upon the reviews carried out over the case-file without holding a hearing. The applicants did not have the opportunity to orally submit their objections to detention, their allegations with respect to the content and legal qualification of the evidence forming the basis for their detention, their counter-statements with respect to the considerations and assessments in their favour or to their detriment, and their requests for release before a judge or court. Accordingly, review of the applicants' detention within the scope of the imputed offences without holding a hearing between the above-mentioned dates and their deprivation of liberty for 8 months and 18 days under such a procedure do not comply with the principles of "equality of arms" and "adversarial proceedings".

342. In its previous judgment, the Constitutional Court held that review of the applicant's objection to detention without a hearing 1 month and 28 days later (*Mehmet Haberal*, § 128) did not constitute a breach of Article 19 § 8 of the Constitution, whereas the it concluded that the continuation of the applicants' detention for 7 months and 2 days (*Mehmet Halim Oral*, § 53; *Ferit Çelik*, § 53) and for 3 months and 17 days (*Ulaş Kaya and Adnan Ataman*, § 61) as a result of the examinations carried out over the case-file without holding a hearing was in breach of Article 19 § 8 of the Constitution.

343. As explained above, ordering the continuation of the applicants' detention for 8 months and 18 days through examinations carried out over the case-file is in breach of the safeguards set out in Article 19 § 8 of the Constitution. It is therefore necessary to examine whether this situation is legitimate within the scope of Article 15 of the Constitution which entails the suspension and the restriction of exercise of the fundamental rights and freedoms in time of emergency cases.

iv. Article 15 of the Constitution

344. The examination to be made pursuant to Article 15 of the Constitution is limited to determine whether the impugned interference infringes upon the very essence of the rights and freedoms set out in paragraph 2 of the same article, whether it is in breach of the obligations stemming from the international law, and whether it is within the extent required by the emergency case (see § 186 above).

345. The right to liberty and security is not one of the core rights provided in Article 15 § 2 of the Constitution as inviolable even when emergency administration procedures such as war, mobilization, martial law or a state of emergency are in force (see § 196). It is therefore possible in times of emergency to impose measures with respect to this right contrary to the safeguards enshrined in the Constitution in time of emergency cases.

346. Nor is this right among the non-derogable rights in the international conventions to which Turkey is a party, notably Article 4 § 2 of ICCPR and Article 15 § 2 of the ECHR, as well as the additional protocols thereto. Furthermore, it has not been found established that the interference with the applicants' right to liberty and security is in breach of any obligation (any safeguard continued to be under protection in time of an emergency case) stemming from the international law (see §§ 199-200 above).

347. However, the right to liberty and security is a fundamental right which precludes the State to arbitrarily interfere with the individuals' freedom (see *Erdem Gül and Can Dündar*, cited-above, § 62). Not arbitrarily depriving individuals of their liberty is among the most significant underlying safeguards of all political systems bound by the principle of rule of law. Procedural safeguards afforded for the prevention of the arbitrary deprivation of liberty must also be assessed in this scope.

348. The requirement that an interference with individuals' freedoms must not be arbitrary is a fundamental safeguard that must be also applied when emergency administration procedures are in force. Even in time of emergencies, an individual's deprivation of liberty in arbitrary manner or suspension of basic procedural safeguards prscribed for the prevention of arbitrary detention is contrary to the obligations stemming from international law (see §§ 138-145 above).

349. In order to conclude that the interference with the applicants' right to liberty and security resulting from the review of the applicant's detention status without holding a hearing is "within the extent required by the emergency case" under Article 15 of the Constitution, this interference must not be arbitrary at the outset. On the other hand, in assessing whether the interference in question is "proportionate" or not, the period during which the applicants are deprived of liberty without being brought before a judge, as well as the characteristics of the case leading to the declaration of the state of emergency in our country, and the circumstances emerging upon the declaration of the state of emergency must also be taken into consideration.

350. In the course and aftermath of coup attempt of 15 July, upon the instructions of the chief public prosecutor's office, investigations were launched throughout the country against 162.000 persons who involved in the coup attempt or who were considered to be in connection with the FETÖ/PDY even if not directly involved in the coup attempt. In this scope, over 50.000 persons were detained on remand whereas over 47.000 persons were released subject to conditional bail (see § 52 above). The investigation authorities faced with the necessity to immediately initiate and conduct investigations against tens of thousands of suspects upon such an unexpected situation, namely the coup attempt. Given also the characteristics of the FETÖ/PDY considered to be the perpetrator of this attempt (confidentiality, cell-type structuring, infiltrating public institutions and organizations, attributing holiness to itself, and acting on the basis of obedience and devotion), it is clear that these investigations are far more difficult and complex than other criminal investigations. In this respect, especially courts and the investigation authorities are to manage an unforeseeable heavy workload. Furthermore, on 16 July just after the

suppression of the coup attempt, the HCJP decided, at the first stage, suspension of 2.745 judges and prosecutors from their office for having connection with the FETÖ/PDY, and at the subsequent stages, over 4.000 members of the judiciary were dismissed from office (see § 57 above).

351. Certain measures were employed following the coup-attempt, especially in order to overcome the serious situation encountered by the investigation authorities and judicial bodies and to maintain proper functioning of the investigation and/or prosecution proceedings. Therefore, internship periods of candidate judges and prosecutors were shortened and they were promoted for office immediately, in order to back up number of judges and prosecutors on duty. Moreover, necessary administrative actions were taken for the recruitment of candidate judges and prosecutors, and the judges and prosecutors who were previously retired or resigned were enabled to be reinstated.

352. Furthermore, certain amendments have been made to procedural rules with respect to the investigations and prosecutions for certain offences (especially offences associated with the coup-attempt, the FETÖ/PDY, and terrorism), effective throughout the state of emergency. Accordingly, Article 6 of the Decree Law no. 667 issued under the state of emergency enables that during the state of emergency, the detention reviews, examinations of objections to detention and requests for release shall be assessed and concluded over the case-file with respect to the offences defined in Parts 4, 5, 6 and 7 of the Chapter 4 of the Volume 2 of Law no. 5237, the offences falling into the scope of Law no. 3713, and the collective offences. Besides, Article 3 of the Decree Law no. 668 sets out that if the magistrate judge's office or the court shall revise its decision if it accepts the objection, otherwise, it shall refer the objection within a maximum period of ten days to the competent court to examine the objection. It is also set forth that, detention reviews and requests for release shall be assessed and concluded over the case-file within time intervals of maximum 30 days (see § 129-130 above).

353. Accordingly, the detainees' right to recourse to a judicial authority for ensuring their release has been maintained in time of emergency case.

In this respect, pursuant to Article 104 § 1 of Law no. 5271, all detainees including those who have been detained on remand within the scope of the investigations conducted into the incidents leading to declaration of the state of emergency may request to be released at any stage of the investigation and prosecution. However, pursuant to Article 3 of the Decree Law no. 668, requests for release made by those detained on remand due to certain offences shall be concluded over the case-file within periods of maximum thirty days, along with detention reviews.

354. Moreover, during this period, detention reviews have continued to be examined *ex officio* in respect of all suspects or accused persons including those detained on remand within the scope of the investigations conducted into the incidents leading to the declaration of the state of emergency, within a period of maximum 30 days, pursuant to Article 108 of Law no. 5271. Such reviews are conducted by magistrate judge at the investigation phase by and the competent court at the investigation phase. Further, it is possible to object to the decisions on detention, to dismissals of the request for release, and to continuation of detention during the state of emergency. Besides, during the state of emergency, review of detention or objection to the detention may be concluded over the case-file pursuant to Article 6 of the Decree Law no. 667.

355. The offence of "attempting to overthrow the constitutional order" on the basis of which the applicants have been detained and other offences maintained to be committed by the applicants in the indictment (attempting to overthrow the GNAT or to prevent it from performing its duties, attempting to overthrow the Government of the Republic of Turkey or to prevent it from performing its duties, being a member of an armed terrorist organization) are set out in the Volume II, Chapter IV, Part V of Law no. 5237 and also among the offences enumerated in Articles 6 and 3 of the Decree Laws no. 667 and 668. Accordingly, the continuation of the applicants' detention over the case-file without holding a hearing has been ordered in line with the legal arrangements introduced by the above-mentioned Decree Laws.

356. Having regard to the severe workload of unforeseeable nature to which the investigation authorities and judicial organs have been exposed after the coup attempt, the suspension and dismissal of a significant part of the judges and prosecutors who would tackle with this workload and ensure proper functioning of the legal system within the country (about 1/3 of all members of the judiciary) by the HCJP for being in relation and connection with the FETÖ/PDY, and the dismissal of a significant part of the assistant courthouse personnel and law enforcement officers from public office who would take part in the investigations and prosecutions including those concerning the coup attempt or the FETÖ/PDY, it must be acknowledged that carrying out detention reviews of those detained for having committed certain offences over the case-file without holding a hearing is a proportionate measure which is required by the exigency of the state of emergency.

357. Finally, a certain part of the guardians and gendarmerie personnel in charge for ensuring safety and protection of the detainees and a significant part of the security officers who may be assigned, when necessary, to ensure safety of detainees were dismissed or suspended from public office for having a link with the FETÖ/PDY. It is also obvious that the penitentiary institutions are operating beyond capacity as tens of thousands of suspects have been detained as a result of the investigations conducted into the coup attempt and the FETÖ/PDY. As a matter of fact, many inmates have been released in progress of time upon changes made in the time periods for transfer to an open penitentiary institution and for entitlement of conditional release and probation, and, thereby, the number of inmates staying in the closed penitentiary institutions has been decreased. Given all of these facts, it must not be ignored that if thousands of persons who are detained due to offences especially those concerning the coup attempt, the FETÖ/PDY and terrorism and a great majority of whom are held in penitentiary institutions located in provincial centres are periodically taken to courthouses or places where they could be heard via the SEGBIS (the Audio and Video Information System) for their detention reviews, there may occur extremely serious security problems. In this respect, conducting detention reviews in respect of the offences in question without holding a hearing may be considered as a genuine necessity for maintaining public security in time

of the state of emergency declared following the coup attempt of 15 July, which constituted a severe attack to the existence of the state and the society and to the national security.

358. Accordingly, it has been concluded that continuation of the detention of the applicants, who have been detained on remand with the allegation of having committed an offence within the scope of the coup attempt, by virtue of decisions rendered over detention reviews made over the case-file without holding a hearing during a period of 8 months and 18 days amounts to a measure "proportionate to the extent required by the emergency case".

359. For these reasons, the interference, which is contrary to the safeguards set out in Article 19 § 8 of the Constitution for the individual's right to liberty and security, complies with the criteria set in Article 15 of the Constitution which provides that fundamental rights and freedoms may be suspended or restricted in time of "state of emergency".

IV. JUDGMENT

For these reasons, the Constitutional Court unanimously held on 20 June 2017 that

A. 1. The alleged violation of the right to liberty and security due to unlawful detention be DECLARED INADMISSIBLE, in respect of all applicants, for *being manifestly ill-founded.*

2. The alleged violation of the right to liberty and security due to unreasonable length of detention be DECLARED INADMISSIBLE, in respect of all applicants, for *being manifestly ill-founded.*

3. The alleged violation of the right to liberty and security due to the restriction on access to case-file by the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy, be DECLARED INADMISSIBLE for *being manifestly ill-founded.*

The alleged violation of the right to liberty and security due to conducting the review of the detention without holding a hearing be DECLARED ADMISSIBLE, in respect of the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy.

B. There was no breach of the right to liberty and security of the applicants Birol Baki, Burhan Güneş and Salih Mehmet Dağköy, considered in conjunction with Article 15 of the Constitution,

C. The court expenses be COVERED by the applicants.

D. A copy of this judgment be SUBMITTED to the Ministry of Justice.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

FURKAN OMURTAG

(Application no. 2014/18179)

25 October 2017

On 25 October 2017, the First Section of the Constitutional Court found a violation of the right to liberty and security safeguarded by Article 19 of the Constitution in the individual application lodged by *Furkan Omurtag* (no. 2014/18179).

THE FACTS

[8-40] The applicant, who was a minor at the relevant time, was detained on remand for attempted theft. The applicant's objections against his detention were dismissed by the Magistrate Judge's Offices.

The chief public prosecutor's office indicted the applicant for malicious damage of property, criminal trespass to a residence, and attempted theft.

After having lodged an individual application, the applicant was released by the competent criminal court. At the end of the trial, the court imposed a fine on him for theft of the material within the fixtures of a building, criminal trespass to a residence, and malicious damage of property.

V. EXAMINATION AND GROUNDS

41. The Constitutional Court, at its session of 25 October 2017, examined the application and decided as follows.

A. Alleged Violation of the Applicant's Right to Protect His Corporeal and Spiritual Existence

1. Alleged Unlawfulness of the Applicant's Arrest and Police Custody

a. The Applicant's Allegations and the Ministry's Observations

42. The applicant maintained that he had been mentally depressed for being placed, upon being detained on remand, in the same penitentiary institution with the person who had sexually abused him.

43. In its observations, the Ministry indicated that the applicant had been placed, for a week, in the same penitentiary institution with the

person having sexually abused him; however, they had never been in the same place during that period; and that paying regard to the applicant's particular situation in question, the administration of the penitentiary institution had ensured his transfer to another penitentiary institution.

44. In his counter-statements against the Ministry, the applicant maintained that his particular situation for being a minor and having experienced sad events had not been taken into consideration; and that even the idea of staying in the same penitentiary institution with the person having sexually abused him had been considerably sorrowful for him.

b. The Court's Assessment

45. As required by the subsidiary nature of the individual application mechanism, for an individual application to be lodged with the Constitutional Court, the ordinary legal remedies must be primarily exhausted. The applicant is to raise, primarily and in due course of time, his complaints –subject matter of the individual application– before the competent administrative and judicial authorities, to submit the relevant information and evidence to these authorities, as well as to pay due regard to pursue his case and application during this process (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17).

46. The applicant filed any complaint regarding his above-mentioned allegation, neither in writing nor orally, with the administration of the penitentiary institution where he was kept. Nevertheless, the relevant penitentiary institutions' administrations identified this situation and took the necessary steps to that end.

47. It has been observed that convicts and detainees placed in penitentiary institutions may primarily file a challenge, with the execution judges, against the acts and actions of the penitentiary institution's administration and then challenge the decisions taken by the execution judge before assize courts. However, given the fact that the applicant failed to have recourse to these remedies, it appears that he lodged an individual application without exhausting the available judicial remedies.

48. For these reasons, this part of the application was declared inadmissible for *non-exhaustion of available remedies* without any further examination as to the other inadmissibility criteria.

B. Alleged Violation of the Right to Personal Liberty and Security

1. Alleged Examination of Challenge to Detention without a Hearing

a. The Applicant's Allegations and the Ministry's Observations

49. Stating that the challenge to his detention ordered on 1 October 2014 had been examined over the case-file and without a hearing, the applicant maintained that his right to personal liberty and security had been violated.

50. Making a reference to the previous decisions rendered by the Court and the Ministry's previous observations submitted in this respect, the latter submitted no submissions for the present case.

b. The Court's Assessment

51. Article 19 § 8 of the Constitution reads as follows:

> *"Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful".*

52. This provision entitles a person deprived of his liberty for being arrested or detained on remand to bring his complaints concerning the procedural and substantive circumstances of the alleged unlawfulness of deprivation of his liberty. The assessment to be made by the competent judicial authority with respect to the complaints raised by the person deprived of his liberty must be of judicial nature and afford appropriate safeguards for the challenges raised by him. Besides, this provision safeguards the right to request effective review of the lawfulness of detention through hearings held in the presence of a judge as well as

the right to request speedy determination by the competent authorities whether detention measure is necessary (see *Firas Aslan and Hebat Aslan*, no. 2012/1158, 21 November 2013, §§ 64-66).

53. Pursuant to Article 19 § 8 of the Constitution, it is not necessary to hear the applicant in review of every challenge to the courts' decisions ordering continued detention. However, the detainee is entitled to request to be heard at reasonable intervals. During the judicial review of detention, the principles of "adversarial proceedings" and "equality of arms" must be complied with (see *Firas Aslan and Hebat Aslan*, § 68).

54. In view of Article 19 § 8 of the Constitution, holding a hearing in case of every challenge to detention order, including those in relation to the speedy conclusion of detention of a person deprived of his liberty, would deactivate the criminal justice system. Therefore, the obligations as to trial procedure, which are set out in Article 19 § 8 of the Constitution, do not require to hold a hearing in every challenge to be raised against detention unless there is a special circumstance that would make it necessary to hold a hearing (see *Firas Aslan and Hebat Aslan*, § 73).

55. In the present case, the applicant was detained on remand, by the Ceyhan Magistrate Judge through its detention order of 19 September 2014, in the presence of both the applicant and his lawyer. On 26 September 2014, the applicant's continued detention was ordered. His challenge to the detention order was dismissed by the Ceyhan Assize Court on 1 October 2014. Therefore, it cannot be regarded as a requisite to hold a hearing for the examination of the challenge by the Ceyhan Assize Court on 1 October 2014, since a reasonable period of twelve days had elapsed since the former examination made by the Ceyhan Magistrate Judge on 19 September 2014. It is explicit that examination of the challenge -which was conducted twelve days after the decision ordering the applicant's continued detention following his and his lawyer's oral defence submissions- without a hearing would not fall foul of Article 19 § 8 of the Constitution.

56. For these reasons, this part of the application was declared inadmissible *for being manifestly ill-founded*.

2. Alleged Examination of the Challenge to Detention by Another Magistrate Judge

a. The Applicant's Allegations and the Ministry's Observations

57. Asserting that the challenge to his detention had been examined by a judge of the same instance with the judge ordering his detention, the applicant maintained that Article 13 of the European Convention on Human Rights ("the Convention") had been breached.

58. In its observations, the Ministry indicated that the examination made by the Osmaniye Magistrate Judge could not be said to be ineffective in that this tribunal was authorized to make a judicial review of the challenged decision and to decide on the merits of the challenge.

59. In his counter-statements, the applicant did not submit any explanation as to this consideration.

b. The Court's Examination

60. As Article 19 § 8 of the Constitution is *lex specialis* in relation to Article 40 of the Constitution (Article 13 of the Convention), this complaint of the applicant must be also examined within the scope of Article 19 § 8 of the Constitution where the right to personal liberty and security is enshrined.

61. Article 19 § 8 entitles every person deprived of his liberty for any reason to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful. The above-mentioned provisions enshrined in the Constitution and the Convention afford a safeguard for the examination of the request for release made, or the decisions ordering continued detention issued, during the proceedings conducted by a court upon the challenge to the lawfulness of detention (see *Firas Aslan and Hebat Aslan*, § 30).

62. Challenges to the decisions rendered by the magistrate courts established by virtue of Article 48 of Law no. 6545 and dated 18 June 2014 shall be examined, in case of existence of more than one magistrate judges in the same venue, by the magistrate court with the consecutive number pursuant to Article 268 § 3 of Law no. 5271.

63. The Court previously dealt with the request for annulment of the provision of law according to which the authority to review the challenges to the decisions issued by the magistrate judges is still the same tribunals and ultimately dismissed it on the grounds that there was no constitutional norm which necessitated the examination of challenges to the magistrate judges' decisions by a higher tribunal or any other court, that in cases where necessitated by workload of the courts bearing the name of a province or district, several "chambers" established within these courts could not be regarded as a tribunal of the same instance in terms of the proceedings conducted and examination of the appeal requests; that the magistrate courts designated as the review authority of the challenges pursuant to Article 268 § 3 of Law no. 5271 were empowered to review the challenged decision and to decide on the merits of the challenge; and that therefore, the prescribed appeal remedy was effective (see the Court's judgment no. E. 2014/164, K. 2015/12, 14 January 2015).

64. The basic principle inherent in the appeal remedy of the criminal trial procedure is to ensure effective judicial review of the punitive decisions by a separate authority which is independent of the court rendering the initial decision. It is therefore not necessary that such an authority is a tribunal of higher jurisdiction or a superior tribunal. Magistrate judges designated, by virtue of Article 268 § 3 of Code no. 5271 which concerns the appeal remedy, as the review authority of challenges are empowered to review the challenged decision and adjudicate on the merits thereof. Therefore, the available appeal remedy appears to be effective.

65. For these reasons, this part of the application was declared inadmissible for *being manifestly ill-founded*.

3. Alleged Unlawfulness of Detention

a. The Applicant's Allegations and the Ministry's Observations

66. The applicant maintained that his detention had been unlawful and disproportionate; that he had been mentally depressed for having being sexually abused; that no regard had been paid to his special status in spite of being a minor; that the charges against him had not been of a

severe nature which would necessitate his detention; that his challenges to his continued detention had remained inconclusive; that his release had not been effected although he should not have been indeed detained on remand; and that he had been wrongfully kept in detention. He accordingly alleged that his rights to personal liberty and security as well as to a fair trial had been violated.

67. In its observations, the Ministry indicated that the grounds for the applicant's detention were relevant and sufficient; that there was no legal obstacle to his detention in view of the imputed offence; and that there existed strong suspicion of guilt on his part.

68. The applicant noted in his counter-statements against the Ministry's observations that there was no risk of his fleeing and tampering with the evidence; and that his status as a minor as well as his special circumstance should have been taken into consideration.

b. The Court's Assessment

i. Admissibility

69. The alleged unlawfulness of detention was not manifestly ill-founded and there were no other grounds for its inadmissibility. Accordingly, it was declared admissible.

ii. Merits

(1) General Principles

70. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, certain circumstances under which individuals may be deprived of liberty are set forth, provided that the conditions of detention must be prescribed by law. Therefore, freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

71. Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the

criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53 and 54).

72. In Article 13 of the Constitution, it is set forth that fundamental rights and freedoms may be restricted only by law. Article 19 of the Constitution also provides for that terms and conditions under which the individual's right to personal liberty and security may be restricted are to be prescribed by law. Therefore, detention amounting to an interference with the individual's personal liberty must have a legal basis pursuant to Articles 13 and 19 of the Constitution (see *Murat Narman*, § 43; and *Halas Aslan*, § 55).

73. As set out in Article 19 § 3 of the Constitution, individuals under a strong suspicion of criminal guilt may be apprehended by decision of a judge solely for the purposes of preventing the risk of their fleeing, destroying or altering the evidence as well as in other circumstances prescribed by law and necessitating detention (see *Halas Aslan*, § 57).

74. Accordingly, detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, the accusation needs to be supported with convincing evidence likely to be regarded as strong. Nature of the facts likely to be regarded as convincing evidence mainly depends on the particular circumstances of every concrete case (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013, § 72).

75. Besides, it is set forth in Article 19 § 3 of the Constitution that a detention order may be issued for the purposes of preventing the risk of "fleeing" or "destroying or altering the evidence" (see *Halas Aslan*, § 58).

76. On the other hand, Article 13 of the Constitution provides for that any restriction with fundamental rights and freedoms cannot fall foul of

the principle of "proportionality". The phrase *"necessitating detention"* included in Article 19 § 3 of the Constitution also points out the requirement that detention must be proportionate (see *Halas Aslan*, § 72).

77. This principle is formed of three sub-principles, namely "sufficiency", "necessity" and "proportionality". "Sufficiency" means that the envisaged interference must be sufficient for attaining the desired aim; "necessity" means that the interference must be necessary for the desired aim, in other words, it is not possible to attain the said aim through a less severe interference; and "proportionality" means a reasonable balance must be struck between the interference and the aim sought to be attained (see the Court's judgment no. E.2016/13 K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

78. One of the factors to be taken into consideration is that the detention measure is to be proportionate to the gravity of the imputed offence as well as to severity of the sanction to be imposed. As a matter of fact, Article 100 of Code no. 5271 indicates that a detention order cannot be issued if the gravity of the act is not in proportion with the expected penalty or security measures to be taken (see *Halas Aslan,* § 72).

79. Besides, detention measure may be said to be proportionate only when the other preventive measures alternative to detention are not sufficient. Accordingly, in the event that requirements of conditional bail -having a lesser impact on fundamental rights and freedoms as compared to detention- are sufficient for the legitimate aim sought to be achieved, detention measure must not be applied, which is also pointed out by Article 101 § 1 of Code no. 5271 (see *Halas Aslan*, § 79).

80. In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations.

81. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them.

The Constitutional Court's 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). As a matter of fact, it is set out in Article 101 § 2 of Code no. 5271 that in detention orders, evidence indicating strong suspicion of guilt, existence of grounds for detention and the proportionality of the detention measure will be justified with concrete facts and clearly demonstrated (see *Halas Aslan*, § 75).

82. As regards the detention of minors, it must be taken into consideration in the light of the relevant international conventions and instruments that detention is a measure of last resort in respect of minors, and if it is inevitable to have recourse to this measure, it must be discontinued in the shortest time possible. Nevertheless, this principle cannot be construed that the minors can in no way be detained. As also underlined in a Recommendation adopted by the Committee of Ministers of the Council of Europe addressed to the member states, detention measure may be applied in exceptional cases where minors who are of relatively older age have committed very serious offences.

(2) Application of Principles to the Present Case

83. The applicant was detained on remand, by virtue of Article 100 of Code no. 5271, for attempted theft. In this respect, the interference with his right to personal liberty and security on account of his detention had a legal basis.

84. According to the findings of the investigation authorities, at the time of incident the applicant trespassed on the yard of a three-storey building for committing a theft and broke door-lock of a storeroom located within the yard by a waterpipe wrench, which was then secured by the evidence unit. He was then caught red-handed while attempting to run away. Therefore, it is undoubted that there is strong suspicion of guilt in the present case.

85. Also given the fact that the applicant was caught red-handed, it has been observed that the risk of fleeing on the part of the applicant, which was relied on by the magistrate judge ordering his detention, had a factual basis.

86. Besides, it must be ascertained whether the applicant's detention was proportionate. In determining whether a detention measure is proportionate within the meaning of Articles 13 and 19 of the Constitution, all particular circumstances of the present case must be taken into consideration. In this sense, particular regard must be had to the applicant's being a minor at the relevant time.

87. In the present case, the detention order against the applicant did not involve an assessment revealing that his status as a minor had been taken into consideration. It cannot be therefore concluded that in ordering the applicant's detention, the principles enshrined in the international conventions and instruments were complied with, and in finding the alternative preventive measures insufficient, due regard was paid to the applicant's age.

88. Besides, considering the fact that minors may be detained only in exceptional cases of very serious offences, the court ordering the applicant's detention failed to demonstrate to what extent the offence of attempted theft was serious in the specific circumstances of the present case. Furthermore, the offence imputed to the applicant cannot be considered to be serious in view of the penalty to be imposed. As a matter of fact, at the end of the trial, merely a fine was imposed on the applicant for the imputed offences. Regard being had to the relevant legal provision providing that in case of failure to pay a fine imposed on a minor, this penalty cannot be converted into imprisonment, the applicant's detention cannot be considered proportionate as to the seriousness of the offence and severity of the sanction.

89. For these reasons, it was concluded that Article 19 § 3 of the Constitution had been violated.

C. Application of Article 50 of Code no. 6216

90. Article 50 §§ 1 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution of the violation and the consequences thereof shall be ruled…"

91. The applicant claimed 500,000 Turkish liras (TRY) for pecuniary damage and TRY 500,000 for non-pecuniary damage.

92. In the present case, it was concluded that the right to personal liberty and security had been violated.

93. The applicant was awarded a net amount of TRY 18,000 for his non-pecuniary damage which could not be redressed by merely finding a violation.

94. In order for the Court to award pecuniary compensation, there must be a casual link between the pecuniary damage allegedly sustained by the applicant and the violation found. As the applicant did not submit any document in support thereof, his claim for pecuniary damage must be rejected.

95. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1.800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 25 October 2017 that

A. 1. The alleged violation of the applicant's right to protect his corporeal and spiritual existence be DECLARED INADMISSIBLE for *non-exhaustion of available remedies*;

2. The alleged review of the challenge to detention without a hearing be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

3. The alleged review of the challenge to detention by an equivalent tribunal be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

4. The alleged unlawfulness of detention be DECLARED ADMISSIBLE;

B. The right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution was VIOLATED;

C. A net amount of TRY 18,000 be PAID to the applicant as non-pecuniary compensation, and other claims for compensation be DISMISSED;

D. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. 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;

F. A copy of the judgment be SENT to the 5th Chamber of the Ceyhan Criminal Court (E. 2014/756, K. 2015/530);

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

AYHAN BİLGEN

(Application no. 2017/5974)

21 December 2017

On 21 December 2017, the Plenary of the Constitutional Court found a violation of the right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution in the individual application lodged by *Ayhan Bilgen* (no. 2017/5974).

THE FACTS

[9-62] The applicant is currently a member of the Parliament. He was elected from the Kars district as the candidate of the HDP on 7 June 2015 and 1 November 2015.

An investigation was conducted against the applicant by the Ankara Chief Public Prosecutor's Office for certain offences allegedly committed by him when he was an MP, and two separate motions were drawn up for lifting his parliamentary immunity.

In the meantime, a provisional article was added to the Constitution for lifting parliamentary immunities for the pending motions (Law no. 6718, Article 1, published in the Official Gazette on 8 June 2016). Provisional Article 20 provides that parliamentary immunity shall not be applicable to motions for lifting immunities submitted to competent authorities by 20 May 2016, the date of adoption of this provisional article by the Grand National Assembly of Turkey ("the GNAT").

Because the investigation files against the applicant also fell within the scope of the provisional article, they were sent to the Ankara Chief Public Prosecutor's Office for necessary action. Afterwards, the investigation files were referred to the Diyarbakır Chief Public Prosecutor's Office ("the Prosecutor's Office") for lack of jurisdiction.

On 29 January 2017, the applicant was taken into custody and subsequently taken to the Prosecutor's Office. On the same date the Prosecutor's Office referred the applicant to the Diyarbakır 4th Magistrate Judge's Office with a request for his detention. The applicant was charged with the call made on behalf of the Central Executive Board –he is a member of this board– through the social media account of the HDP within the scope of "the 6-7 October events". The Judge's Office dismissed

the request for the applicant's detention on the ground that "there was no evidence indicating that the applicant had been involved in posting the tweet nor did he give instruction in this respect, therefore it would not be proportionate to detain him in at this stage".

The Prosecutor's Office contested the decision of the Judge's Office. On 30 January 2017 the Diyarbakır 5th Magistrate Judge's Office accepted the claim of the Prosecutor's Office and held that an arrest warrant would be issued against the applicant.

On 31 January 2017, the applicant appeared before the Diyarbakır 5th Magistrate Judge's Office where his detention was ordered for his alleged membership of an armed terrorist organization.

On 8 February 2017, the Prosecutor's Office indicted the applicant for the offences of membership of an armed terrorist organization, inciting to commit an offence and contravening the Law on Meetings and Demonstrations.

On 8 September 2017, the 5th Chamber of the Diyarbakır Assize Court released the applicant.

The case against the applicant was pending before the first instance court as of the date when the individual application lodged by him was examined by the Constitutional Court.

V. EXAMINATION AND GROUNDS

63. The Constitutional Court, at its session of 21 December 2017, examined the application and decided as follows:

A. Alleged Denial of Access to the Investigation File

1. The Applicant's Allegations and the Ministry's Observations

64. The applicant maintained that he had not been well-informed of the charges against him during his custody and detention processes; that his request to examine the investigation file had been denied on the basis of the restriction order imposed; that the restricted order issued long after the date when the impugned offences had been allegedly committed -just

before his being taken into custody- did not involve any explanation as to how the investigation would be imperilled; and that he could not be aware of the charges against him and the evidence for which he was deprived of the opportunity to make his self-defence on account of the restriction order. According to him, such conduct of the investigation authorities had not complied with the principles of "equality of arms" and "adversarial proceedings" in that this situation had placed him at a disadvantage vis-à-vis the investigation authorities. The applicant accordingly alleged that he had been deprived of the opportunity to effectively challenge his detention and that his right to defence had been restricted, which gave rise to violations of his rights to personal liberty and security as well as to a fair trial.

65. In its observations, the Ministry primarily indicated that the applicant failed to have recourse to the compensation remedy set forth in Article 141 of the Code of Criminal Procedures no. 5271 ("Code no. 5271"), which afforded the persons -who have not been informed of the charges against them- the right to claim compensation. The Ministry further noted that the applicant should have challenged the restriction order by the date when he had been aware of it; however, he did not do so. Besides, it was emphasized that the applicant was informed of the charges against him during his statement-taking process and that the detention order clearly set out the grounds necessitating his detention, which led to the conclusion that the applicant had been indeed aware of the charges.

66. The Ministry finally indicated, with reference to the petition whereby the applicant challenged his detention, that the latter had indeed had the opportunity to refute the allegations.

2. The Court's Assessment

67. Article 19 § 8 of the Constitution titled *"Personal liberty and security"* provides for as follows:

> *"Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful".*

68. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In this respect, the Court found it appropriate to examine the applicant's complaints under this heading within the scope of the right to personal liberty and security enshrined in Article 19 § 8 of the Constitution.

a. General Principles

69. Article 19 § 4 of the Constitution provides for that individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them, and in cases of offences committed collectively, this notification shall be made, at the latest, before the individual is brought before a judge (see *Günay Dağ and Others*, § 168).

70. Besides, it is set forth in Article 19 § 8 of the Constitution that a person deprived of his liberty for any reason is entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding his situation and for his immediate release if the restriction imposed upon him is not lawful. Even if it is not possible to offer all safeguards inherent in the right to a fair trial through the procedure laid down in this provision, all the safeguards applicable to the alleged conditions of detention are to be secured through a judicial decision (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, §§ 122 and 123).

71. In this respect, in examining the requests for continuation of detention or for release, the principles of "equality of arms" and "adversarial proceedings" must be complied with (see *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, § 30). The principle of equality of arms means that parties of the case must be subject to the same conditions in terms of procedural rights and requires that each party be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. The principle of adversarial proceedings requires that the parties must be given the opportunity to have knowledge of and to comment on the case file, thereby ensuring the parties to actively participate in the proceedings (see *Bülent Karataş*, no. 2013/6428, 26 June 2014, §§ 70 and 71).

72. It may be necessary to impose a restriction, during the investigation phase, on access to certain evidence for the purposes of protecting fundamental rights of the third parties, maintaining public interest or securing the methods applied by the judicial authorities in conducting investigation. Therefore, it cannot be said that imposing a restriction on the counsel's power to examine the file in order for the sound conduct of the investigation stage is not necessary for the public order of a democratic society. However, such a restriction on access to the investigation file must be proportionate to the aim sought to be attained and must not hinder the sufficient exercise of the right to defence (see the Court's judgment, E.2014/195 K. 2015/116, 23 December 2015, § 107).

73. Any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness within the scope of Article 19 § 8 of the Constitution. However, Article 19 § 4 of the Constitution does not entail that the information provided to the person arrested or detained in the course of his arrest or detention must embody a full list of imputed offences, in other words, all evidence forming a basis for the charges against him must be notified or disclosed (see *Günay Dağ and Others*, § 175).

74. If the applicant is asked, during the process when his statement or defence submissions are taken, questions about the content of documents access of which has been restricted or he makes a reference to the content of such documents in raising a challenge against his detention order, it must be accepted that the applicant has had access to the documents underlying his detention and had sufficient information about the contents, and thus he has had the opportunity to challenge the reasons of his detention in a sufficient manner. In such a case, the person concerned has sufficient knowledge about the contents of the documents underlying his detention (see *Hidayet Karaca* [Plenary], no. 2015/144, 14 July 2015, § 107).

b. Application of Principles to the Present Case

75. On 27 January 2017, the Diyarbakır 3rd Magistrate Judge imposed restriction on the lawyer's right to examine the investigation file and to

take copies of the documents included therein for the risk of *"imperilling the investigation"* on the part of the applicant, relying on Article 153 § 2 of Code no. 5271.

76. There is no information or document indicating as to whether the restriction order was subsequently lifted. However, it appears that the restriction was automatically discontinued by virtue of Article 153 § 4 of Code no. 5271 by 17 February 2017 when the indictment was accepted by the 5th Chamber of the Diyarbakır Assize Court.

77. The charges against the applicant concern the acts that were specified in the investigation reports issued by the Ankara Chief Public Prosecutor's Office before the introduction of the constitutional amendment on the parliamentary immunity. There is no finding or allegation that the applicant or his lawyers had no access to the investigation reports and investigation files attached thereto prior to the restriction order.

78. Besides, it has been observed that during his questioning by the Diyarbakır Chief Public Prosecutor's Office, the applicant was provided with certain explanations and asked questions about the acts imputed to him. The questions put to him comprehensively contain information and evidence as to the imputed acts. During his questioning, the applicant did not make any explanation as to the charges against him, but his lawyers presented their defence submissions. Besides, the Diyarbakır Chief Public Prosecutor's Office's letter whereby the applicant's detention was requested as well as the Diyarbakır 4th Magistrate Judge's letter whereby his challenge to his detention was dismissed embodied detailed information and assessments as to the imputed acts. Moreover, it has been observed that during his statement-taking process before the Diyarbakır 5th Magistrate Judge, the applicant was provided with an explanation as to the imputed acts, and he exhaustively presented his defence submissions as to the substantive aspect of the impugned incidents. In ordering the applicant's detention, the Diyarbakır 5th Magistrate Judge also made assessments as to the imputed acts. Finally, it appears that in his petition whereby he challenged his detention, the applicant submitted detailed defence arguments by also mentioning material facts concerning the charges. It has been accordingly concluded that both the applicant and his

lawyers had access to the information forming a basis for the charges and his detention.

79. In this respect, regard being had to the fact that basic elements underlying the charges against him as well as information which is essential for the assessment of the lawfulness of his detention were informed to the applicant or his lawyers and that the applicant was provided with the opportunity to submit his counter-statements and objections thereto, it cannot be said that the applicant could not effectively challenge his detention due to the short-term restriction order imposed during the investigation.

80. For these reasons, the Court found the allegation that the applicant could not effectively challenge his detention due to the restriction order inadmissible for *being manifestly ill-founded* as there was no manifest violation in this respect.

B. Alleged Unlawfulness of Detention

1. The Applicant's Allegations and the Ministry's Observations

81. The applicant maintained that he had been unlawfully detained on remand in spite of enjoying parliamentary immunity; that there was no strong suspicion of guilt or no concrete evidence of having committed an offence in the present case; that the investigation authorities failed to investigate whether he had attended the meeting of the Central Executive Committee held at the material time or whether it had been decided at the relevant meeting that a call would be made for committing an offence. He accordingly alleged that his right to personal liberty and security had been violated.

82. Stating that as required by Article 38 § 5 of the Constitution, no one shall be compelled to make a statement that would incriminate himself or to present such incriminating evidence, the applicant considered that his detention for not having made, during his questioning and statement-taking processes, any self-incriminating statement in respect of the impugned explanation posted via twitter was in breach of this safeguard.

83. He also asserted that the decisions whereby his detention was ordered and dismissing his challenge to detention lacked any grounds.

84. Besides, the applicant, underlying that there was no special arrangement which allowed the public prosecutor to challenge the decision on his release -by way of conditional bail-, also maintained that although it was therefore impossible for the prosecutor's office to challenge the said decision, his detention had been ordered on the challenge to an unappealable decision (by the prosecutor's office); and that his detention order was therefore unlawful.

85. He finally asserted that he was detained on remand in order not to prevent offences but to prevent him from engaging in political activities as an MP of the People's Democratic Party (HDP) as well as to silence the opposing party.

86. In its observations, the Ministry referring to the similar decisions of the Constitutional Court and the European Court of Human Rights (the ECHR) on detention indicated that at the time of his detention, there was convincing evidence showing that the applicant might have committed an offence given the grounds specified in his detention order, the acts imputed to him in the indictment and the existing evidence.

87. Notably making reference to the "6-7 October Events", the Ministry stated that showing these events as a ground for strong suspicion in the detention order did not constitute an arbitrariness in the assessment of the evidence.

88. According to the Ministry, which emphasized that the acts imputed to the applicant had been individualized in the detention order and the indictment, the applicant's allegation that he was detained in the absence of any convincing grounds for suspecting that he had committed an offence was unfounded.

89. The Ministry accordingly considered that the applicant's complaints as to the unlawfulness of detention was manifestly ill-founded.

2. The Court's Assessment

90. Article 13 of the Constitution, titled *"Restriction of fundamental rights and freedoms"* reads as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

91. The first paragraph and the first sentence of the third paragraph of Article 19 of the Constitution, titled "*Personal liberty and security*", read 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."*

92. The applicant's allegations under this section must be examined within the scope of the right to personal liberty and security under Article 19 § 3 of the Constitution.

a. Admissibility

93. The allegations under this heading must be declared admissible for not being manifestly ill-founded and there being no other grounds to declare them inadmissible.

b. Merits

i. General Principles

94. In Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2

and 3, certain circumstances under which individuals may be deprived of liberty are set forth, provided that the conditions of detention must be prescribed by law. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

95. Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality (see *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 53 and 54).

96. In Article 13 of the Constitution, it is set forth that fundamental rights and freedoms may be restricted only by law. Article 19 of the Constitution also provides for that terms and conditions under which the individual's right to personal liberty and security may be restricted are to be prescribed by law. Therefore, detention amounting to an interference with the individual's personal liberty must have a legal basis pursuant to Articles 13 and 19 of the Constitution (see *Murat Narman*, § 43; and *Halas Aslan*, § 55).

97. As set out in Article 19 § 3 of the Constitution, individuals under a strong suspicion of criminal guilt may be apprehended by decision of a judge solely for the purposes of preventing the risk of their fleeing, destroying or altering the evidence as well as in other circumstances prescribed by law and necessitating detention (see *Halas Aslan*, § 57).

98. Accordingly, the detention measure can be applied only for "individuals against whom there is a strong indication of guilt". In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, the accusation needs to be supported with convincing evidence likely to be regarded as strong. Nature of the facts likely to be regarded as convincing evidence

mainly depends on the particular circumstances of every concrete case (see *Mustafa Ali Balbay*, no. 2012/1272, 4 December 2013 § 72).

99. In case of an initial detention, it may not be always possible to show the existence of strong suspicion of guilt along with all relevant evidence. This is because, one of the aims of detention is to proceed with the criminal investigation and/or prosecution in order to confirm or refute the suspicions regarding the person concerned (see *Dursun Çiçek*, no. 2012/1108, 16 July 2014, § 87; and *Halas Aslan*, § 76). It is not therefore certainly necessary that there is sufficient evidence at the time of arrest and detention. Accordingly, the facts underlying the suspicions to constitute a basis for the accusation and thereby for detention must not be considered to be at the same level with the facts to be discussed at the subsequent stages of the criminal proceedings and to be a basis for the conviction (see *Mustafa Ali Balbay*, § 73).

100. In cases where serious allegations indicate, or circumstances of the present case reveal, that the acts imputed to suspect or accused fall within the ambit of fundamental rights and freedoms that are sine qua non for a democratic society such as the freedom of expression, the freedom of the press, the right to trade-union freedom and the right to engage in political activities, judicial authorities ordering detention must act with more diligence in determining the strong suspicion of guilt. The question as to whether the duty of diligence has been fulfilled is subject to the Court's review (see *Gülser Yıldırım (2)*, § 116, and for a violation judgment rendered at the end of such review, see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, §§ 72-78; and for inadmissibility decisions, see *Mustafa Ali Balbay*, § 73; *Hidayet Karaca*, § 93; *İzzettin Alpergin* [Plenary], no. 2013/385, 14 July 2015, § 46; and *Mehmet Baransu (2)*, no. 2015/7231, 17 May 2016, §§ 124, 133 and 142).

101. Besides, it is set forth in Article 19 § 3 of the Constitution that a detention order may be issued for the purposes of preventing the risk of "fleeing" or "destroying or altering the evidence". The constitution-maker has also laid down the phrase *"in other circumstances prescribed by law and necessitating detention"* whereby it is implied that the grounds for detention are not limited to those specified in the Constitution and any

such ground other than the specified ones may be regulated only by law (see *Halas Aslan*, § 58).

102. Article 100 of Code no. 5271 embodies the grounds for detention. Accordingly, a detention order may be issued if the suspect or accused flees, absconds or there exists concrete evidence causing suspicion in this respect and if his behaviours cause strong suspicion that he attempts to destroy, conceal or alter the evidence or to exercise pressure on the witnesses, victims or others. This Article also provides a list of offences for which there is a statutory presumption of the existence of grounds for detention (see *Ramazan Aras,* no. 2012/239, 2 July 2013, § 46; and *Halas Aslan*, § 59). However, in case of an initial detention, it may be not be always possible, by its very nature, to concretely specify all facts forming a basis for the grounds for detention prescribed in the Constitution and Law (see *Selçuk Özdemir* [Plenary], no. 2016/49158, 26 July 2017, § 68).

103. On the other hand, Article 13 of the Constitution provides for that any restriction with fundamental rights and freedoms cannot fall foul of the principle of "proportionality". The phrase *"necessitating detention"* included in Article 19 § 3 of the Constitution also points out the requirement that detention must be proportionate (see *Halas Aslan*, § 72).

104. This principle is formed of three sub-principles, namely "sufficiency", "necessity" and "proportionality". "Sufficiency" means that the envisaged interference must be sufficient for attaining the desired aim; "necessity" means that the interference is necessary for the desired aim, in other words, it is not possible to attain the said aim through a less severe interference; and "proportionality" means that a reasonable balance must be struck between the interference and the aim sought to be attained (see the Court's judgment no. E.2016/13 K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

105. One of the factors to be taken into consideration is that the detention measure is to be proportionate to the gravity of the imputed offence as well as to severity of the sanction to be imposed. As a matter of fact, Article 100 of Code no. 5271 indicates that a detention order cannot be issued if the gravity of the act is not in proportion with the expected

penalty or security measures to be taken (see *Halas Aslan*, § 72; and *Gülser Yıldırım*, § 121).

106. Besides, detention measure may be said to be proportionate only when the other preventive measures alternative to detention are not sufficient. Accordingly, in the event that requirements of conditional bail -having a lesser impact on fundamental rights and freedoms as compared to detention- are sufficient for the legitimate aim sought to be achieved, detention measure must not be applied, which is also pointed out by Article 101 § 1 of Code no. 5271 (see *Halas Aslan*, § 79; and *Gülser Yıldırım (2)*, § 122).

107. In every concrete case, it falls in the first place upon the judicial authorities deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, 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)*, § 123).

108. However, it is the Constitutional Court's duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court's 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*, § 79; *Selçuk Özdemir*, § 76; and *Gülser Yıldırım (2)*, § 124). As a matter of fact, it is set out in Article 101 § 2 of Code no. 5271 that in detention orders, evidence indicating strong suspicion of guilt, existence of grounds for detention and the proportionality of the detention measure will be justified with concrete facts and clearly demonstrated (see *Halas Aslan*, § 75; and *Selçuk Özdemir*, § 67).

ii. Application of Principles to the Present Case

109. In the present case, it must be primarily ascertained whether the applicant's detention had a legal basis. His detention was ordered, due to the same act specified in two separate investigation reports, pursuant to Article 100 of Code no. 5271, for his alleged membership of an armed terrorist organization, namely the PKK.

110. The applicant also complained that he had been detained on remand in spite of enjoying parliamentary immunity.

111. Article 83 § 2 *in limine* of the Constitution sets forth that an MP who is alleged to have committed an offence prior or subsequent to election shall not be arrested, questioned, detained or tried "unless the Assembly decides otherwise".

112. However, by Provisional Article 20 added to the Constitution by Article 1 of Law no. 6718, it is set forth that motions concerning the lifting of parliamentary immunity which have been submitted, to the Ministry of Justice, the Prime Ministry, the Office of the Speaker of the Grand National Assembly of Turkey ("GNAT or Assembly") or to the Office of the Joint Committee composed of the members of the Committees on the Constitution and on Justice by 20 May 2016 -the date of adoption of this article in the Grand National Assembly of Turkey- shall be exempt from the parliamentary immunity enshrined in Article 83 § 2 *in limine* of the Constitution.

113. A request for annulment of the above-cited legal arrangement was filed with the Court by 70 MPs including the applicant, maintaining that "this arrangement was in the form of an Assembly's resolution on lifting of the parliamentary immunity". The Court concluded that it was not a resolution as regards the lifting of parliamentary immunity under Article 85 of the Constitution but a constitutional amendment. It also dismissed the request due to the failure to pursue the procedure as regards the request for annulment of constitutional amendments (see the Court's judgment no. E.2016/54 K.2016/117, 3 June 2016, §§ 4-15).

114. Regard being had to the Constitutional Court's abovementioned decision, it appears that in the present case, no decision for lifting the applicant's parliamentary immunity has been taken; but an exemption to parliamentary immunity has been introduced by the constitutional amendment with respect to the files at certain stages. As a matter of fact, the applicant raised no allegation that the offences imputed to him fell outside this exemption.

115. As a matter of fact, in ordering the applicant's detention, the Diyarbakır 5th Magistrate's Judge considered that *"By virtue of Provisional*

Article 20 added to the Turkish Constitution by Article 1 of Law no. 6718, the imputed offences are not within the scope of parliamentary immunity, and therefore investigation and prosecution into these acts may be conducted".

116. Therefore, it cannot be said under the specific circumstances of the present case that the applicant's detention cannot be ordered for enjoying parliamentary immunity. Accordingly, the detention measure applied in respect of him had a legal basis (see, in the same way, *Gülser Yıldırım (2)*, § 132).

117. Before proceeding with an assessment as to whether the detention measure revealed to have a legal basis had a legitimate aim and was proportionate, it must be determined whether there was strong indication of having committed an offence, which was the prerequisite of the detention.

118. Having regard to the calls made on behalf of the Central Executive Board through the social media account of the HDP within the scope of "the 6-7 October events" and the applicant's being a member of the Central Executive Board, the Diyarbakır 5th Magistrate Judge's Office ordering the applicant's detention concluded that there was strong criminal suspicion on the part of the applicant for the alleged membership of an armed terrorist organization, the PKK.

119. In its judgment in the case of *Gülser Yıldırım (2)*, the Constitutional Court stated that the investigation authorities had relied on factual and legal grounds while establishing a causal link between the calls made on behalf of the HDP's Central Executive Board and the calls made by the PKK, as well as between the calls and the violent acts in question. In reaching this conclusion, the Court also draw attention to the fact that the applicant had not argued that the call had been made beyond her will; on the contrary, she had made statements that were in support of the call in question (see *Gülser Yıldırım (2)*, §§ 136-139).

120. There is no doubt that a call was made on behalf of the Central Executive Board through the social media account of the HDP by provoking people to pour out into streets and clash with the security forces and that the applicant was a member of the HDP's Central Executive Board. Although

the investigation authorities considered that there was discrepancy, in his defence submissions, as to whether he had indeed attended the HDP's Central Executive Board meeting, the applicant argued at all stages that he had had no will in the impugned call. He also consistently stated that no such decision for making a call had been taken at the meetings he had attended.

121. The investigation authorities have reached no factual finding as to the fact that the applicant was present at the meeting of the Central Executive Board when it was allegedly decided that the call in question would be made; that the applicant made statements in support of this call; and that therefore the call was made within his will. As a matter of fact, the Diyarbakır 4th Magistrate Judge's Office dismissing the initial request for the applicant's detention also relied on the similar grounds in its detention order of 29 January 2017. Nor did the piece of news forming a basis for the investigation authorities' assessment to the contrary include any expression that the applicant had been present at the HDP's Central Executive Board meeting when a call was decided to be made.

122. Accordingly, in view of the available documents, it has been concluded that the investigation authorities failed to demonstrate "a strong indication of guilt" in the present case.

123. In the presence of such a conclusion reached by the Court, no separate examination is required for the applicant's other allegations as to whether the grounds for detention were present, whether the detention order issued against him was proportionate and whether his detention was unlawful.

124. Finally, in view of the detention process and the documents at its hand, the Court has considered that the applicant's complaint of being detained on remand beyond any objectives specified in the Constitution but with a political motive was not sufficiently founded.

125. For the reasons explained above, the Court has found that the applicant's right to personal liberty and security under Article 19 § 3 of the Constitution was violated.

126. In addition, stating that due to his detention, he was restrained from taking part in legislative activities -which was directly related to his right to stand for election- and he was unable to carry out political activities, the applicant alleged, referring to certain precedent judgments of the Court, that his right to stand for election in conjunction with his right to personal liberty and security had also been violated. As regards the applicant's main complaint, the Court found that his right to personal liberty and security had been violated. Therefore, in view of the circumstances of the present case, no separate examination was deemed necessary as to the alleged violation of the applicant's right to stand for election.

C. Application of Article 50 of Code no. 6216

127. Article 50 §§ 1 *in limine* and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

128. The applicant claimed 100,000 Turkish Liras (TRY) for non-pecuniary damage.

129. In the present case, it was held that there had been a violation of Article 19 § 3 of the Constitution due to unlawfulness of the applicant's

detention. As a result of the proceedings, the applicant's release was ordered on 8 September 2017, and he was released on the very same day. Therefore, his detention was discontinued. It has been therefore concluded that there is no other step required to be taken for the redress of the consequences of the violation other than awarding compensation.

130. On account of the interference with the applicant's right to personal liberty and security, he was awarded a net amount of TRY 20,000 for his non-pecuniary damage which could not be redressed by merely finding a violation.

131. The total court expense of TRY 2,257.50 including the court fee of TRY 257.50 and the counsel fee of TRY 1.800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 21 December 2017 that

A. 1. The alleged violation of the right to personal liberty and security due to the restricted access to the investigation file be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

2. The alleged violation of the right to personal liberty and security due to unlawfulness of detention be DECLARED ADMISSIBLE;

B. The right to personal liberty and security safeguarded by Article 19 § 3 of the Constitution was VIOLATED;

C. A net amount of TRY 20,000 be PAID to the applicant as non-pecuniary compensation, and other claims for compensation be DISMISSED;

D. The total court expense of TRY 2,057.50 including the court fee of TRY 257,50 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. 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;

F. A copy of the judgment be SENT to the 5th Chamber of the Diyarbakır Assize Court (E. 2017/658);

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

FREEDOMS OF EXPRESSION, THE ARTS AND THE PRESS (ARTICLES 26, 27 AND 28)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

AHMET TEMİZ (6)

(Application no. 2014/10213)

1 February 2017

On 1 February 2017, the Second Section of the Constitutional Court found no violation of the freedom of receiving information or ideas safeguarded by Article 26 of the Constitution in the individual application lodged by *Ahmet Temiz* (no. 2014/10213).

THE FACTS

[7-18] The applicant is a convicted person sentenced to aggravated life imprisonment for attempting to withdraw a part of the territory from the State's administration and held in the Ankara High Security Penitentiary Institution. He was a subscriber to a national newspaper, namely *Ülkede Özgür Gündem Gazetesi*, in which certain incidents taking place in the penitentiary institution were mentioned and certain charges against the director of the penitentiary institution were raised. The Education Board of the Penitentiary Institution did not find it appropriate to deliver the impugned part of the said newspaper to the applicant as this piece of news distorted the decisions taken by the administration of the penitentiary institution, contained false and wrong information and designated officers -notably the director- as a target.

The applicant filed a complaint with the incumbent execution judge against the decisions whereby his access to certain news was denied. However, his complaint was dismissed as the practice in question was neither in breach of the rules of the penitentiary institution nor contrary to legislation or law.

He then appealed the execution judge's decision before the relevant assize court which also dismissed his appeal request as the decision was in accordance with the procedure and law. The applicant subsequently lodged an individual application.

V. EXAMINATION AND GROUNDS

19. The Constitutional Court, at its session of 1 February 2017, examined the application and decided as follows.

A. Request for Legal Aid

20. It has been understood that the applicant has been unable to afford to pay the litigation costs. Therefore, in accordance with the principles set out in *Mehmet Şerif Ay* judgment of the Constitutional Court (no. 2012/1181, 17 September 2013), in order not to cause financial difficulties to the applicant, his request for legal aid should be accepted for not being manifestly ill-founded.

B. Alleged Violation

1. The Applicant's Allegations

21. The applicant claimed that the newspaper to which he was a subscriber was delivered to him by removing a news item, which constituted an arbitrary act. He maintained that there were no distortions in the news stating the real events that occurred in the penitentiary institution. He alleged that the director of the penitentiary institution was responsible for all the events and that the purpose of the administration was to conceal what had happened. In this respect, the applicant claimed that Articles 2, 10, 26 and 28 of the Constitution were violated.

2. The Court's Assessment

22. The Constitutional Court is not bound by the legal characterization of the facts by the applicant, but it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court considered that the applicant's allegation must be examined within the scope of freedom of receiving information or ideas which is one of the aspects of the freedom of expression safeguarded by Article 26 of the Constitution.

23. Relevant part of Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*" provides as follows:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…*

The exercise of these freedoms may be restricted for the purposes of … public order, public safety, … preventing crime, … protecting … rights and private and family life …, or protecting … proper functioning …

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

a. Admissibility

24. There is no ground to declare inadmissible the present application which is not manifestly ill-founded. Therefore, it must be declared admissible.

b. Merits

i. Existence of the Interference

25. The applicant, a convict in the penitentiary institution, was delivered the newspaper to which he was a subscriber after its certain parts had been removed, which clearly constituted an interference with his freedom of receiving information or ideas, and therefore his freedom of expression.

ii. Whether the Interference Constituted a Violation

26. Article 13 of the Constitution provides as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution ... These restrictions shall not be contrary to … the requirements of the democratic order of the society … and the principle of proportionality."

27. The abovementioned interference will lead to a violation of Article 26 of the Constitution, unless it fulfils the conditions set forth in Article 13 thereof.

28. Therefore, it must be determined whether the interference complied with the requirements of being prescribed by law, being justified by one or more of the grounds stipulated in Article 26 § 2 of the Constitution and not being contrary to the requirements of the democratic order of the society

and the principle of proportionality, which are stipulated in Article 13 of the Constitution and applicable to the present case.

(1) Lawfulness

29. It has been concluded that Article 62 of Law no. 5275, which formed a basis for the interference, satisfied the criterion of being restricted by law.

(2) Legitimate Aim

30. Certain parts of the newspaper were not delivered to the applicant for the purposes of protecting the lives of individuals, maintaining the order and security of the penitentiary institution and preventing crimes. It has been concluded that the said interference pursued a legitimate aim within the meaning of Article 26 § 2 of the Constitution.

(3) Compliance with the Requirements of a Democratic Society and the Proportionality

31. The concept "requirements of a democratic society" entails that the restrictions on freedom of expression must be compulsory or exceptional measures and appear to be the last resort or the last measure to be taken. In order for a restriction to be considered as one of the requirements of a democratic social order, it must serve a pressing social need in a democratic society. Accordingly, a restrictive measure cannot be considered to comply with the requirements of a democratic social order, unless it fulfils a social need or it is the last resort (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, $ 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51).

32. The question whether any restriction on fundamental rights and freedoms –in addition to being necessary in a democratic social order- is proportionate and allows for the minimum interference with fundamental rights and freedoms must also be examined. Therefore, in terms of the interferences with freedom of expression, it must be examined whether the said interference chosen to achieve the intended purpose was appropriate, necessary and proportionate (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8

April 2015, § 63; *Bekir Coşkun* §§ 53 and 54; for detailed information on the principle of proportionality, see also *Abdullah Öcalan* [Plenary], 2013/409, 25 June 2014, §§ 96-98; *Sebahat Tuncel*, no. 2012/1051, 20 February 2014, § 84; *Tansel Çölaşan*, §§ 54 and 55; and *Mehmet Ali Aydın*, §§ 70-72).

33. Given the particular circumstances of the present case, the applicant is a convict held in a high security penitentiary institution. Convicts and detainees, as a rule, enjoy all fundamental rights and freedoms safeguarded by the Constitution (see *Mehmet Reşit Arslan and Others*, no. 2013/583, 10 December 2014, § 65; and *Hüseyin Sürensoy*, no. 2013/749, 6 October 2015, § 44).

34. It is laid down in Article 26 § 1 of the Constitution that everyone has freedom of expression. As a consequence of this, the Court has underlined in its many judgments that the freedom of expression of convicts and detainees is also under the protection the Constitution. The Court has ruled that the access by convicts and detainees to periodicals or non-periodicals shall be protected within the scope of the freedom of expression, as a concrete reflection of the freedom of access to information and opinions (see *Kamuran Reşit Bekir*, § 43; *Hüseyin Sürensoy*, § 44; and *İbrahim Bilmez*, no. 2013/434, 26 February 2015, § 74).

35. In addition, as an inevitable consequence of being held in prison, certain rights of prisoners may be restricted in cases of admissible requirements such as preventing crimes and maintaining discipline in order to ensure security and order in prisons. However, even in such cases, any restriction on the rights of convicts and detainees must be proportionate (see *Kamuran Reşit Bekir*, § 44; and *Hüseyin Sürensoy*, § 43). In this context, in cases similar to the present application, the duty incumbent on public authorities and courts is to strike a fair balance between the freedom of expression of prisoners and the requirement of maintaining security, discipline and order in the penitentiary institutions.

36. Main issue to be discussed in the present case is whether the administration and inferior courts could plausibly indicate that the grounds relied on in their decisions that gave rise to the impugned interference complied with the "requirements of a democratic society"

and the principle of "proportionality" in terms of the restriction on the freedom of expression (see *Bekir Coşkun*, § 56; *Abdullah Öcalan*, § 98; and *Tansel Çölaşan*, § 56).

37. In cases where aim of the interference with the freedom of expression is ensuring security, discipline and order of a penitentiary institution as in the present case, inferior courts must assess whether the impugned expressions contain any false and wrong information or threat and insult which imperil the security and order of the penitentiary institution, designate officers as a target, enable communication for organizational purposes among members of terrorist organizations, benefit-oriented criminal organizations or other criminal organizations, and create panic among people and institutions (see *Bejdar Ro Amed*, no. 2013/363, 16 April 2015, § 80; and for a judgment finding a violation due to the failure of the administrative and inferior courts to make such assessments, see *Kamuran Reşit Bekir*, § 73).

38. In this sense, the Court always underlines that in order to determine whether texts -such as the impugned news- incite to violence taken as a whole, the terms used in these texts and their contexts must be taken into consideration (see *Abdullah Öcalan*, § 108; and *Fatih Taş* [Plenary], no. 2013/1461 12 November 2014, § 100).

39. Prior to the impugned interference, certain incidents took place in the penitentiary institution where the applicant was held for being convicted of a terrorist offence. The request of another inmate, who was also convicted of the same offence, for conditional release was dismissed by the administrative and judicial authorities. Thereafter, 108 other inmates at the penitentiary institution wrote a petition whereby they condemned the dismissal of the request, as well as held the chief director of the institution liable therefore. It has accordingly been revealed that there had already been a tense atmosphere at the penitentiary institution before the said news.

40. During the incidents at the penitentiary institution, certain charges against the director of the penitentiary institution were raised in the above-mentioned newspaper. It must be acknowledged that during a

period when violent acts were taking place in a certain part of the country, designation of an institution director as a target by a newspaper –in respect of which there were strong allegations that it has been directed by the terrorist organization PKK and against which several investigations and prosecutions had been conducted for similar reasons– caused worry and anxiety to the officers of the penitentiary institution. Besides, the news was formulated with expressions in imperative mood, which may be constructed as a threat in Turkish.

41. In determining the probability whether a written text would imperil safety of individuals and security of penitentiary institution, the officers of the penitentiary institution and inferior courts having the first-hand information about the incident undoubtedly have a wider margin of appreciation (for assessments as to the margin of appreciation afforded to the officers of penitentiary institutions in similar cases, see *Özkan Kart*, no. 2013/1821, 5 November 2014, § 51).

42. The Court's duty is to oversee that the impugned interference was made on the basis of the acceptable assessment of the relevant facts and was not arbitrary. Regard being had to the fact that some incidents with respect to the matter discussed in the news had previously taken place in the same penitentiary institution, it has been considered that wording of the newspaper and its style of discussing the matter naturally caused worry and anxiety to officers of the penitentiary institution where convicts of terrorist offences were held.

43. In examining the individual applications, the Court must take into consideration the difficulties encountered in fighting against terrorism as well as the conditions in respect thereof. In certain exceptional cases where tension is high and security of penitentiary institution is at stake, it is acceptable that the administration may take the measures necessitated by the situation. Accordingly, it has been concluded that the interference with the applicant's freedom of expression, for preventing the officers from being a target and maintaining security of the penitentiary institution, was necessary in a democratic society.

44. It must be considered that the applicant was denied access to merely one piece of news published in the newspaper. There was no other

interference with his access to the remaining part of the relevant issue or next issues of the newspaper. It has been therefore considered that the impugned restriction was a proportionate measure which constituted the minimum interference, necessary for the purposes of public interest, with the freedom of expression.

45. For the reasons explained above, the Court found no violation of the freedom of receiving information or ideas which falls under the scope of the freedom of expression safeguarded by Article 26 of the Constitution.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 1 February 2017 that

A. The request for legal aid be ACCEPTED;

B. The alleged violation of the freedom of receiving information or ideas within the scope of the freedom of expression be DECLARED ADMISSIBLE;

C. The freedom of receiving information or ideas safeguarded by Article 26 of the Constitution was NOT VIOLATED;

D. A copy of the judgment be SENT to the Ministry of Justice; and

E. The court fee of 206.10 Turkish liras (TRY) -from which the applicant was temporarily exempted- be COLLECTED from the applicant by virtue of Article 399 § 1 of the Code of Civil Procedure dated 12 January 2011 and no. 6100.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ORHAN PALA

(Application no. 2014/2983)

15 February 2017

On 15 February 2017, the Second Section of the Constitutional Court found violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution in the individual application lodged by *Orhan Pala* (no. 2014/2983).

THE FACTS

[8-25] The applicant is a journalist and the chief editor of the website, www.borsagundem.com, through which live broadcasts and news concerning capital markets are made and periodic articles are published.

On 5 November 2012, the website managed by the applicant published a piece of news concerning two persons who are shareholders and board members of some companies shares of which were traded at the İstanbul Stock Exchange and also owners of an intermediary firm (the complainants).

In the news in question, it is noted that the complainants were previously convicted of manipulation; however, the conviction decision against them did not finalize due to statute of limitations; and that they were currently prosecuted before the İstanbul Criminal Court for contravening the Capital Market Law, fraud, supplying arms for an armed terrorist organization, membership of an armed terrorist organization, membership of an organization to commit an offence and establishing an organization to commit an offence. In the remaining part of the news, information is provided about the companies the complainants have recently taken over, and it is alleged that they are living in luxury and source of their fortune is issue of concern.

The complainants filed a criminal complaint against the applicant, alleging that the information in the news was distorted and not accurate, as a result of which their reputation had been tarnished, and that shares of their companies listed in the Istanbul Stock Exchange decreased in value due to this news. In his defence submissions during the criminal proceedings against him, the applicant indicated that the information therein was accurate and submitted the indictment drawn up in the previous proceedings conducted against the complainants. He also

provided the relevant court with a document which included information about the proceedings conducted against the complainants on the publication date of the news and which was alleged to be taken from the National Judiciary Informatics System (UYAP).

At the end of the proceedings, the applicant was sentenced to 2 months and 27 days' imprisonment for insulting; however, the court suspended the pronouncement of the judgment. The challenge against the criminal court's decision was dismissed by the magistrate court on 24 January 2014.

V. EXAMINATION AND GROUNDS

26. The Constitutional Court, at its session of 15 February 2017, examined the application and decided as follows.

A. The Applicant's Allegations and the Ministry's Observations

27. The applicant maintained that in average 150 pieces of news were reported every day through the web-site where he was serving as a chief editor. He further indicated that a news source delivered him the impugned news based on an UYAP document; and that the content of the news was apparently accurate, and they had no intent to deceive the readers. He further criticized that the incumbent court failed to check the UYAP data and accordingly alleged that his right to a fair trial had been violated.

28. He also emphasized that as the complainants were the managers and shareholders of publicly-held companies and intermediary firms, the proceedings conducted against them were of a particular concern for the public; and that publication of such news through a website providing news and information about the stock exchange and capital markets was also of public interest. The applicant accordingly claimed that his freedom of expression had been breached. He requested the Court to find a violation and order a retrial.

29. In the observations of the Ministry, certain judgments of the Constitutional Court and the European Court of Human Rights (the ECHR) were recalled, and it was noted that a fair balance was to be struck between the applicant's freedoms of expression and the press and the

complainants' rights to honour and dignity. It was also indicated therein that the UYAP (National Judiciary Informatics System) screenshot, which was submitted to the first instance court, had been extracted from a citizen portal which rendered service to citizens via *vatandas.uyap.gov.tr*. The Ministry further noted that according to the examination as to the authenticity of the information included in the UYAP document, *"information other than the one on type of case matches with the information in the file available on UYAP; however, the information on type of case does not correspond to. However, on the date when the screenshot was taken, these offences were also stated in the file"*.

30. In his counter-statements against the Ministry's observations, the applicant reiterated his complaints in the application form.

B. The Court's Assessment

31. Relevant part of Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"*, reads as follows:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…*
>
> *The exercise of these freedoms may be restricted for the purposes of … protecting … reputation and rights … of others…*
>
> *The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."*

32. Relevant part of Article 28 of the Constitution, titled *"Freedom of the press"* reads as follows:

> *"The press is free and shall not be censored…*
>
> *The State shall take the necessary measures to ensure freedom of the press and information.*

In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply…"

33. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant asserted that the evidence he submitted to the inferior court to prove the authenticity of the news and to show his good faith had not been assessed sufficiently; and that his punishment was in breach of his right to a fair trial. Under the circumstances of the present case, it was considered that the applicant's complaint that no adversarial proceeding was conducted in respect of him in order to determine whether his allegations had a basis was to be examined together with his complaint concerning the alleged violation of the freedoms of expression and the press.

1. Admissibility

34. The Court declared the alleged violations of the freedoms of expression and the press admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

2. Merits

a. Existence of Interference

35. The applicant was sentenced twice to imprisonment for a term of 2 months and 27 days due to the news published through the web-site where he was the chief editor. The incumbent court then suspended the pronouncement of his verdict. Therefore, the applicant's freedom of expression was interfered with by this decision.

b. Whether the Interference Constituted a Violation

36. Relevant part of Article 13 of the Constitution reads as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution... These restrictions shall not be contrary to …, the requirements of the democratic order of the society and … the principle of proportionality."

37. The afore-mentioned interference would constitute a breach of Article 26 of the Constitution unless it satisfied the conditions set out in Article 13 of the Constitution.

38. Therefore, it must be determined whether the restriction complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, relying on one or several justified reasons specified in Article 26 § 2 of the Constitution and not being contrary to the requirements of a democratic society and the proportionality principle.

i. Lawfulness

39. Article 132 of the Turkish Criminal Code no. 5237 was found to satisfy the criterion of "being restricted by law".

ii. Legitimate Aim

40. It has been concluded that the decision whereby the applicant was sentenced was a part of the measures intending to protect "…. reputation or rights of the others" and pursued a legitimate aim.

iii. Compliance with the Requirements of a Democratic Society and Proportionality

(1) General Principles

41. The Court has previously explained several times what should be inferred from the phrase "requirements of the democratic order of the society". Accordingly, the measure restricting fundamental rights and freedoms must meet a social need as well as be a measure of last resort. A measure failing to satisfy these requirements cannot be considered to comply with the requirements of the democratic order of the society (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51). The inferior courts have a certain amount of discretionary power in deciding whether such an exigency exists. However, this discretionary power is subject to the Court's review.

42. Besides, it must be assessed whether any restriction on fundamental rights and freedoms is a proportionate measure which permits minimum interference with fundamental rights, in addition to being necessary for the democratic order of the society (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 63; and *Bekir Coşkun*, §§ 53, 54; for the explanations as to the principle of proportionality, see also *Tansel Çölaşan*, §§ 54, 55; and *Mehmet Ali Aydın*, §§ 70-72). Therefore, there must be a reasonable proportionality between the sentence imposed and the damage sustained by the complainants.

43. Firstly, the applicant was punished not on account of all information and comments included in the impugned news but for having misinformed the public of the accusations imputed to the complainants during their criminal proceedings. In the said news, it was claimed that the complainants were being tried for, *inter alia*, providing arms to, and being a member of, an armed terrorist organization. However, the complainants were indeed tried not for these offences but for, *inter alia*, establishing a criminal organization and being a member thereof.

44. The inferior courts failed to strike a balance between the applicant's freedoms of expression and the press and the complainants' right to protect their dignity. The first instance court found the unauthenticity of certain information in the news sufficient for constituting an attack towards the complainants' dignity. Therefore, the question before the Court is whether the inferior courts' decisions -whereby the applicant was held liable for unauthenticity of certain information in the news published through the website where he was the chief editor- are in breach of the freedom of imparting information, which is safeguarded by Articles 26 and 28 of the Constitution.

45. Online news reporting falls into the scope of the freedom of the press so long as it fulfils the main function of the press (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, §§ 36-42). Freedoms of expression and the press are of vital importance for the proper functioning of democracy (see *Bekir Coşkun*, §§ 34-36).

46. However, Articles 26 and 28 of the Constitution do not afford unlimited freedom of expression. The obligation to comply with the restrictions specified in Article 26 § 2 imposes certain "duties and liabilities" for the exercise of the freedom of expression, which is applicable also to the press (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 89; and *R.V.Y. A.Ş.*, no. 2013/1429, 14 October 2015, § 35).

47. These duties and liabilities are of particular importance when "reputation and rights of the others" may get harmed and particularly when reputation of a person whose name is cited is at stake. As in the present case, in determining the extent of the media's obligation to research authenticity of factual statements in respect of private persons, which are allegedly libellous, the conditions required to be taken in consideration may be enumerated as follows: nature and degree of the factual statement in question; whether the sources of news are reasonably reliable in terms of the relevant allegations; and whether the journalists have acted in good faith with a view to providing accurate and reliable information.

48. Freedom of the press entails those concerned to respect for the professional ethics and to act in good faith as well as in a manner that would ensure them to provide accurate and reliable information. Distorting the truth maliciously may sometimes extend the limits of acceptable criticism. Therefore, the task of reporting news necessarily embodies duties and responsibilities as well as boundaries required to be complied with by the media outlets themselves (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, §§ 42-43; *Kadir Sağdıç* [Plenary], no. 2013/6617, 8 April 2015, §§ 53, 54; and *İlhan Cihaner (2)*, no. 2013/5574, 30 June 2014, §§ 60, 61). In this respect, it may be said that if factual allegations defaming real persons were not checked, the permittable limits of the freedom of expression would be exceeded.

(2) Application of Principles to the Present Case

49. It is obvious that the initiation of criminal proceedings due to several offences against the complainants, who were the managers and shareholders of intermediary firms and companies of which shares were traded at the stock market, is of particular concern to the public. Besides,

no objection was raised as to the information included in the news, except for qualifications of certain imputed offences.

50. The applicant maintained that the source of information concerning the offences specified in the news and imputed to the complainants was a document obtained from the UYAP, and he submitted this document to the incumbent court in order to show his good faith. The court, however, failed to take any action with a view to determining whether the document was authentic or not. Besides, although the applicant submitted a sound factual basis, the court also refused to assess this evidence. The Ministry confirmed that it was indeed a copy of the original UYAP screenshot but noted that the UYAP data were updated afterwards. Although the applicant based his allegations on an official record, it was not admitted that the offences specified in the news, which had sufficient factual basis, were falsified in bad faith or by means of altering the truth.

51. Expecting the journalists to act as a prosecutor to verify the accuracy of a statement imposes a heavy burden of proof on them, and such a liability may give rise to unfair consequences at the end of the proceedings where they stand as an accused or a defendant. Therefore, in the present case, it must be acknowledged that the applicant, as a journalist, had acted in an adequately responsible manner.

52. In its previous judgments, the Court has noted that punishment of journalists due to news or comments made about an individual would pose an obstacle, to a significant extent, to the contribution of the press to the discussion of matters that are of public interest; and that they must not be punished in the absence of strong grounds (see *Bekir Coşkun* § 58; and *Ali Rıza Üçer (2)*, [Plenary], no. 2013/8598, 2 July 2015, § 46).

53. Besides, it is explicit that sentencing the applicant to imprisonment due to a press offence would not be compatible with the freedoms of expression and the press. Such a sentence may be justified only in exceptional cases. Even if a person suffering pecuniary or non-pecuniary damage on account of a publication may be entitled to bring a civil claim for damage against the journalist publishing inaccurate information about him, it must be acknowledged that the imprisonment sentence, which is highly severe in terms of ordinary defamation cases as in the present

application, inevitably has a chilling effect on the freedoms of expression and the press.

54. In addition, the criminal court decided to suspend the pronouncement of the verdict and subjected the applicant to probation for five years. In his capacity as a chief editor, the applicant always faces the risk of execution of his sentence within this probation period. The fear of being sanctioned has a suspensive effect on the individuals, and even if an individual may complete the probation period without being further convicted, such a suspensive effect may restrain disclosure of his thoughts or his press activities. As a result, it must be admitted that the risk of execution of his imprisonment sentence in future has caused him stress and fear of being punished.

55. Consequently, the Constitutional Court found violations of the freedoms of expression and the press safeguarded by Articles 26 and 28 of the Constitution.

3. Application of Article 50 of Code no. 6216

56. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution of the violation and the consequences thereof shall be ruled. However, legitimacy review cannot be done, decisions having the quality of administrative acts and transactions cannot be made.

(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."

57. The applicant requested a retrial. He did not claim any compensation.

58. It was concluded that the applicant's freedoms of expression and the press were violated.

59. As there is legal interest in conducting a retrial in order to redress the consequences of the violations of the applicant's freedoms of expression and the press, it must be ordered that a copy of the judgment be sent to the 19th Chamber of the Anatolian Magistrate's Court (abolished) for a retrial.

60. The total court expense of 2,006.10 Turkish liras (TRY) including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 15 February 2017 that

A. The alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

B. The freedoms of expression and the press respectively safeguarded by Articles 26 and 28 of the Constitution were VIOLATED;

C. A copy of the judgment be SENT to the relevant court taking over the files of the 19th Chamber of the Anatolian Magistrate's Court (abolished) to conduct a retrial for redress of the consequences of the violation;

D. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. 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.

F. A copy of the judgment be SENT to the Ministry of Justice.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

HAKAN YİĞİT

(Application no. 2015/3378)

5 July 2017

On 5 July 2017, the Second Section of the Constitutional Court found violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution in the individual application lodged by *Hakan Yiğit* (no. 2015/3378).

THE FACTS

[8-31] The applicant is the news director of a web-site, namely memurlar.net. Following the 17-25 December investigations, tape recordings alleged to belong to Fetullah Gülen or persons who are in close relationship with him were broadcasted or reported as news via many web-sites. Subsequently, the news portal, memurlar.net, broadcasted these tapes with the heading "Conversation between Gülen and the top *Abi* ("top brother") is now available on the Internet".

The tape in question relates to the phone conversations held between Fetullah Gülen and a person who was defined by the web-site as "the top *abi*" and whose full identity information was not given. During these conversations, the unidentified person provided Fetullah Gülen with information –generally classified– about several bureaucrats, politicians and businessmen, informed Fetullah Gülen of the relations between the group which is led by Fetullah Gülen and which would be subsequently called as the FETÖ/PDY, as well as received instruction from Fetullah Gülen.

Following the broadcast of the news, Fetullah Gülen filed a criminal complaint against the applicant as well as the media outlets broadcasting the impugned news for insulting his personal rights and breaching the confidentiality of communication.

Thereupon, the Ankara Chief Public Prosecutor's Office brought a criminal case against the applicant for unlawfully disclosing the contents of the communication and insulting persons through internet. According to the prosecutor's office, the imputed offence results from the broadcast of the relevant contents through media outlets and is a type of offence which is separate from the offences of breach of the confidentiality of communication and recording of the contents thereof. The prosecutor's office noted that commission of the offence in question was completed by

way of notifying or announcing the contents of the communication to the person or persons who is/are not a party thereto.

During the criminal proceedings, the applicant maintained; that they had acted in line with the responsibility of the press; that the news is within the press freedom to make news and that the impugned tapes were removed from the web-site one day later upon the request of the complainant's lawyer.

By the decision of the 24th Chamber of the Ankara Criminal Court, the applicant was acquitted of the offence of insulting but sentenced to 1 year and 8 months' imprisonment for breaching the confidentiality of communication. However, the criminal court decided to suspend the pronouncement of the judgment and to subject the applicant to probation for a period of 5 years. According to the criminal court, publication of a phone conversation between persons –even if socially prominent ones–, which enables everyone to learn the content thereof, is sufficient for the offence to occur. The applicant's challenge to the criminal court's decision was dismissed by the 6th Chamber of the Ankara Assize Court.

V. EXAMINATION AND GROUNDS

32. The Constitutional Court, at its session of 5 July 2017, examined the application and decided as follows.

A. The Applicant's Allegations and the Ministry's Observations

33. The applicant maintained that he was the news director of one of the most popular web-sites of Turkey; that the impugned video and audio tapes published and made available by them had already been broadcasted by networking sites and hundreds of web-sites; and that they reported the contents of these audio tapes as news. He also noted that, in relation to the officials of the other press and media outlets having broadcasted the same audio tapes, either a decision of non-prosecution was issued by the chief public prosecutor's offices or an acquittal decision was rendered by the courts. He submitted some of these decisions to the Court and accordingly alleged that his freedoms of expression and the press were violated.

34. In its observations, the Ministry of Justice ("the Ministry") recalled the judgments of the Court and the European Court of Human Rights ("the ECHR") concerning the freedoms of expression and the press as well as pointed out the public interest inherent in the impugned news. According to the Ministry, conversations mentioned in the said news revealed the plans of the Fetullahist Terrorist Organization/Parallel State Structure ("the FETÖ/PDY") and the organization leader concerning the appointment of bureaucrats and state tenders, which thereby contributed to a public debate. The Ministry also pointed out that there was no allegation that the conversations included in the news had been neither unreal nor distorted. Referring to the ECHR's case-law in its *Radio Twist A.S. v. Slovakia* judgment, the Ministry noted that the mere act of broadcasting any information −even if obtained illegally by a third person− must be also considered to fall into the scope of the freedom of expression. The Ministry further stated that broadcasting of the same communication contents previously by several global and national web-sites and news portals must also be taken into consideration.

35. In his counter-statements against the Ministry's observations, the applicant reiterated his previous submissions and requested the Court to find a violation.

B. The Court's Assessment

36. Article 26 of the Constitution, titled *"Freedom of expression and dissemination of thought"* and to be relied in the assessment of the allegation, reads as follows:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…*
>
> *The exercise of these freedoms may be restricted for the purposes of … protecting … and private and … life of others…*
>
> *The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."*

37. Relevant part of Article 28 of the Constitution, titled *"Freedom of the press"* reads as follows:

"The press is free and shall not be censored…

The State shall take the necessary measures to ensure freedom of the press and information.

In the limitation of freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply…"

1. Admissibility

38. The Court declared the alleged violations of the freedoms of expression and the press admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

2. Merits

a. Existence of Interference

39. The applicant was sentenced to imprisonment for a term of 1 year and 8 months on account of the news published via the web-site where he was the chief editor. The incumbent court then suspended the pronouncement of the verdict. Accordingly, the court decision constituted an interference with the applicant's freedoms of expression and the press.

b. Whether the Interference Constituted a Violation

40. Relevant part of Article 13 of the Constitution reads as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution... These restrictions shall not be contrary to …, the requirements of the democratic order of the society and … the principle of proportionality."

41. The afore-mentioned interference would constitute a breach of Articles 26 and 28 of the Constitution unless it satisfied the conditions set out in Article 13 of the Constitution. Therefore, it must be determined whether the restriction complied with the requirements set out in Article

13 of the Constitution, namely being prescribed by law, relying on one or several justified reasons specified in Article 26 § 2 of the Constitution and not being contrary to the requirements of democratic society and the proportionality principle.

i. Lawfulness

42. Article 132 of the Turkish Criminal Code no. 5237 was found to satisfy the criterion of "being restricted by law".

ii. Legitimate Aim

43. It has been concluded that the decision whereby the applicant was sentenced was a part of the measures intending to protect "…. private lives of the others" and pursued a legitimate aim.

iii. Compliance with the Requirements of a Democratic Society and Proportionality

(1) General Principles

44. There is no hesitation as to the requirement that online news reporting must be considered to fall into the scope of the freedom of the press so long as it fulfils the main function of the press (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, §§ 36-42).

45. As the Court has stated many times, the freedom of expression safeguarded by Article 26 of the Constitution and the freedom of the press, which is one of the former's aspect requiring special safeguards and set out in Article 28 of the Constitution, are essential foundations of the democratic society and *sine qua non* for the improvement of the society and development of each individual (see *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 69; and *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 34-36).

46. Both the freedoms of expression and the press are subject to certain restrictions set out in Article 26 § 2 of the Constitution and required to be fully complied with. These exceptions must be convincingly established in every concrete case.

47. The Court also explained what should be inferred from the phrase *"requirements of the democratic order of the society"* specified in Article 13 of the Constitution. Accordingly, the measure restricting fundamental rights and freedoms must meet a social need as well as be a measure of last resort. A measure failing to satisfy these requirements cannot be considered to comply with the requirements of the democratic order of the society (see *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51). The inferior courts have a certain amount of discretionary power in deciding whether such an exigency exists. However, this discretionary power is subject to the Court's review.

48. Besides, it must be assessed whether any restriction on fundamental rights and freedoms is a proportionate measure which permits minimum interference with fundamental rights, in addition to being necessary for the democratic order of the society (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 63; and *Bekir Coşkun*, §§ 53, 54; for the explanations as to the principle of proportionality, see also *Tansel Çölaşan*, §§ 54, 55; and *Mehmet Ali Aydın*, §§ 70-72). Therefore, there must be a reasonable proportionality between the sentence imposed and the damage sustained by the complainants.

49. In the present case, the applicant was punished for having disclosed the private communication of individuals through the impugned news. Further, the first instance court considered that the content of communication and the way how the news was reported were not insulting the complainant and accordingly acquitted the applicant of the charge of defamation. Therefore, the question before the Court is rather whether the domestic court's decision −which regarded as an offence the publication of the complainant's private conversation through news on the website where the applicant was the chief editor− was contrary to the freedom of imparting information safeguarded by Articles 26 and 28 of the Constitution.

50. Articles 26 and 28 of the Constitution do not afford unlimited freedom of expression. The obligation to comply with the restrictions specified in Article 26 § 2 imposes certain "duties and liabilities" for the exercise of the freedom of expression, which is applicable also to the press (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February

2016, § 89; and *R.V.Y. A.Ş.*, no. 2013/1429, 14 October 2015, § 35). These duties and liabilities are of particular importance when private lives of others may get harmed and particularly when reputation of a person whose name is cited is at stake.

51. It must be also borne in mind that while the press is to comply with the relevant restrictions, it is also obliged to impart information on matters of public concern and State affairs, as required by its primary duty to ensure proper functioning of a democracy. Apart from the press' liability to impart the said information and ideas, the public also has the right to receive them. Freedom of the press affords the public one of the best means for discovering ideas and conducts of public figures such as politicians, high bureaucrats, opinion leaders or businessmen as well as for forming an opinion in respect thereof (see *İlhan Cihaner (2)*, no. 2013/5574, 30 June 2014, §§ 56-58; *Kadir Sağdıç* [Plenary], no. 2013/6617, 8 April 2015, §§ 49-51, 61-63; and *Nihat Özdemir* [Plenary], no. 2013/1997, 8 April 2015, §§ 45-47, 57-58).

52. Besides, the information imparted by the press in the present case concerns private communication of the individuals. As per Article 22 § 1 of the Constitution which sets forth *"Everyone has the freedom of communication. Privacy of communication is fundamental"*, "everyone" also including the public figures is afforded freedom of communication, and privacy of the communication cannot be breached.

53. In Article 22 of the Constitution, it is not particularly cited that communication must be "respected". It is obvious that there is a right to "respect for" the freedom of communication for two reasons: First, freedom of communication, which is enshrined in the chapter (IV) titled *"privacy and protection of private life"* under part two of the Constitution where the individual's rights and duties are set forth, is a special aspect of the right to *"privacy of private life"* enshrined in Article 20 of the Constitution. Therefore, as required by Article 20 of the Constitution where it is specified *"Everyone has the right to demand respect for his private life…"*, everyone has the right "to demand respect" also for his freedom of communication. Second, the nature of privacy inherent in the communication according to the Constitution primarily embodies the right "to demand respect" for communication.

54. Article 22 of the Constitution does not only require the State to refrain from interfering but also imposes certain positive obligations to effectively respect for freedom of communication, when taken together with Article 5 of the Constitution. This obligation also requires the State to take relevant measures for ensuring respect for freedom of communication and protecting the privacy of communication, regardless of the relationships between individuals. As a requirement of this constitutional obligation, Article 132 of Code no. 5237 defines the acts of contravening the privacy of communication between private persons, intercepting the communication and disclosing the contents as criminal acts.

55. The present case concerns the punishment imposed on the applicant for his alleged disclosure of contents of the communication. Disclosure means revealing, imparting or disseminating any confidential information. In cases where contents of the communication are disclosed and disseminated for the first time, this act is easily defined as disclosure in criminal law. However, the question whether the act of revealing, disseminating or declaring once again the contents previously published or made public would be regarded as "disclosure" is a controversial issue.

56. Therefore, a meticulous distinction must be made between the act of disclosing the content of communication for the first time and the act of reporting previously disclosed contents as news. It is not the Court's duty to point out that previous disclosure of any kind of confidential information concerning private life, such as contents of communication, automatically decriminalizes their being reported as news. However, it must be admitted that lawfulness of sanctions imposed on a journalist for publishing confidential information which has been already made known for the first time is in dispute.

57. In the present case, the interference with the private communication was made not by the organs exercising public power but by a media outlet. Therefore, a conflict arose between the legitimate aim of restriction –*"protection of private lives of the other individuals"* – that is specified in Article 26 § 2 of the Constitution and the journalists' right to freely use the relevant information. It is obvious that this conflict becomes more apparent in cases of interference with the freedom of communication, which is afforded special protection by the Constitution. However, reporting of sensitive information such as contents of communication –

even if obtained through illegal means– as news does not automatically deprive the journalists of the protection afforded by Articles 26 and 28 of the Constitution.

58. In applications similar to the present one, the step required to be taken by the Court is to strike a balance between the journalists' freedom of the press and the freedom of communication of the individuals whose private communication has been interfered. Such a balance may be struck only when all conditions including the content of information reported as news, identities of the individuals whose communication has been interfered, contribution made by the news to public debates and the context where the concrete case took place are taken into consideration

59. In exercising its power to review, the Court is to consider and examine the case as a whole including the content of the communication reported as news and the context whereby these contents are expressed. It must be firstly established whether the interference is "proportionate to the legitimate aims" and whether the grounds specified by national authorities to justify the said interference are "relevant and sufficient". In doing so, the Court must reach a favourable conclusion that the bodies exercising public power and the inferior courts have applied standards complying with the principles set out in Articles 26 and 28 of the Constitution as well as relied on acceptable assessment of the relevant findings.

(2) Application of Principles to the Present Case

60. The applicant, chief editor of a news portal, was convicted of having published contents of the other individuals' communication. The incumbent chief public prosecutor's office asserted that reporting or disclosing the content thereof to a person or persons not a party to the communication constituted the offence. The first instance court did not make any further assessment and accordingly decided that publication of phone conversations of individuals −regardless of who they were− in a way that everyone may become aware thereof was sufficient for occurrence of the offence.

61. The first instance court did not strike a balance between the applicant's freedoms of expression and the press and others' right to

protection of their honour and dignity and granted absolute superiority to the latter one. According to the Court, any conclusion reached without taking the case as a whole and striking a balance between the individuals' rights and freedoms in line with the established principles cannot be considered to comply with the principles enshrined in Articles 26 and 28 of the Constitution.

62. Firstly, in the present case, the applicant was convicted of having disclosed the contents of communication –which were published on the internet– of Fetullah Gülen, known by the public as a retired preacher. These contents enabled individuals to learn ideas and conducts of the complainant who was indisputably a notable person as well as activities of the group led by the complainant in the political, social and economic fields and to form an opinion on these matters. Therefore, publication of the contents undoubtedly contributed to a debate of high public interest, which was at the top of the public agenda.

63. Secondly, the complainant did not claim that the applicant had made unreal news by altering the content or making any addition thereto. Nor did the inferior courts make such assessments in their decisions.

64. Thirdly, in the reasoning of the conviction decision, the first instance court did not take into consideration the fact that it was not the applicant who had published the said communication contents for the first time. As a matter of fact, within the context of the criminal law and in light of the relevant case-law of the Court of Cassation, the question as to whether the "disclosure", which is an element of the offence, had occurred is the main issue to be discussed. At the time when the impugned news was published, the contents of Fetullah Gülen's communication had already been made public. Therefore, the aim pursued for the protection of the communication contents of those concerned had considerably disappeared, and the damage intended to be prevented by the restriction imposed had already taken place.

65. Lastly, it was not stated that the other media outlets were punished for having published contents of the said communication. On the contrary, a decision of non-prosecution was rendered, on 21 March 2014, by the Ankara Chief Public Prosecutor's Office in respect of at least four press officials who had published the same contents with those of the

applicant. Nor was it maintained that the other journalists publishing the said communication contents had been punished on account thereof.

66. In light of the above-mentioned considerations, it has been concluded that the inferior courts' intent to protect the complainant's freedom of communication was not sufficient for justifying the restrictions imposed on the applicant's freedoms of expression and the press enshrined in Articles 26 and 28 of the Constitution. The inferior courts failed to strike a fair balance between the protection of freedom of the press as well as freedom of communication, which is an aspect of the private life.

67. The first instance court sentenced the applicant to imprisonment for a term of 1 year and 8 months but then suspended the pronouncement of the verdict. He was accordingly subject to probation for five years. The applicant, who was the chief editor of a news site, always faced the risk of execution of his imprisonment sentence within that period. Fearing to be subject to a sanction has a deterrent effect on individuals, and even if the person concerned is not convicted of a new offence during the probation period, he is under the risk, due to this effect, of abstaining from expressing his ideas or conducting press-related activities in future (see *Orhan Pala*, no. 2014/2983, 15 February 2017, § 54).

68. In other words, given the primary duty of the press to ensure proper functioning of democracy, it must be admitted that the applicant's punishment may discourage the contribution made by the press to open debates of public interest. Therefore, the interference in the form of the applicant's imprisonment for a term of 1 year and 8 months and his being subject to probation for 5 years as the pronouncement of his verdict was suspended is disproportionate to the aim pursued for the protection of the complainant's private life.

69. For these reasons, the Court found violations of the freedoms of expression and the press which are safeguarded respectively in Articles 26 and 28 of the Constitution.

C. Application of Article 50 of Code no. 6216

70. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution of the violation and the consequences thereof shall be ruled. However, legitimacy review cannot be done, decisions having the quality of administrative acts and transactions cannot be made.

(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."

71. The applicant requested the Court to find a violation and order a retrial as well as to award him 50,000 Turkish liras (TRY). He did not claim any compensation for pecuniary damages.

72. It was concluded that the applicant's freedoms of expression and the press were violated.

73. As there is legal interest in conducting a retrial in order to redress the consequences of the violations of the applicant's freedoms of expression and the press, it must be ordered that a copy of the judgment be sent to the 24th Chamber of the Ankara Criminal Court (file no. E.2014/493) for a retrial.

74. The Court finding violations of the applicant's freedoms of expression and the press decided to award the applicant 2,000 Turkish liras (TRY) as non-pecuniary compensation for his damages which could not be redressed by a mere finding of a violation.

75. The total court expense of TRY 2,026.90 including the court fee of TRY 226.90 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 5 July 2017 that

A. The applicant's request for non-disclosure of his identity in public documents be DISMISSED;

B. The alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

C. The freedoms of expression and the press respectively safeguarded by Articles 26 and 28 of the Constitution were VIOLATED;

D. A copy of the judgment be SENT to the 24th Chamber of the Ankara Criminal Court (the file no. E.2014/493) to conduct a retrial for redress of the consequences of the violation;

E. A net amount of TRY 2,000 be PAID to the applicant as non-pecuniary compensation, and other claims for compensation be DISMISSED;

F. The total court expense of TRY 2,026.90 including the court fee of TRY 226.90 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

G. 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.

H. A copy of the judgment be SENT to the Ministry of Justice.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

BİZİM FM RADYO YAYINCILIĞI VE REKLAMCILIK A. Ş.

(Application no. 2014/11028)

18 October 2017

On 18 October 2017, the Plenary of the Constitutional Court found violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution in the individual application lodged by *Bizim FM Radyo Yayıncılığı ve Reklamcılık A.Ş.* (no. 2014/11028).

THE FACTS

[8-40] In Turkey, private radio broadcasting started in 1989, despite the constitutional and legal obstacles. Private radio broadcasting has gained a legal basis with the amendment made to Article 133 of the Constitution in 1993. Subsequently, the former (now repealed) Law no. 3984 on the Establishment of Radio and Television Enterprises and their Broadcasts was enacted in 1994, and the Law was followed by the secondary regulations. During this transitional period, then-existing radios that satisfied the criteria set by the Radio and Television Supreme Council (RTÜK) were allowed to continue broadcasting until a frequency auction was made. However, despite the imperative provisions of the above mentioned Law and Law no. 6112 on the Establishment of Radio and Television Enterprises and their Media Services which entered into force in 2011, no auction has been made by the administration until today. The current terrestrial radios in Turkey are the radios that started broadcasting before 1995 or that were granted broadcast permission with certain administrative or judicial orders after 1995. In other words, since 1995, no radio has started broadcasting upon allocation of channel and frequency through a frequency auction.

The applicant company voluntarily suspended its broadcast that was made under a license issued in 1995. Afterwards, the applicant requested from the RTÜK a (R3) licence in order to be able to make local radio broadcast. However, its request was rejected without any justification.

The applicant contested the RTUK's decision before the Administrative Court (the court). The applicant maintained that the administration's failure to hold a frequency auction for a long time resulted in inequality

between the companies that were actually broadcasting and the companies that wanted to broadcast for the first time.

The court dismissed the case. In its decision, it pointed out that until a frequency auction and channel and frequency allocations would be made in accordance with the provisional Article 6 of the former Law no. 3984, the companies that were broadcasting on the date of entry into force of the Law would be able to continue their broadcasts, as limited to the residential areas where they had been permitted to broadcast. According to the court, as the applicant company had previously suspended its broadcasts voluntarily, the provisional Article would not be applied with respect to it. The frequency auction which would enable new broadcast applications was not held yet. Therefore, rejection of the application for a licence did not contravene the law.

Upon appeal, the 13th Chamber of the Council of State (the Chamber) quashed the judgment of the court. According to the Chamber's judgment, while the administration that was liable to allocate, as soon as possible, the channels and frequencies by holding frequency auction, it caused the continuation of the transition period by not doing so, which would give rise to unequal practices between the pre-existing radios and the new companies that wanted to go into radio broadcasting. The Chamber also held that the rejection of applications based on an auction to be held on an unknown date violates the freedom of expression and dissemination of thought safeguarded by the Constitution, and in this regards it also violate the constitutional provision set therein that radio and television stations shall be established and operated freely.

However, the Chamber accepted the rectification request lodged by the respondent administration and upheld the judgment of the first instance court. The Chamber gave no explanation as to the reason why it reversed its previous judgment.

V. EXAMINATION AND GROUNDS

41. The Constitutional Court, at its session of 18 October 2017, examined the application and decided as follows.

A. The Applicant's Allegations and the Ministry's Observations

42. The applicant radio stated that it voluntarily suspended its broadcast that was made under a license issued in 1995 and that however its request for restarting the broadcast was rejected by the administration. The applicant indicated that the administration did not make a frequency auction since 1995 and that an expected auction's date was indefinite. According to the applicant, this situation led to unequal practices between the pre-exiting radios and new companies wishing to go into the radio broadcasting business, and thereby restricted the right to broadcast. The applicant alleged that its rights safeguarded by Articles 2, 5, 10, 26, 36 and 138 of the Constitution were violated, and in this regard, it requested retrial.

43. The Ministry, in its observations, referring to the relevant judgments of the European Court of Human Rights and reiterating the relevant legislation, stated that in the current legal order, the pre-existing radios that applied in 1995 were not allowed to expand their service area or change their licence type. In addition, also the radios that suspended their broadcast or that applied after 1995 would not be granted a broadcast licence by the Radio and Television Supreme Council ("RTÜK").

B. The Court's Assessment

44. Article 26 §§ 1 and 4 of the Constitution provides as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.

Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented."

45. The relevant part of the first sentence of Article 26 § 1 of the Constitution, as well as Article 26 § 3 thereof provide as follows:

"The press is free …"

"The State shall take the necessary measures to ensure freedom of the press and information."

46. The relevant part of Article 5 of the Constitution provides as follows:

"The fundamental aims and duties of the State are to safeguard … the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."

47. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In the present case, the main dispute between the RTÜK and the applicant that voluntarily suspended its broadcast while having a temporary right to broadcast is related to whether the applicant's previous temporary licence allows it to restart broadcasting after the suspension of its broadcast. The decisions of the public authorities to grant broadcast licence or to reject such requests concern the freedoms of expression and the press enjoyed by the mass media.

48. It is clearly specified in the third sentence of Article 26 § 1 of the Constitution that the freedom of expression shall not preclude subjecting the radio broadcasts to a system of licencing. Nevertheless, the measures taken in terms of the applicable licencing system, also including those related to the companies broadcasting without a licence, must be examined in accordance with the standards developed within the scope of freedom of expression and freedom of the press, respectively safeguarded by Articles 26 and 28 of the Constitution.

1. Admissibility

49. The alleged violations of the freedoms of expression and the press were declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

2. Merits

a. General Principles

50. Freedoms of expression and the press of the mass media are fully protected respectively by Articles 26 and 28-32 of the Constitution. Freedom of expression protects not only the content of the thoughts and opinions but also the manner in which they are communicated. As a matter of fact, the means to be used in the exercise of freedom of expression are specified as "speech, writing, pictures or other means" in Article 26 of the Constitution, and the expression of "other means" indicates that any means of expression are subject to constitutional protection (see *Fatih* Taş [Plenary], no. 2013/1461, 12 November 2014, § 58). The last sentence of Article 26 § 1 of the Constitution provides that freedom of expression shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing. According to this provision, radio and television broadcasts are safeguarded by Article 26. There is no doubt that radio and television broadcasts are an integral part of freedom of expression. (see *R. V. Y. A.Ş.*, no. 2013/1429, 14 October 2015, § 28).

51. Accordingly, the principles applicable to freedom of the media, including radio broadcasting, are similar to those applicable to freedom of the press. Basic principles concerning freedoms of expression and the press are elaborated in many judgments of the Constitutional Court (see *Fatih Taş*, §§ 57-67, 80 and 94; *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 30-38; *Ali Rıza Üçer (2)* [Plenary], no. 2013/8598, 2 July 2015, §§ 30-33; *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, §§ 33-39; and *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.* [Plenary], no. 2013/2623, 11 November 2015, §§ 27- 55).

52. Freedom of expression refers to the individuals' ability of having access to the news and information, other people's opinions, not being

condemned due to the opinions and convictions they have acquired and of freely expressing, explaining, defending, transmitting to others and disseminating these either alone or with others through various methods. Freedom of expression has a direct bearing on a significant part of other rights and freedoms enshrined in the Constitution. Indeed, the press, which is the primary means of expression and dissemination of thought is one of the ways of exercising freedom of expression. Freedom of the press is specially regulated under Articles 28-32 of the Constitution (see *Fatih Taş*, § 64; and *Medya Gündem Dijital* Yayıncılık *Ticaret A.Ş.*, § 27).

53. Freedom of the press ensures that the individual and the society are informed through transmission and circulation of thoughts. Expression of thoughts, including those opposing the majority, via all sorts of means, attracting supporters to the thoughts expressed, materializing the thoughts and convincing to materialize the thoughts are among the requirements of the pluralistic democratic order. A political system where the freedom of expression is not ensured cannot be regarded as democracy. Therefore, freedoms of expression and the press are for everyone and of vital importance for the proper functioning of democracy (see the Court's judgment no. E.1997/19, K.1997/66, 23 October 1997; *Bekir Coşkun*, §§ 34-36; and *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, § 28).

54. Printed, audio or visual press guarantees the sound functioning of the democracy and individuals' realization of themselves by way of strictly scrutinizing the political decisions, actions and negligence of the public authorities and facilitating citizens' participation to decision making processes (see *R. V. Y. A.Ş.*, § 34; *Fatih* Taş, § 66; İlhan *Cihaner (2),* no. 2013/5574, 30 June 2014, § 63; *Medya Gündem Dijital* Yayıncılık *Ticaret* A.Ş., § 39; and *Önder Balıkçı*, no. 2014/6009, 15 February 2017, § 41). However, freedom of the press, which is a specific aspect of the freedom of expression, is not a safeguard protecting merely the right of the press to impart and disseminate news. It is also directly related to the public's right to receive news and ideas for ensuring democratic pluralism. In particular, it is indispensable in order to ensure the democratic pluralism that the news and ideas within the scope of public debates are made accessible to the people and the people are allowed to participate

in such debates (for newspaper journalism, see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 87; and for online journalism, see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, §§ 34-37).

55. Audio and visual media such as radio and television have a faster and stronger effect than the printed works. First of all, news and ideas are transmitted through sounds and videos, which is more effective on humans. Secondly, individuals have an easier access to the mass media than the printed works. Lastly, printed works are subject to limited distribution. On the other hand, mass media have a direct access to, and impact on, the whole society (see *R. V. Y. A.Ş.*, § 31). In this context, audio and visual media such as radio and television play a very important role in the functioning of democracy.

56. It is an undeniable fact that the State has a positive obligation in the field of freedoms of expression and the press (for the judgments pointing out the State's positive obligation in terms of freedom of expression, see *Nilgün Halloran,* no. 2012/1184, 16 July 2014, § 32; *Ergün Poyraz (2),* § 48; for a judgment pointing out the State's positive obligation in terms of freedom of the press, see *Bekir Coşkun*, §§ 32 and 46). Effective use of freedoms of expression and the press, one of the prerequisites for the functioning of democracy, is not based merely on the State's duty to abstain from interference. These freedoms may also require the State to take legal and practical protective measures even in terms of the relations between individuals. Given the importance of the freedoms of expression and the press, the State is expected to provide the highest safeguards with regard to these freedoms. As a matter of fact, according to Article 5 of the Constitution, safeguarding the democracy, striving for the removal of obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law and providing the conditions required for the development of the individual's material and spiritual existence are among the fundamental aims and duties of the State. More specifically, Article 28 § 3 of the Constitution imposes on the State an obligation to take the necessary measures to ensure the freedom of press and information. In addition, the phrases "*subjecting broadcasts to a system*

of licensing" which is set forth in the last sentence of Article 26 § 1 and "*regulatory provisions concerning the use of means to disseminate information and thoughts*" set forth in Article 26 § 4 allow the State to organize the press and broadcasting and to monitor them through licencing, along with the obligation of maintaining the order in this sector and removing obstacles which make it difficult or impossible to enjoy the freedoms of expression and press.

57. The Constitutional Court attaches importance to the balance between the general interests of the society and the interests of the individual when deciding on whether the State has a positive obligation in a specific area. This obligation of the State –inevitably– varies depending on the challenges associated with the administration of the State and society, as well as on the choices as regards priorities and resources. Therefore, the margin of appreciation enjoyed by the State is also taken into account in the determination of the positive obligations incumbent on the State. In a democratic society, such an obligation must not be construed as imposing an impossible or unfair burden on the authorities exercising public power.

b. Application of Principles to the Present Case

58. The applicant maintained that while it had been broadcasting based on a temporary local radio licence before 1995, it suspended its broadcast and that however, it was not allowed to restart broadcasting. The question of whether the previous temporary licence allows the applicant to restart broadcasting falls outside the Constitutional Court's jurisdiction. The Constitutional Court will focus on whether the denial of the applicant's request for broadcasting for the first time or again was in breach of its freedoms of expression and the press.

59. In Turkey, private radio broadcasting started in 1989, despite the constitutional and legal obstacles. Private radio broadcasting has gained a legal basis with the constitutional amendment in 1993 and the former Law no. 3984 that was enacted in 1994. The then-existing radios that satisfied the criteria set by the RTÜK were allowed to continue broadcasting until a frequency auction was made. However, despite the imperative provisions

of the above mentioned Law and Law no. 6112 which entered into force in 2011, no auction has been made by the administration until today. The current terrestrial radios in Turkey are the ones that started broadcasting before 1995 or that were granted broadcast permission with certain administrative or judicial orders after 1995. In other words, since 1995, no radio has started broadcasting upon allocation of channel and frequency through a frequency auction made in accordance with the legislation.

60. In this context, the obligation of the State to ensure pluralism in the sector of radio and television broadcasting is underlined in the reasoning of the constitutional amendment of 1993, and it was stated that in case of failure to provide pluralism, there could be no mention of democracy. It is obvious that the aim of the relevant constitutional amendment and the legal arrangements in this regard is to develop the freedoms of expression and press in our country. Therefore, it cannot be said that those constitutional and legal provisions aim to make the existing transition period permanent. The former Law no. 3984 does not contain any provision as to the date of the frequency auction to be held. As a matter of fact, the auction was not made until 2011 when the new Law came into force. As for Law no. 6112, there is an explicit provision for frequency planning and allocation, and the deadline for the frequency auction for the terrestrial radio broadcasting is set forth as 3 September 2015 therein; however, no step has been taken in this respect until today. For this reason, the broadcasting companies that will broadcast for the first time or those wishing to broadcast again as in the present application have been waiting for approximately 24 years, as a frequency auction has not been held yet.

61. The former Law no. 3984 contained broad provisions, thereby making it impossible to predict the date when the temporary regime would end. Although Law no. 6112 that entered into force in 2011 contains imperative provisions, the said temporary regime has not been terminated. The continuation of the transitional period, which has been operating since 1995 when the private radio broadcasting started, has led to unequal practices between the companies continuing broadcasting and those wishing to go into broadcasting, which is a continuing situation.

62. Furthermore, in view of the reasons above, it must be accepted that the relevant legislation is neither clear nor definite and that this situation does not allow the applicant to clearly predict the date when it will be allocated a frequency to go into broadcasting. There have been many legislation and regulation amendments concerning channel and frequency allocation. The relevant rules have been challenged before the administrative court and subsequently annulled. As a result of this uncertainty, since 1993, at least four companies have gained the status of national radio upon the decisions of the courts and supreme boards. Although since 1993 it has not been legally possible for a new company to start territorial radio broadcast and such demands have been rejected by the administration and the courts, some companies have gained national radio status due to legal uncertainty. This uncertainty and unpredictability are also fuelled by the uncertainty about when the State will fulfil its obligation as to the arrangement of the frequencies which should be considered as a part of its obligation to ensure freedom of expression. Accordingly, the relevant laws and regulations as well as the decisions of the administration and the courts, taken as a whole, do not meet the requirement of predictability.

63. Lastly, the administration and the courts have failed to provide adequate safeguards against the arbitrariness arisen due to non-enforcement of the laws with respect to the applicant and the others who want to make radio broadcast.

64. It must be accepted that such a situation may also lead to problems in terms of competition in the radio broadcasting sector. It is clear that the lack of measures to maintain pluralism in the national media for a very long period of 24 years has prejudiced the freedoms of expression and press that are of vital importance in a democratic society.

65. The rejection of the applications for radio broadcasts due to the lack of a frequency auction constitutes a structural problem that adversely affects the right to broadcast, which is an important means in ensuring the transmission and dissemination of thoughts. Even if it is assumed that there existed some legal and technical difficulties with regard to licencing and regulation in the early days of the private radio broadcasting, it has

not been asserted either by the administration or the courts that such an obligation would impose an unfair burden on the State. Nor any other reason has been submitted to justify the failure of frequency allocation.

66. All these points reveal that the State has failed to fulfil its obligation to carry out the necessary legal and administrative regulations in order to ensure effective pluralism in the media and to secure the freedoms of press and information, besides its obligation to enforce the existing legislation effectively.

67. For these reasons, it must be noted that the channels and frequencies with a limited number must be allocated fairly in a manner allowing the companies that meet the conditions to broadcast. In the event that the territorial radio broadcasting is not organized and the frequencies in this respect are not allocated on an equitable basis in spite of the constitutional rules and the laws mentioned above, the available structural problem will continue, leading to continuous violations of the freedoms of expression and press safeguarded by Articles 26 and 28 of the Constitution.

68. Consequently, the Constitutional Court has found violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution.

3. Application of Article 50 of Code no. 6216

69. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution of the violation and the consequences thereof shall be ruled. However, legitimacy review cannot be done, decisions having the quality of administrative acts and transactions cannot be made.*
>
> *(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 favor 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."

70. The applicant requested that the violation be found and a retrial be conducted.

71. It has been concluded that the freedoms of expression and the press have been violated. The said violations have resulted from a structural problem such as failure to allocate frequency to make territorial radio broadcasting. As the inferior courts are not in a position to give decision having the characteristics of an administrative act, there is no legal interest in conducting a retrial.

72. A copy of the judgment must be sent to the RTÜK —the relevant public institution— in order to redress the violation and its consequences. As this judgment of the Constitutional Court indicates the finding of a structural violation and aims to redress the consequences of the violation, it cannot be inferred that the applicant must be allocated a frequency.

73. As no compensation has been claimed, the Court will make no assessment in this respect.

74. The total court expense of 2,006.10 Turkish liras (TRY) including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 18 October 2017 that

A. The alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

B. The freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution were VIOLATED;

C. One copy of the judgment be SENT to the Radio and Television Supreme Council to redress the consequences of the violations of the freedoms of expression and the press;

D. As there is no legal interest in conducting a retrial, the request in this regard be REJECTED;

E. The total court expense of 2,006.10 Turkish liras (TRY) including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

F. The payment be made within four months as from the date when the applicant apply 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; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ALİ KIDIK

(Application no. 2014/5552)

26 October 2017

On 26 October 2017, the Second Section of the Constitutional Court found violations of the freedoms of expression and the press safeguarded respectively by Articles 26 and 28 of the Constitution in the individual application lodged by *Ali Kıdık* (no. 2014/5552).

THE FACTS

[8-29] The applicant, owner and chief editor of a web-site publishing in the aviation sector, published five news articles on his web-site in March and April 2014 about O.Y., then chairman of the Turkish Aeronautical Association ("the TAA"). Titles of these news articles are as follows: "If you cause TAA to go bankrupt, I would not leave you in peace", "This document would make you shocked", "Full of ambition for undeserved money! When would you be satisfied" and "Turkish Aeronautical Association is on the edge of cliff". It was asserted therein that a meeting was held with O.Y. without touching upon the content thereof, and in brief, the following claims were made: the TAA was managed improperly, policies to the detriment of the association had been pursued, friends of O.Y. granted undeserved profit, total debt of the TAA exceeded 410 million Turkish liras according to the data provided by the Turkish Central Bank, and O.Y. provided employment for 110 of his relatives. Certain documents were published in support of these claims. The applicant was of the opinion that the TAA should focus on its fundamental duties and should be managed by professionals.

Upon O.Y.'s request, the 5th Chamber of the Ankara Magistrate's Court ordered blocking of access to the impugned news and articles. In his column that he wrote immediately upon the court's order, the applicant directly targeted O.Y. and maintained that a jet-aircraft and a helicopter of the TAA were rented out, with very low rates, to a political party chairman in the course of the local election campaigns, also recalling that his previous claims had not been refuted yet. The same court accepted O.Y.'s request and once again ordered blocking of access to this article. The objections raised by the applicant against these orders were dismissed by the 14th Chamber of the Ankara Criminal Court.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court, at its session of 26 October 2017, examined the application and decided as follows:

A. The Applicant's Allegations and the Ministry's Observations

31. The applicant made the following allegations and requests:

i. He contended that the blocked articles did not involve any aspect that would constitute an offence; his articles did not contain insults; the legal conditions for blocking access did not arise; pieces of news in the articles were true; there was public interest in publishing actual and current news and they were imparted by striking a balance between the essence and the form.

ii. He maintained that disclosing corruptions taking place in such a prominent public association served the best interest of the public; the press had a duty to inform the public of current events; and not only giving the news but also criticising and assessing the situation from different angles should also be considered as part of freedom of the press.

iii. He added that all his claims in the articles were concrete and supported by documents and that the inferior courts delivered their decisions on the very same day as the petition of complaint was filed, without collecting any documents or information.

iv. The applicant complained that his freedom of expression and freedom of the press were violated.

32. In its observations, the Ministry indicated that, despite the indispensable significance of the freedom of expression for a democratic society, the press was required to comply with the limitations set out for "the protection of the reputation or rights and private and family life of others". According to the Ministry, Article 9 of Law no. 5651 was adopted as a requirement of the State's positive obligation to protect the individuals' honour and reputation. Therefore, in the present case, the inferior courts found that there had been an attack against the complainant's personal

reputation. The Ministry considered that the fact that the blocking of access was only imposed on certain articles instead of the whole website showed that the interference was proportionate.

B. The Court's Assessment

33. In the examination of the allegation, the Court will rely on Articles 26 and 28 of the Constitution which concern the protection of the freedom of expression and freedom of the press. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*" reads, in so far as relevant, as follows:

> *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities...*
>
> *The exercise of these freedoms may be restricted for the purposes of ... protecting the reputation or rights … of others...*
>
> *The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."*

34. Article 28 of the Constitution, titled "*Freedom of the press*" reads, in so far as relevant, as follows:

> *"The press is free, and shall not be censored...*
>
> *The State shall take the necessary measures to ensure freedom of the press and information.*
>
> *In the limitation of freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply..."*

1. Admissibility

35. The Court declared the alleged violations of the freedoms of expression and the press admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

Mr. Serdar ÖZGÜLDÜR expressed a dissenting opinion in this respect.

2. Merits

a. Existence of Interference

36. Access was blocked with a court order to the applicant's articles published on a website. The said court order interfered with the applicant's freedom of expression and freedom of the press.

b. Whether the Interference Constituted a Violation

37. Article 13 of the Constitution reads, in so far as relevant, as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution... . These restrictions shall not be contrary to ... the requirements of the democratic order of the society ... and the principle of proportionality."*

38. The above-mentioned interference shall constitute a violation of Article 26 of the Constitution unless it satisfies the requirements laid down in Article 13 of the Constitution. Therefore, it must be examined whether the interference in the present case was prescribed by law as required by Article 13 of the Constitution, relied on one or more than one of the legitimate aims set out in Article 26 § 2, and was in compliance with the requirements of the democratic order of the society and the principle of proportionality.

i. Whether the Interference was Prescribed by Law

39. No complaint was lodged as to the criterion of prescription by law. Under the circumstances of the instant application, the Court has concluded that Article 9 of Law no. 5651 constituted the legal basis of the restriction.

ii. Whether the Interference Pursued a Legitimate Aim

40. The Court has concluded that the impugned orders to block access to the news pieces and columns at issue pursued a legitimate aim as they were part of a series of measures aimed at "protecting the rights or reputation of others".

iii. Whether the Interference Complied with Requirements of the Democratic Order of the Society and the Principle of Proportionality

(1) General Principles

(a) Requirements of the Democratic Order of the Society

41. The Court has explained on many occasions what should be understood from the expression "requirements of the democratic order of the society". Accordingly, a measure that restricts the fundamental rights and freedoms must correspond to a social need and be used as a last resort. If the restrictive measure does not satisfy these criteria, it cannot be considered as a measure which is compatible with requirements of the democratic order of the society (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan,* no. 2014/6128, 7 July 2015, § 51). Inferior courts enjoy a certain margin of appreciation in the determination of whether or not such a social need is present. Nevertheless, this margin of appreciation is subject to the Court's review.

(b) Proportionality

42. In addition, it should also be examined whether any restriction imposed on fundamental rights and freedoms is a proportional limitation that allows for the least interference possible with fundamental rights, provided that the relevant interference is required for the democratic order of the society (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 63; *Bekir Coşkun*, §§ 53 and 54; for explanations as to the principle of proportionality, see also *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, §§ 96-98; *Tansel Çölaşan*, §§ 54 and 55; and *Mehmet Ali Aydın*, §§ 70-72). Therefore, the measure of blocking access imposed in the present case must be in a reasonable balance of proportionality with the damage that is believed to have been sustained by the complainant.

(c) Online Journalism and Freedom of the Press

43. Online journalism via the Internet, as long as it performs the fundamental function of the press, must be considered within the ambit

of freedom of the press (see *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, no. 2013/2623, 11 November 2015, §§ 36-42; *Önder Balıkçı*, no. 2014/6009, 15 February 2017, § 39; and *Orhan Pala*, no. 2014/2983, 15 February 2017, § 45). While freedom of the Internet falls within the ambit of the liberty of imparting thoughts and opinions from the perspective of the press, it is considered as part of the liberty of receiving information or ideas -enshrined in the essence of the constitutional protection on the freedom of expression- from the perspective of individuals accessing the Internet (i.e. the Internet users).

44. The freedom of expression and freedom of the press apply to everyone and are vital for proper functioning of democracy (see *Bekir Coşkun*, §§ 34-36). These freedoms not only cover the content of information but also the means through which such information is disseminated. Therefore, all kinds of restrictions imposed on websites or measures such as blocking of access to news available on websites have a real bearing on the freedom of receiving and imparting information. It must be borne in mind that the press offers one of the best means of conveying different ideas and positions in terms of forming public opinion (see *İlhan Cihaner (2)*, no. 2013/5574, 30 June 2014, § 63).

(d) Scope of the Freedom of Expression

45. On the other hand, Article 26 § 1 of the Constitution does not envisage a limitation on the freedom of expression in regard to contents. The freedom of expression covers any kind of expression such as imparting political, artistic, academic or commercial thoughts and opinions (see *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, § 37; and *Önder Balıkçı*, § 40). Therefore, the information contained in columns and news pieces on a website, even if they are regarded as "valueless" or "useless" by others, fall under the protection of the freedom of expression regardless of individuals' subjective evaluations.

46. In cases such as the present one, the freedoms of expression and the press also protect, in addition to the right to convey information, the public's right to receive information regarding well-known figures. Moreover, the Court has repeatedly emphasised that politicians, figures

well-known to the public, and persons exercising public authority should be more tolerant to criticism as a consequence of their functions and that the acceptable limits of criticism towards these persons are wider (see, for politicians, *Ergün Poyraz (2)*, § 58; for persons exercising public authority, *Nilgün Halloran,* no. 2012/1184, 16 July 2014, § 45; for a well-known Chief Public Prosecutor, *İlhan Cihaner (2)*, § 82; and for a well-known public official preparing to enter politics, *Önder Balıkçı*, § 42).

(e) Duties and Responsibilities of the Press

47. Although the press has the right to criticise and comment on politicians and public officials in a democratic society, Articles 26 and 28 of the Constitution do not guarantee an absolutely unlimited freedom of expression. Article 12 § 2 of the Constitution ("*The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals.*") also refers to the duties and responsibilities of persons in the exercise of their fundamental rights and freedoms. The obligation to abide by the limitations stipulated by Article 26 § 2 of the Constitution entails certain "duties and responsibilities" with respect to the exercise of the freedom of expression, which are also applicable to the press (see, for the duties and responsibilities of the press, *Orhan Pala*, § 46; *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 22 February 2016, § 89; *R.V.Y. A.Ş.,* no. 2013/1429, 14 October 2015, § 35; *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 67; and *Önder Balıkçı*, § 43).

48. These duties and responsibilities are particularly important in situations where "the rights and reputation of others" might be damaged and especially when the reputation of an individual whose name is mentioned is concerned (see *Orhan Pala*, § 47). Freedom of the press requires the persons concerned to respect the professional ethics, give true and reliable information and act in good faith. Distortion of the truth in bad faith may exceed the limits of acceptable criticism. Therefore, the duty to provide information includes obligations and responsibilities and limits to which the press agencies need to conform *ipso facto* (see *Orhan Pala*, § 48; *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, §§ 42 and 43; *Kadir Sağdıç* [Plenary], no. 2013/6617, 8 April 2015, §§ 53 and 54; and *İlhan Cihaner (2)*, §§ 60 and 61).

49. The scope of the responsibilities at issue varies depending on the applicant's circumstances and the means by which the freedom of expression is exercised. In the determination of whether a sentence is "necessary in a democratic society", the Court will not disregard this aspect of the matter.

(f) Protection of the Honour and Reputation of Individuals

50. According to Article 26 § 2 of the Constitution, another reason for restricting the freedom of expression and, by extension, a responsibility that must be fulfilled by the press is the protection of the reputation or rights of others. The honour and reputation of an individual constitute a part of his/her personal identity and spiritual integrity and benefits from the protection of Article 17 § 1 of the Constitution (see *İlhan Cihaner (2)*, § 44). The State is obliged not to arbitrarily interfere with an individual's honour and reputation and to prevent the attacks of third parties (see *Nilgün Halloran*, § 41; *Adnan Oktar (3),* no. 2013/1123, 2 October 2013, § 33; *Bekir Coşkun*, § 45; and *Önder Balıkçı*, § 44).

51. For these reasons, in similar applications, the Court examined whether a fair balance had been struck between the applicant's freedom of expression and the press (which was interfered with due to the blocking of access to the content) and the right to respect for the honour and reputation (which was interfered with due to the news published on the website) (see *Nilgün Halloran*, § 27 and *İlhan Cihaner (2)*, § 39). This examination is not an abstract one.

(g) Balancing Exercise between Competing Rights

52. Some of the criteria for a balancing exercise between competing rights -applicable to the present case- may be listed as follows:

i. whether the publication in question is true;

ii. whether there is public interest in the publication and whether it contributes to a debate of general interest;

iii. whether the public is interested in the subject and whether the subject is current;

iv. whether a balance was struck between the essence and the form;

v. the circumstances under which the news or article was published;

vi. the subject of the news or article; the kind of expressions used therein; the content, form and consequences of the publication;

vii. the nature and scope of the restrictions on the news;

viii. the identity of the person stating the expressions found in the news;

ix. the identity of the person targeted, how well he/she is known and prior conduct of the person concerned;

x. the weight of the rights of the public and other persons against the expressions used.

53. In line with the circumstances of the application, the Court reviews whether the relevant criteria, some of which are mentioned above, were duly taken into consideration (see *Nilgün Halloran*, § 41; *Ergün Poyraz (2)*, § 56; *Kadir Sağdıç*, §§ 58-66; and *İlhan Cihaner*, §§ 66-73). Therefore, all the content published by the applicant should be evaluated within the entirety of the case, without separating them from the context in which they were published (see *Nilgün Halloran*, § 52 and *Önder Balıkçı*, § 45).

(h) Grounds for the Interference with Freedom of Expression

54. In this regard, the centreline of the assessments to be made in respect of the impugned incident is whether the administration and inferior courts could plausibly set forth that the grounds on which they relied in their decisions constituting the interference in question were "necessary in a democratic society" and compatible with the "principle of proportionality" in respect of the restriction imposed on the freedom of expression (see *Bekir Coşkun*, § 56; *Abdullah Öcalan*, § 98; *Tansel Çölaşan*, § 56; and *Ahmet Temiz (6)*, no. 2014/10213, 1 February 2017, § 34). Interferences with the freedom of expression without any grounds or on such grounds that do not satisfy the criteria laid down by the Court shall be in breach of Article 26 of the Constitution.

(2) Certain Findings as to the Blocking of Access Ordered on the Basis of Article 9 of Law no. 5651

55. Expression and dissemination of thoughts on the Internet are easier, cheaper, faster and more widespread than the printed publications. It is easy to access websites, as well. Websites offer a larger capacity in terms of storing and disseminating a vast amount of data. For these reasons, websites play an important role in improving the public's access to current issues and facilitating the transmission of information. For the same reasons, some offences are committed more easily by means of the publications on the Internet. In particular, personal rights and rights to private life may be violated by anyone in an easy, cost-free and speedy manner. The legislator has provided for special and speedy procedures, besides ordinary cases or filing complaints before the public prosecutor's offices, for the purpose of combating more effectively with the offences committed through the Internet and providing a speedier and more effective protection of private life and personal rights. One of those procedures involves the decisions on removal of the content and the blocking of access to publication, which was introduced by Law no. 5651 and is issued by a magistrate judge via a non-contentious procedure or by the head of the Information and Communication Technologies Authority (ICTA) and the approval of a magistrate judge.

56. It is clearly noted under Article 8 of Law no. 5651, titled "*Decision on blocking of access and its execution*", that the magistrate judges' decisions to block access or remove content are "protection measures". It is noted under Article 9/A of Law no. 5651, titled "*Blocking of access to the content on account of the right to respect for private life*", that such a decision is a "protection measure". In its judgment dated 2 October 2014, the Plenary of the Court held that decisions on blocking of access are necessary and exceptional judicial measures which are taken in democratic countries for the grave offences such as child pornography, sexual abuse of children and racism and are imposed as a part of criminal proceedings. The Court previously pointed out that the decisions on blocking of access under Law no. 5651 are not criminal or administrative sanctions but merely measures (see the Court's judgment no. E.2014/149, K.2014/151, 2 October 2014).

57. Protection measures restrict a fundamental right of the persons in respect of whom a judgment had not been rendered yet at the time of the imposition. Accordingly, at the time of imposition of the measure, it was not legally certain whether the act had been carried out; if it had been carried out, whether it had been done so by the suspect or accused or whether the relevant act constituted an offence; or whether the facts justifying the imposition of measures on third parties had been accurate. Such certainty could only be observed upon the finalisation of the judgment. Therefore, the protection measure does not involve a degree of lawfulness to the extent of legal certainty at the time of its imposition. The question whether the relevant measure is lawful or not may only be answered when the facts and legal consideration on which the measure is based are proven to be appropriate. Otherwise, it would be concluded that the imposed measure is unlawful.

58. According to Article 9 of Law no. 5651 which is resorted to in cases of violation of personal rights, natural persons and legal entities alleging a violation of their personal rights may request the removal of publication of that content by means of sending a warning to the content provider or, if the content provider cannot be contacted, to the hosting provider, or such persons/entities may also apply directly to a judge to request blocking of access to the content. The judge who receives such a request is obliged to issue a decision on the request without holding a hearing. The necessary action for the decision on blocking of access to the content submitted by the Access Providers Union ("the Union") to the access provider must be carried out immediately, within 4 hours at the latest, by the access provider.

59. It is not clear in Article 9 of Law no. 5651 whether a judicial investigation will be launched against the perpetrators after the decision to block access. Where an investigation is launched for the interference with personal rights, judicial authorities may render a decision as to the consequence of the blocking of access measure according to the outcome of the investigation or prosecution. On the other hand, if an investigation is not launched, the measure in question will prevent Internet users from accessing the blocked content for an indefinite period of time.

60. As it is observed, upon the request for blocking of access to content, the magistrate judge carries out an examination on the basis of the documents submitted by the person who filed the request. Accordingly, the relevant media organ and those responsible are not informed of the application which was filed. Moreover, the relevant persons from the website, against which the request for blocking of access was filed, cannot be present at the hearing as in contentious proceedings since a hearing will not be held. As the judge is obliged to issue the decision within 24 hours, he/she cannot send a notification to the other party and ask them to submit written statements. The other party cannot defend themselves, they cannot have information or make comments on the evidence, opinions and observations submitted for the purpose of affecting the decision of the judge.

61. As the remedy of blocking of access envisaged under Law no. 5651 is a non-contentious legal remedy, namely as there is not an adverse party, the representatives of the media organ which would be effected by the decision and those responsible cannot benefit from the principle of the equality of arms and they cannot have reasonable and acceptable opportunities to present their defence, including the possibility of submitting evidence against the allegations of the person filing the request. In summary, the judge issues his/her decision on the basis of the case file, namely on the basis of the information and documents submitted by the person filing the request; and the statements of the other party cannot be collected in the course of these proceedings.

62. For these reasons, taking protection measures in general and the measure of blocking of access to the online publication at issue specifically may be considered as justified in some respect, or "*prima facie*" justified. In other words, it must be acknowledged that the procedure provided for under Article 9 of Law no. 5651, which is the basis for the decision on blocking of access at issue, is exceptional. That procedure involves the magistrate judge rendering a decision on blocking of access within 24 hours without holding a hearing, hearing the other party or collecting evidence at the end of a review limited to pieces of evidence submitted by the person who filed the request. This procedure may only be applied

if the relevant online publication is seen, at first sight, to be manifestly in breach of personal rights. In cases where it is *prima facie* understood that the personal rights were breached without any need to make further examination, such as the disclosure of naked photographs or videos of a person, the exceptional procedure stipulated under Article 9 of Law no. 5651 may be conducted.

63. The doctrine of *prima facie* violation is also applied to the objections to be filed against the decision on blocking of access to Internet rendered by the domestic courts. Indeed, Article 9 of Law no. 5651 contains special provisions with regard to the method of objections to be filed against a measure concerning the restriction of access to a webpage. The decision rendered upon review of the objection is not delivered as a result of contentious proceedings, which settles the dispute on the merits; it is limited to the *prima facie* necessity of the decision of the magistrate judge to block access. In such cases, the "doctrine of *prima facie* violation" would ensure a fair balance between the need for speedy protection of personal rights from online publications and the freedom of expression.

(3) Other Available Legal Remedies against Interferences with Honour and Reputation

64. Both criminal and civil protection mechanisms are available in our country against third parties' interferences with personal rights. A person whose personal rights have been attacked through an online publication may follow the procedure laid down in Article 9 of Law no. 5651 by applying to a magistrate judge and obtaining a speedy protection in case of a "*prima facie* violation". To secure more satisfaction, the same person may also pursue other remedies. In private law, for example, persons may rely on Articles 24 and 25 of the Turkish Civil Code (Law no. 4721, dated 22 November 2001) to request the prevention or stay of interference or the termination of an on-going interference, determination of the unlawfulness of an interference, publication or notification to third parties of the decision or the text of response and correction. They may also bring actions for compensation of pecuniary or non-pecuniary damages. In cases where a delay would pose a risk and cause serious damage, the judge may be requested to decide on the requisite measures for the

prevention of the risk or damage. Therefore, in cases where a delay would pose a risk or cause serious damage, an interim measure may be taken pursuant to the Code of Civil Procedure (Law no. 6100, dated 12 January 2011) upon request in order to prevent the risk or damage. Apart from those, a person who has suffered an interference with his/her personal rights may file an action of unjust enrichment (*sebepsiz zenginleşme*) against those who made an unjust gain due to their statements or the victim of interference may also, as per the provisions regulating performance of business without requirement of proxy (*vekaletsiz iş görme*), request the transfer of the gains made thanks to the publication.

65. If an attack made against personal rights via Internet constitutes an offence according to criminal laws, the complainant may solely or also request that the perpetrator be punished. In this case, the claimant may apply to a public prosecutor's office for criminal investigation and prosecution. In any event, the public prosecutor is legally obliged to launch an investigation *ex officio* in respect of offences that do not require a complaint to be filed. In the event that a criminal investigation is launched, since the judge will decide on security measures if he/she renders a conviction pursuant to Article 223 § 6 of the Code of Criminal Procedure (Law no. 5271, dated 4 December 2014), a decision will also have been delivered with regard to the measure of blocking of Internet access.

66. Moreover, persons may pursue general legal remedies in any case for the protection of their personal rights if they cannot secure the protection they wanted due to the *prima facie* lack of a violation found as per Article 9 of Law no. 5651. The fact that the magistrate judge has or has not found a violation *prima facie* does not mean that the dispute is entirely resolved. Because decisions rendered *prima facie* shall never materially constitute a final decision for a normal case.

67. In this context, in cases where no violation is found *prima facie* through the procedure set out in Article 9 of Law no. 5651, the request shall be dismissed without any further examination. In the cases handled before general courts, on the other hand, the alleged violation must be proven for the request to be accepted. In such cases, general courts may not dismiss the request by simply holding that no violation is found at

first sight. It must be proven whether or not there has been a violation with all the evidence available, including expert reports.

(4) Application of Principles to the Present Case

68. As indicated above, the blocking of access envisaged by Article 9 of Law no. 5651 is a remedy that is only used in cases of unlawful interference with personal rights and it aims to eliminate without delay the interferences targeting an individual's honour and reputation. The purpose of implementing the measure of blocking of access to an online publication is to strike the necessary delicate balance between freedom of the press and personal rights. That is, it seeks to stop an on-going and *prima facie* visible interference with personal rights by blocking the access to the relevant publications of websites that unjustly harm individuals, disseminate false information about them, and violate their honour and reputation. In this sense, this measure should be used in such a way that does not impair the very essence of freedom of the press and the rights of the members of the press to impart information and criticise but protects, at the same time, the interests of the right holder.

69. The impugned news pieces and columns contained, in general, the allegations that the Turkish Aeronautical Association ("the TAA") was managed improperly, that the policies pursued were to the detriment of the association, and some people were offered undeserved profit. According to the applicant, the TAA's ranks were filled with those who were close to the complainant. Certain documents were also shared in the impugned columns and news pieces as basis for the allegations. In general, the complainant's policies were considered as a scandal (see §§ 13-16 and 18 above).

70. In both of its judgments, the first-instance court observed that the complainant had not been tried in relation to the allegations published on the website and held that the publication of those allegations without a finalised court judgment would cause a breach of personal rights. The said court acknowledged that the news and the articles reflected the author's personal opinion and exceeded the limits of simply conveying information. In its second judgment, the first-instance court indicated the

nature of the articles as "news or a personal opinion" but also added that they could humiliate the complainant in the society.

71. Nevertheless, it was neither alleged nor did the inferior courts held in their judgments that the applicant had reported false news by distorting the facts or making additions to the news, that she had acted in bad faith, or that method of obtaining the information had been unacceptable. It is clear the complainant did not wish any negative news to be reported with regard to his chairmanship of the TAA. It should be noted that the impugned news pieces and columns are under the protection of the freedom of expression, regardless of individuals' subjective assessments (see § 46 above).

72. In the case of *Orhan Pala*, the Court held that expecting the journalists to act as a prosecutor to verify the accuracy of a statement imposes a heavy burden of proof on them, and such a liability may give rise to unfair consequences at the end of the proceedings where they stand as an accused or a defendant (see *Orhan Pala*, § 51).

73. In the present application, the first-instance court considered the absence of any judicial decision against the complainant in the impugned articles as the justification of the blocking of access to the articles. In other words, it held that no news containing allegations against a person may be reported without an existing judicial decision against that person. Adopting such a limit of certainty in news reporting and expression of opinions in the press would obviously result in the total removal of the freedoms of expression and the press.

74. It is clear that the TAA is one of the longest-standing and most important institutions of Turkey in aviation. Given that the website of which the applicant is the owner and chief editor particularly publishes pieces regarding the field of aviation, there is no doubt that any development related to the TAA falls within the applicant's area of interest. It is understood that the applicant reflected the management of the TAA and the policies of its chairman as sensational and that he found the developments unacceptable. Through his website, he directed harsh criticism towards the complainant from his point of view.

75. The news pieces and columns in question were about an aviation association which was, at the material time, and still is one of the prominent and well-known institutions of Turkey. Similarly, it is clear that the articles in question serve the function of ensuring that the opinions and attitude of the complainant, who has an undeniable level of recognition, as well as his activities related to aviation are discovered and that a public opinion is created in those respects. The higher the value of a news piece or article to inform the public is, the more the person needs to succumb to the publication of the said news piece or article (see *İlhan Cihaner (2),* § 74 and *Kadir Sağdıç,* § 67).

76. Although the impugned online articles involve political aspects in part, it is beyond dispute that, fundamentally, they concern an institution which depends on donations from the society and serves the public; therefore, the articles are related to public interests and have a high value in terms of informing the public. According to the conclusion drawn from the above, there is no doubt that the publication of certain allegations concerning the TAA and its chairman (the complainant) in the news and articles contributes to a debate of high general interest.

77. It may be acknowledged that certain phrases used in the impugned news pieces and columns harshly criticised the complainant and even crossed the line at times. First of all, in this kind of applications, it is not for the judicial authorities to substitute themselves for the press and to determine what type of reporting shall be used in a certain situation. And secondly, it must be accepted that the scope of freedom of the press, as a natural consequence of its close relationship with democracy, should be interpreted broadly to allow for exaggeration and even provocation to some extent.

78. It has not been shown that the publication of the news had a considerable impact on the complainant's life. Considering that the news was not related to his private life, it did not contain strong insults, nor did it amount to an arbitrary personal attack, what remains is the polemical and aggressive style used by the applicant as he was reporting the news. In this regard, it must be noted that the freedom of expression does not only protect the content of the news and opinions but also the style through

which they are conveyed (see, *Medya Gündem Dijital Yayıncılık Ticaret A.Ş.*, §§ 41 and 42; *Ergün Poyraz (2)*, § 77; *İlhan Cihaner (2)*, §§ 59 and 86; and *Kadir Sağdıç*, §§ 52 and 76).

79. The complainant is the chairman of one of the largest institutions active in the field of aviation. It is obvious that the complainant enjoyed certain advantages as regards conveying his views to those interested. In fact, prior to the publication of the impugned articles, the applicant had met with the complainant in his capacity as a journalist and asked the complainant about the allegations. Therefore, it should be acknowledged that the limits of criticism directed towards the complainant are much broader compared to ordinary persons. Taking account of the public's right to be informed about well-known figures, the complainant should foresee that his actions and words will be tracked by the press, that there will be news coverage about him, and that he might be strongly criticised; thus, he should be able to tolerate these to a higher extent for the sake of democratic pluralism.

80. It is out of question to think that the offences punishable under criminal legislation may be left unsanctioned if they have been committed over the Internet. For this reason, it is a necessity, in terms of the legal system, to block access in some cases. On the other hand, the Internet offers an indispensable platform for accessing information, expressing and sharing information and thoughts, and spreading the knowledge. In this day and age, Internet has become one of the most effective and widespread medium used by individuals in the exercise of their freedom of expression and information since it accommodates the principal means of participation in the debates and actions concerning matters of general interest.

81. In its examination as to the annulment of Article 9 § 9 of Law no. 5651, the Court held that if individuals were to fear that they may be subject to the State interference when exercising their rights and freedoms, it would inhibit their free exercise of those rights and freedoms, and will severely impede individuals in their efforts to construct the foundations of a democratic society. In the same judgment, the Court followed that individuals employ the internet in the exercise of many rights and

freedoms defined in the Constitution. For example, individuals may use the internet to exercise their freedom of information, their freedom of thought and expression, their freedom of education and learning, their freedom to receive information, and their freedom of enterprise (see the Court's judgment no. E.2014/87, K.2015/112, 8 December 2015, § 166).

82. Therefore, given the vital importance of the rights and freedoms linked to the freedom of Internet -in particular the freedoms of expression and the press- in a democratic society, it is clear that the authorities and courts using the public power with respect to the Internet should act very delicately (see the Court's judgment no. E.2014/149, K.2014/151, 2 October 2014; and for explanations on the indispensable nature of the Internet, see also the Court's judgment no. E.2014/87, K.2015/112, 8 December 2015, § 116). The measure of blocking access to the Internet must be used as a last resort. If it is possible to tackle harmful content on the Internet through other means or if the blocking of access caused a larger damage in comparison with the protected interest, the decision to block access shall constitute a violation of the freedoms of expression and the press under those circumstances.

83. One of the methods of protecting personal rights in the Turkish legal system in cases where there has been an interference with personal rights committed via the Internet is the non-contentious legal remedy before magistrate judges, which is regulated by Article 9 of Law no. 5651 and was used in the present application. As noted before, this is a remedy in which the persons responsible for the media outlet to be affected by the decision cannot be afforded the guarantees of the law of trial procedure and where, by extension, it becomes difficult to strike a balance between conflicting rights. The decision of blocking of access to content serves the function of informing the public of the fact that a piece of news coverage amounted to an attack on the honour and reputation of others. It should be recalled that it is possible to deliver such a decision as a result of non-contentious proceedings only in cases where the unlawfulness and the interference with personal rights are apparent enough to be seen at first sight (i.e. prima facie) and where the damage must be redressed speedily.

84. In addition, the restriction becomes permanent in cases, as in the present one, where there is no subsequent criminal investigation and prosecution and, consequently, no new decision rendered in respect of the measure. Such restrictions with indefinite durations clearly pose great risks with regard to the freedoms of expression and the press. For these reasons, this legal remedy must be considered as such a remedy that is effective in a very narrow area, compared to other remedies in the legal system aimed at protecting the honour and reputation of individuals.

85. Holding that the impugned news pieces and articles had amounted to an interference with the complainant's personal rights, the first-instance court decided to block access to the content pursuant to Article 9 of Law no. 5651. Nonetheless, the first-instance court failed to prove that it was necessary to eliminate the unlawful interference with the complainant's honour and reputation through the impugned news, without carrying out adversarial proceedings, in a speedy manner and without delay.

86. Considering that the final cause of the victim of an unlawful interference with the individuals' right to respect for their honour and reputation due to expressions of thought and opinion on online platforms is the compensation of the damages he/she has suffered, the Court observes that there are other criminal or civil remedies (depending on the circumstances) that are available, effective and capable of offering a better prospect of success especially with regard to disputes such as the one giving rise to the present application. Moreover, the complainant still has the opportunity to request the blocking of access to the content within a set of contentious proceedings he can file.

87. In view of all the circumstances of the present application, the Court considers that the interference with the freedoms of expression and the press guaranteed under Articles 26 and 28 of the Constitution -caused by the blocking of access decision giving rise to the complaint- did not correspond to a more pressing social need. The reasons given for the blocking of access decision against the applicant may not be deemed sufficient. The impugned blocking of access decision is not necessary in a democratic society for the protection of the complainant's reputation.

88. In a democratic society, restrictions may not be used to the extent in which they disproportionately hinder the exercise of a right, regardless of the aims they pursue. In the instant case, the news pieces and articles at issue seem to have been blocked for an indefinite duration. Therefore, even if it is argued that the disputed restriction concerned certain specific articles and had limited effects, the significance of the interference is not any less. Even if the blocking of access to an online publication may be acceptable for the purpose of temporarily stopping an interference with personal rights until the end of an investigation or proceedings, it cannot be considered as proportionate under the circumstances of the instant case that a decision taken as a measure without establishing relevant and sufficient grounds stay in effect indefinitely.

89. For these reasons, it must be held that there has been a violation of the freedom of expression protected under Article 26 of the Constitution and the freedom of the press protected under Article 28 of the Constitution.

Mr. Serdar ÖZGÜLDÜR expressed a dissenting opinion in this respect.

C. Application of Article 50 of Code no. 6216

90. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

91. The applicant requested the Court to find a violation.

92. As there is legal interest in conducting a retrial in order to redress the consequences of the violations of the applicant's freedoms of expression and the press, a copy of the judgment must be sent to the Ankara 5th Magistrate Judge (Miscellaneous Files nos. 2014/355 and 2014/320) for retrial.

93. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 26 October 2017:

A. BY MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, that the alleged violations of the freedoms of expression and the press be DECLARED ADMISSIBLE;

B. BY MAJORITY and by dissenting opinion of Mr. Serdar ÖZGÜLDÜR, that the freedom of expression and freedom of the press safeguarded by Articles 26 and 28 of the Constitution were VIOLATED;

C. That a copy of the judgment be SENT to the Ankara 5th Magistrate Judge (Miscellaneous Files nos. 2014/355 and 2014/320) for a retrial to remove the consequences of the violation;

D.That the total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. That 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; and

F. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE SERDAR ÖZGÜLDÜR

In the case giving rise to the present application, the "blocking of access" decision was not imposed on the whole of the website in question but solely on the applicant's allegations and statements (news pieces and columns) with regard to the person concerned (the complainant). Article 9 titled "Removal of content from publication and blocking of access" of Law no. 5651 (dated 4 May 2007) provides for a special protection system, for the parties concerned by publications, with regard to violations of personal rights via any publication made on the Internet. Accordingly, a decision of "blocking of access" may be issued as a measure upon request of the person concerned and decision of the relevant magistrate judge, where the conditions are fulfilled. This decision, which may be challenged and which becomes final upon dismissal of the objection, is an important protection mechanism provided for the individual rights and freedoms. This legal ground for restriction -imposed on the freedom of expression within the scope of protection of the honour and reputation of individuals- shall be examined and ruled on by the relevant judicial body (the magistrate judge) in every individual case. This objectionable decision can only become final in respect of the said "measure". The person affected by the "blocking of access" decision can (and should) claim the lawfulness of his allegations contained in the online publication through filing actions (e.g. for cessation of intervention, compensation, declaration etc.) by relying on the possibilities provided by the Civil Code, the Code of Obligations, or other special laws. If the lawfulness is established as a result of such proceedings, he can have this decision reversed by means of applying to the competent body that issued the "blocking of access" decision. Making an assessment towards a violation by merely criticising and neglecting the legal protection system provided for the persons that are otherwise completely vulnerable to the Internet would lead to a conclusion where the freedom of expression is preferred to the honour and reputation of individuals and thus leaves third parties deprived of a legal safeguard against online publications. Therefore, making an issue subject to an individual application at the very beginning based on the

presumption that there was a "structural problem", although the issue had not been raised as a matter of legal dispute or legally reached a result, would not be in compliance with the law. Noting that this application lodged without exhausting the available legal remedies may not be examined on the merits, I do not agree with the majority who consider otherwise.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

İRFAN SANCI

(Application no. 2014/20168)

26 October 2017

On 26 October 2017, the Second Section of the Constitutional Court found violations of the freedoms of expression, science and the arts as well as of the press safeguarded respectively by Articles 26, 27 and 28 of the Constitution in the individual application lodged by *İrfan Sancı* (no. 2014/20168).

THE FACTS

[7-35] The applicant is the director and partner of a publishing firm which published the Turkish translation of "The Soft Machine", a novel written by the American novelist and essayist William S. Burroughs.

The press office of the relevant chief public prosecutor's office found that there were detailed depictions of homosexual intercourses in twenty separate sections of the novel and that there was no warning on the book cover for the protection of minors. Thereupon, the novel was sent to the Board for the Protection of Minors from Sexually Explicit Materials of the Prime Ministry ("the Board") for receiving its opinion in this respect.

An examination was made by the Board consisting of eleven members –most of whom are elected from various public institutions– and assigned with the duty of assessing whether printed works would have an unfavourable effect on minors (under 18 years of age). Accordingly, the Board has found the novel obscene on the grounds that especially homosexual intercourses between men are explained in the novel to the extent that would tarnish the senses of shame and modesty; that it is not a literary work; that it would not make any additional contribution to the reader's knowledge and it would incite the readers to perform criminal acts; that the content of the novel is in conflict with the social norms of the society and is immoral. In the report, it is underlined that an obscene novel will also be primarily detrimental, that the novel impairs the people's senses of shame and modesty and is immoral in nature which arouses and exploits sexual desires, and that it is in breach of Article 226 of the Turkish Criminal Code no. 5237.

The chief public prosecutor's office filed a criminal case against the applicant and the translator for acting as an intermediary for the

publication of obscene works. In the indictment, the literary movement "Beat Generation" is discussed, and it is also indicated that those supporting the movement and called as "Beatniks" are defending personal salvation, spiritual purification and enlightenment by way of reaching intense sensorial awakening through drugs, jazz music, sexuality or Zen Buddhism, while displaying their strangeness towards the traditional or "closed-minded" section of the society. It is also emphasized therein that the author William S. Burroughs is one of the prominent members of this generation and has aimed at breaking several taboos and reaching a limitless freedom, as a consequence of the thoughts adopted by the movement.

The indictment further indicates that several sections of the novel include detailed depictions of sexual organs and homosexual intercourses as a result of which readers do not get the impression of eroticism. As no measure was taken in the novel for the protection of minors, the translator and the applicant publishing the novel were requested to be sentenced, in the capacity of the owner of the work.

In his defence arguments, the translator maintained that the author is a widely-known, best-seller and a popular author in the world; that the impugned sections of the book appearing to be immoral are for breaking taboos; and that it is not proper to assess the novel merely from the ethical aspect.

In his defence arguments, the applicant noted; that the novel must be assessed as a whole as it was not proper to consider the work as obscene by means of extracting only some sentences or paragraph therein; that the author who was the pioneer of the "Beat Generation" movement had so far influenced several authors, musicians, film-makers and artisans; and that the work was written by the cut-up method, which was well-accepted by the literary world, and therefore, it was not possible to expect a work to be coherent whose author rejects stereotypes.

The competent criminal court had a report issued by a panel of experts consisting of a criminal law lecturer and two lecturers from the department of English language and literature. In this report, it is

indicated that the novel is one of the worldwide prominent literary works and is studied in the universities; that it is praised by prominent authors; that its content does not consist of merely social criticism but it has also exerted influence by its literal method; that sexuality is one of the means serving for the author's social criticism and must not be considered to constitute the offence of obscenity.

The criminal court ordered suspension of the criminal proceeding and rendered the applicant subject to probation for three years pursuant to the Law no. 6352 on the Amendment to Certain Laws for Increasing the Efficiency of Judicial Services and the Suspension of Prosecution and Penalties Regarding Crimes Committed through Press, which entered into force after the issuance of the above-cited report.

The criminal court indicated in its decision that the decision was appealable before the Court of Cassation. However, following the appellate review, the Court of Cassation remitted the case-file to the inferior court on the ground that the decision was indeed non-appealable.

The applicant's challenge to the Assize Court was dismissed.

V. EXAMINATION AND GROUNDS

36. The Constitutional Court, at its session of 26 October 2017, examined the application and decided as follows:

A. Alleged Violation of the Freedom of Expression

1. The Applicant's Allegations

37. The applicant maintained that the impugned novel was an artistic work and that although he should have been acquitted of the charges, he was subject to a three-year probation, which was in breach of the freedoms of expression and labour. He accordingly requested re-trial and compensation.

2. The Court's Assessment

38. Article 26 of the Constitution titled "*Freedom of expression and dissemination of thought*" reads, in so far as relevant, as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities...

The exercise of these freedoms may be restricted for the purposes of ... public order...

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

39. Article 27 § 1 of the Constitution titled "*Freedom of science and arts*" reads as follows:

"Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely."

40. Article 28 of the Constitution titled "*Freedom of the press*" reads, in so far as relevant, as follows:

"The press is free, and shall not be censored...

The State shall take the necessary measures to ensure freedom of the press and information.

In the limitation of freedom of the press, the provisions of Articles 26 and 27 of the Constitution shall apply...

Periodical and non-periodical publications may be seized ... by order of the competent authority explicitly designated by law, in situations where delay may constitute a prejudice with respect to the protection of … public morals..."

41. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court assessed that the applicant's complaints should be examined within the scope of the freedoms of expression and science and arts as well as freedom of the press.

a. Admissibility

42. The alleged violations of the freedoms of expression and science and arts as well as freedom of the press were declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

Justice Mr. M. Emin KUZ did not agree with this conclusion.

b. Merits

i. Existence of an Interference

43. The applicant was tried on the charge of publishing a book with obscene contents but the case against him was suspended without arriving at a conviction, and he was placed under probation for three years. The Court previously concluded that there had been an interference with freedoms of expression and art as well as freedom of the press due to the suspension of prosecution in respect of an applicant concerning the books he had published as the owner of a publishing house. The Court found that, with a decision suspending the prosecution, the threat of prosecution still prevailed for the owner of the publishing house. Underlining the potential chilling effect that the anxiety of being subject to sanctions might have on individuals, the Court concluded that even if the person concerned might eventually be acquitted of the offences he was charged with, there was also the risk that they might, under this effect, refrain from disclosing their thoughts or maintaining their printing activities in the future. Therefore, according to the case-law of the Court, even if the applicant had not yet been convicted because of the books that he had published, it could be accepted that the possibility that the suspended prosecution might resume would cause stress and the anxiety of being punished to the applicants. From that standpoint, the Court found that there had been a violation of the applicants' freedoms of expression and art as well as freedom of the press (see *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, §§ 69-79; and for a later judgment, see also *Ali Gürbüz and Hasan Bayar*, no. 2013/568, 24 June 2015, §§ 46-49).

44. There are no major differences between the circumstances of the present case and the Court's above-mentioned case-law. In view of the principles set forth in the Court's case-law, regard should be had in the present case to the following elements: (i) although there is no final decision convicting the applicant for the time being, there exists an official report which indicates that the book in question is not a work of art and which should be taken into consideration according to the case-law of the Court of Cassation; (ii) the applicant was directly affected by the investigation and prosecution processes that lasted for nearly four years; (iii) and, being a publisher, the applicant is under the risk of facing investigation and prosecution in the future. For these reasons, it must be acknowledged that the three-year-long probation imposed on the applicant by suspending the prosecution against him constituted an interference with the freedoms of expression and art and freedom of the press.

ii. Whether the Interference Constituted a Violation

45. Article 13 of the Constitution reads, in so far as relevant, as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution... . These restrictions shall not be contrary to ... the requirements of the democratic order of the society ... and the principle of proportionality."*

46. The above-mentioned interference would constitute a violation of Articles 26, 27 and 28 of the Constitution unless it satisfied the requirements laid down in Article 13 of the Constitution. Therefore, it must be examined whether the interference in the present case was prescribed by law as required by Article 13 of the Constitution, relied on one or more than one of the legitimate aims set out in Article 26 § 2 and in compliance with the requirements of the democratic order of the society and the principle of proportionality.

(1) Whether the Interference was Prescribed by Law

47. First of all, it is not for the Court to determine which provisions of law should have been applied to the incident giving rise to the present application or foresee which will be applied in the future. The provisions

regarding the protection of children from obscene publications are set out by the Law no. 1117. Article 7 of Law no. 1117 stipulates that this law does not apply to literary works. Moreover, Article 226 § 7 of Law no. 5237 provides that the publications considered as literary works shall not constitute the offence of obscenity on the condition that they are prevented from being accessed by children; however, the Law does not lay down any procedures as to how these works are to be "prevented from being accessed by children". Therefore, although a hesitation arises with regard to the foreseeability of Article 226 § 7, it has not been deemed necessary to assess this matter any further since this hesitation can be obviated via jurisprudence. On the other hand, the Court found that the requirement for "prescription by law" was satisfied by Article 7 and Provisional Article 1 of the Prevention of Terrorism Act (Law no. 3713, dated 12 April 1991) which constituted the basis for the decision on the suspension of prosecution.

(2) Whether the Interference Pursued a Legitimate Aim

48. Article 26 § 2 of the Constitution does not list "protection of public morals" amongst the legitimate grounds for restriction of the freedom of expression. On the other hand, Article 28 § 7 of the Constitution on freedom of the press stipulates that periodical and non-periodical publications may be seized by order of the competent authority explicitly designated by law, in situations where delay may constitute a prejudice with respect to the protection of public morals. Therefore, the Constitution acknowledges "protection of public morals" as a legitimate ground for restricting freedom of the press, which is a specific aspect of the freedom of expression. With this consideration, the Court concluded that the decision to impose sanctions on the applicant was part of a series of measures intending to protect public morals and that it pursued a legitimate aim.

(3) Whether the Interference Complied with Requirements of the Democratic Order of the Society and the Principle of Proportionality

(a) General Principles

49. There is no doubt that publication and dissemination of books, as long as it performs the fundamental function of the press, must be

regarded from the standpoint of the freedom of expression and freedom of the press, the latter being another aspect of the former that is protected by specific safeguards (see *Fatih Taş*, §§ 58-61). In a number of previous cases, the Court held that the freedom of expression enshrined in Article 26 and freedom of the press guaranteed under Article 28 of the Constitution constitute two of the essential foundations of a democratic society and the basic conditions for its progress and for each individual's self-fulfilment (see *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 69 and *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 34-36). The freedom of art and science, another specific aspect of the freedom of expression, is specially protected under Article 27 of the Constitution.

50. The Court has also explained what should be understood from the expression "*requirements of the democratic order of the society*" in Article 13 of the Constitution. Accordingly, a measure that restricts the fundamental rights and freedoms must meet a social need and be used as a last resort. If the restrictive measure does not satisfy these criteria, it cannot be considered as a measure which is compatible with requirements of the democratic order of the society (*Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan,* no. 2014/6128, 7 July 2015, § 51). Inferior courts enjoy a certain margin of appreciation in the determination of whether or not such a social need is present. Nevertheless, this margin of appreciation is subject to the Court's review.

51. It should also be examined whether any limitation imposed upon the fundamental rights and freedoms is a proportional limitation that allows for the minimum interference with fundamental rights, along with being necessary for the democratic order of the society (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 63; *Bekir Coşkun*, §§ 53 and 54; for explanations as to the principle of proportionality, see also *Tansel Çölaşan*, §§ 54 and 55; and *Mehmet Ali Aydın*, §§ 70-72). Therefore, the imposed measure must be in a reasonable balance of proportionality with the damage believed to have been sustained by the public.

52. In the present case, a set of criminal proceedings was filed against the applicant as he published the impugned book containing obscene

expressions. In the bill of indictment, the public prosecutor acknowledged the literary nature of the work. The expert report obtained by the first instance court included highly detailed assessments indicating that the book in question was a work of literature. The Court did not find it necessary to hold a separate examination on whether the work in question was literary. Article 226 § 7 of the Law no. 5237 provides that a conviction cannot be imposed for the offence of obscenity due to literary works as long as measures are taken to protect children. Therefore, the matter before the Constitutional Court is rather the question whether the freedom of expression (Article 26), freedom of science and art (Article 27), and freedom of the press (Article 28) have been violated because of the proceedings brought against the applicant and the three-year probation period imposed by the domestic court for publishing and disseminating a book without taking any measures to protect children.

53. Articles 26, 27 and 28 of the Constitution do not guarantee an unlimited freedom of expression. The freedom of expression is subject to certain exceptions listed in Article 26 of the Constitution and, as regards the protection of public morals, in Article 28 § 5 of the Constitution which must be fully respected. The exceptions in question must be convincingly established in every individual case. Apart from these, Article 41 of the Constitution titled "*Protection of the family and children's rights*" which reads "*The State shall take the necessary measures ... to protect ... children... The State shall take measures for the protection of the children against all kinds of abuse and violence*." charges the State with the responsibility of taking any and every measure necessary for the protection of children and protecting children against abuse and any kind of violence.

54. Moreover, Article 12 § 2 of the Constitution which provides "*The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals*." makes reference to the duties and responsibilities of individuals in the exercise of their fundamental rights and freedoms. As is the case with administrators of other media and press outlets and members of the press, persons responsible of publishing houses have certain "duties and responsibilities" to observe during the exercise of the freedom of expression (with regard

to duties and responsibilities of the press, see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 22 February 2016, § 89; *R.V.Y. A.Ş.*, no. 2013/1429, 14 October 2015, § 35; and *Fatih Taş*, § 67). The scope of the responsibilities at issue varies depending on the applicant's circumstances and the means by which the freedom of expression is exercised. In the determination of whether a sentence is "necessary in a democratic society", the Court will not disregard this aspect of the matter.

55. Even though the press is required to respect the limitations it is subject to, the freedom to express and disseminate art, as in the publication of the impugned novel, is specially guaranteed under Article 27 of the Constitution. In this connection, Article 26 and, especially, Article 27 of the Constitution include the freedom of artistic expression within the scope of obtaining information and ideas and imparting thoughts. These constitutional guarantees offer the possibility to take part in the expression, dissemination and exchange of any cultural, political or social knowledge or idea. Persons who create, publish or disseminate works of literature such as the impugned book in the present case, have a considerable input in the dissemination of ideas and such artistic works are of great importance for a democratic society. For this reason, the State has to act more sensibly regarding the obligation of not interfering unnecessarily with the freedoms of expression of persons who have created the work of art (see *Fatih Taş*, § 104).

56. In this context, the Constitutional Court drew attention in its previous judgments to the fact that segregating any expressed and disseminated thought as "valuable-valueless" or "useful-useless" for the society on the basis of its content would involve subjective elements; thus, it would create a risk of arbitrary limitations on the freedom in question. It should be borne in mind that the freedom of expression also encompasses the freedom to express and disseminate thoughts that may be regarded as "valueless" or "useless" by others (see *Ali Gürbüz and Hasan Bayar*, § 42; and *Önder Balıkçı*, no. 2014/6009, 15 February 2017, § 40).

57. On the other hand, considering that the book in question is a fictional novel and that it has an original style, it should not be forgotten that Articles 26 and 27 of the Constitution do not only safeguard the

contents of expressed ideas and information but also the way they are expressed (see, for comparison, *Fatih Taş*, § 105). It cannot be accepted that authorities of the judiciary enjoy complete freedom in assessing whether a work has artistic or literary value. Judicial bodies must examine expressions without taking them out of context in their assessments with regard to the freedom of expression. Acting to the contrary might lead to reaching erroneous results in the application of the principles set out by Articles 13 and 26 of the Constitution and in terms of making an acceptable assessment of the findings established.

58. Especially when the subject of obscenity is at issue, which is a complex and vague phenomenon, the assessments to be made by judicial authorities must -as a requirement of this principle of a holistic approach- take account of certain factors: the characteristics of the branch of art or the work; the context in which the parts regarded as obscene are expressed; the identity of the author; the purpose and the time of writing; the identities and the sense of aesthetics of the people it addresses/appeals to; the potential effects of the work; and the entirety of all other expressions contained in the work (see, for a newspaper article which was allegedly terrorist propaganda, *Ali Gürbüz and Hasan Bayar*, § 64; for a book which allegedly contained defamatory claims attacking a person's reputation, *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, §§ 63, 66, 67; for a newspaper article with the same allegation, *Tansel Çölaşan,* § 62; and for a judgment concerning the requirement to assess the statements in an electronic mail within the entirety of the events, *Nilgün Halloran,* no. 2012/1184, 16 July 2014, § 52).

59. Lastly, in spite of the high sentences envisaged by law for the offence of obscenity, there is also the possibility in law where the accused person has the possibility of not facing punishment, which is absolute in respect of scientific works but subject to certain criteria in respect of works that have artistic or literary value. Therefore, the question whether the allegedly obscene work fell within the above-mentioned scope and the distinction between scientific works and the works of artistic or literary value become highly important. Furthermore, the bodies using the public power to interfere with the freedom of expression, freedom of art and

freedom of the press should put emphasis on the questions as to how to prevent artistic and literary works from being accessed by children and how to monitor it.

60. In this context, the Court must examine the interference giving rise to the present application within the entirety of the events and determine whether the interference with the freedom of expression was "proportionate" and whether the grounds relied on by the inferior courts to justify the interference were convincing - in other words, "relevant and sufficient" (see *Nilgün Halloran*, § 39; *Bekir Coşkun*, §§ 24 and 58; and *Tansel Çölaşan*, § 52). In doing so, the Court must become convinced that the bodies with public power and the inferior courts applied the standards compatible with Article 26 of the Constitution and the principles set forth by the Court; and that they also rendered their decisions through an acceptable assessment of the material facts. Therefore, the Court will consider the assessments made by the inferior courts and the grounds established.

(b) Application of Principles to the Present Case

61. The case giving rise to the present application was initially filed on the basis of a report issued by the Board for the Protection of Minors from Sexually Explicit Materials ("the Board"). The Court of Cassation's case-law cited shows that the said Board's reports have a significant impact on cases concerning obscenity. While Article 6 of Law no. 1117 limits the supervisory authority of the Board by excluding the works of art that have intellectual, social, scientific and aesthetic value outside the applicable scope of Law no. 1117, it does not specify which works will be regarded to have intellectual, social, scientific or aesthetic value. An assessment made by a board composed of eleven members who are generally bureaucrats, without a preliminary examination made by experts depending on the type of work, leads to the issuance of reports in which such works that should in fact be considered as intellectual, social or artistic are found to be deprived of these qualifications. Therefore, declaring a work obscene by virtue of decisions which are issued by a board that does not even include a pedagogue and sexual health professional and which are imprecisely formulated with general and abstract expressions may lead

to undesirable consequences in terms of freedoms of expression and the press.

62. In the instant case, the Board, the İstanbul Chief Public Prosecutor's Office and the Panel of Experts all stated that homosexual intercourses between men are depicted in an explicit and detailed manner in the impugned book. Nevertheless, the İstanbul Chief Public Prosecutor's Office and the Panel of Experts also acknowledged the book as a literary work. Beyond that conclusion, having examined the impugned publication (see, for a similar approach, *Öcalan*, §§ 25-36), the Court assessed the book as a whole and did not find any reasons to depart from the conclusion that the book had literary value, as acknowledged in the İstanbul Chief Public Prosecutor's Office's bill of indictment and the Panel of Experts' report.

63. The impugned book does not contain any representations such as pictures or drawings that does not give individuals any chance to avoid. Given also the author's complex discourse, it is highly unlikely for minors to be exposed to its contents. The book is open to public access; however, its design is not of a nature which would attract everyone's attention.

64. On the other hand, it has been concluded that in spite of its intellectual and artistic nature, the impugned book is not appropriate for the whole society, and it may aggrieve and offend the sensitivities of those who are not familiar with the issues mentioned therein. Given its topic and discourse, this novel is classified as a specific publication targeting at a certain group of the society. Regard being had to its obscene nature and to the fact that it is a literary publication addressing to a relatively small group of the society, it must be acknowledged that preventive measures to be taken for preventing access of certain groups, especially minors, to this publication –such as an expression or sign indicating that it is harmful for the minors under 18– may correspond to a pressing social need.

65. Therefore, following the determination of the artistic and literary nature of the work, the inferior courts must assess as to whether a measure is required to be taken for the protection of minors and whether a measure taken is appropriate. In the present case, however, both the

reports of the Board and the Panel of Experts and the bill of indictment issued by the İstanbul Chief Public Prosecutor's Office as well as the decisions of the Court of Cassation rendered in similar cases merely focused on the artistic and literary nature of the work without handling any matter with respect to the protection of minors.

66. In the present case, it is not possible to determine, on the basis of the inferior courts' decisions, why and how the impugned book breached the legal provisions on the protection of children's morals. In fact, the first instance court's decision does not include any indication demonstrating that it thoroughly elaborated on the question whether the impugned novel was compatible with the principle of the protection of minors. Without providing any reasoning, the first instance court ordered the suspension of the applicant's prosecution and rendered him subject to a three-year probation. Similarly, the decision of the criminal court which dismissed the applicant's objection against the aforementioned decision does not include any details or reasons in this context. Therefore, since the decisions rendered were not properly reasoned, it cannot be acknowledged that the requirements which should have been taken into account before restricting the applicant's freedom of expression have been duly examined.

67. For these reasons, in disputes regarding works in which obscene elements are found and which are alleged to be of scientific, artistic or literary nature, primarily the authorities exercising public power and then the inferior courts must determine whether the impugned works have any scientific, artistic or literary value. If these works are deemed to have such qualifications, it must be then considered whether the measures for the protection of minors have been taken during the presentation, publication, dissemination, and handing over of artistic and literary works (excluding the scientific ones), and if taken, whether these measures are proportionate. Thereafter, a decision must be taken in light of such determinations. In the present case, it was not assessed whether the impugned book was a literary work. Nor was it considered whether any measure must be taken for the protection of minors. The grounds relied on by the relevant courts were not relevant and sufficient.

68. Consequently, the Court found a violation of the freedoms of expression, science and art, and the press safeguarded by Articles 26, 27 and 28 of the Constitution.

Justice Mr. M. Emin KUZ did not agree with this conclusion.

B. Alleged Violation of the Right to a Trial within a Reasonable Time

69. The applicant complained of an alleged violation of the right to a trial within a reasonable time.

70. The Court has already examined and ruled on the basic principles with regard to the requirement that proceedings held in relation to criminal charges must be concluded with a decision within a reasonable amount of time, as per Articles 36 and 141 of the Constitution (see *B.E.*, no. 2012/625, 9 January 2014; *Ersin Ceyhan*, no. 2013/695, 9 January 2014). There are no reasons in the present case to depart from those principles.

71. In the evaluation of whether the trial period in criminal procedure is reasonable or not, the beginning of the period is the moment of notification of a person by competent authorities that he has committed an offence or application of a series of measures such as search and custody during which he has been initially affected by the allegation or initiation of a criminal case (see, *Ersin Ceyhan*, § 35). In the instant case, it has been understood that the period began with the filing of criminal proceedings by the chief public prosecutor's office on 27 April 2011 and ended with the final judgment rendered in relation to the criminal charge on 14 November 2014.

72. Having regard to the fact that the proceedings lasted for a total period of 3 years and 9 months before two levels of jurisdiction, the Court considered that there had not been a delay that would violate the applicant's rights.

73. For these reasons, the Court found that this part of the application must be declared inadmissible for *being manifestly ill-founded*, without examining it from the standpoint of the remaining admissibility criteria.

C. Application of Article 50 of Code no. 6216

74. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

75. The applicant claimed 20,000 Turkish liras (TRY) in compensation.

76. It has been found that the applicant's freedoms of expression, art and the press were violated.

77. Since there is legal interest in holding a retrial to remove the consequences of the violation of the applicant's freedoms of expression, art and the press, a copy of the judgment must be remitted to the 2nd Chamber of the İstanbul Criminal Court (E.2011/228) for retrial.

78. As regards the non-pecuniary damages sustained by the applicant due to the violation of his freedoms of expression, art and the press, which cannot be redressed by a mere finding of a violation, the Court awarded TRY 3,000 (net) to the applicant as non-pecuniary compensation.

79. The total court expense of 2,006.10 Turkish liras (TRY) including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is

calculated over the documents in the case file, must be reimbursed to the applicant.

JUDGMENT

For these reasons, the Constitutional Court held on 26 October 2017:

A. 1. By MAJORITY and by dissenting opinion of Mr. M. Emin KUZ, that the alleged violation of the freedoms of expression, art and the press be DECLARED ADMISSIBLE;

2. UNANIMOUSLY that the alleged violation of the right to a fair trial be declared INADMISSIBLE for *being manifestly ill-founded*;

B. By MAJORITY and by dissenting opinion of Mr. M. Emin KUZ, that the freedom of expression as well as the freedom of science and the arts and the freedom of the press, which are specific aspects of the freedom of expression, safeguarded by Articles 26, 27 and 28 of the Constitution were VIOLATED;

C. A copy of the judgment be REMITTED to the 2nd Chamber of the İstanbul Criminal Court (E.2011/228) for a retrial to remove the consequences of the violation of freedoms of expression, science and art and the press;

D. A copy of the judgment be SENT to the Prime Ministry's Board for the Protection of Minors from Sexually Explicit Materials;

E. A net amount of TRY 3,000 be PAID to the applicant in respect of non-pecuniary damage, and other compensation claims be REJECTED;

F. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

G. The payments 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; and

H. A copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICE M. EMİN KUZ

The individual application, which was lodged by the applicant with the allegation that the suspension of proceedings against him and his placement under probation were in breach of his freedom of expression and freedom of labour and contract, was examined under the freedom of expression, freedom of science and art and freedom of the press. It was declared admissible and a violation of these freedoms was found.

In the present case, a criminal case was filed against the applicant and, in the hearing of 5 July 2012, the 2nd Chamber of the İstanbul Criminal Court decided to suspend the prosecution pursuant to Provisional Article 1 of Law no. 6352. Upon an appeal submitted by the applicant, on 16 September 2014 the 14th Criminal Chamber of the Court of Cassation remitted the case file on the ground that the suspension of prosecution may not be appealed, and on 14 November 2014 the 2nd Chamber of the İstanbul Criminal Court dismissed the objection (see § 17 of the Judgment).

Considering that the decision giving rise to the application became final with the dismissal of the objection, and also in line with our earlier judgments, the Court has found that the application falls within its temporal jurisdiction.

As indicated above, the applicant used the wrong legal remedy by requesting an appeal against the non-appealable suspension of prosecution which was delivered prior to 23 September 2012, i.e. the beginning of the Court's jurisdiction *ratione temporis*. Thus, the applicant was able to lodge an individual application due to the fact that the [Court of Cassation's] decision dated 16 September 2014 regarding the non-appealability of the said decision of suspension and the [first instance court's] decision dated 14 November 2014 on dismissal of the objection were delivered nearly two years after the beginning of our temporal jurisdiction.

In this connection, if the applicant had resorted to the accurate legal remedy of objection against the first instance court's decision dated 5 July 2012 on the suspension of prosecution, it would probably have become

final before 23 September 2012, thereby falling outside of the Court's temporal jurisdiction. Therefore, the majority's decision to declare the application admissible means that the applicant was only able to complain of the said decision through an individual application because of his failure to resort to the correct legal remedy. In other words, the majority's interpretation results in granting the applicant an advantage in terms of lodging an individual application with the Court over those who used the accurate legal remedy, which would be submitting an objection, at the material time (also taking into account the fact that, in practice, the applications to the remedy of objection are resolved much more rapidly than the remedy of appeal). It must be underlined that the applicant pursued the wrong legal remedy even though he was represented by a lawyer and was in a position to be aware of the appropriate legal remedy thanks to the legal assistance he received.

In a number of decisions and judgments, the Court held that pursuing the wrong legal remedies would not confer upon the applicant any rights in terms of the remedy of individual application, the Court's temporal jurisdiction, or the time-limit for lodging an application.

It may be argued that the applicant was misguided with regard to legal remedy since the first instance court's decision of 5 July 2012 indicated that the remedy of appeal was available against this decision. Nonetheless, given that the applicant was represented by a lawyer, that there was no unforeseeable legal uncertainty as to the legal remedy to be pursued due to the clear provision in Law (see, similarly, *Hüseyin Günel*, no. 2013/2491, 17 July 2014, §§ 47-49), and that the misguidance caused by the first instance court did not eventually result in a denial of holding a review upon objection, it does not seem possible to agree with the majority's extensive interpretation in this regard.

For these reasons, I am of the opinion that the application should be declared inadmissible for incompatibility *ratione temporis* and therefore disagree with the majority's declaration of admissibility.

Secondly, I cannot agree with certain assessments made under the merits of the application and, by extension, the majority's finding of a violation.

In the present case, the first instance court decided to suspend the prosecution on 5 July 2012 pursuant to Provisional Article 1 of Law no. 6352, which entered into force nearly 1 week after the expert report of 25 June 2012 obtained by the said court and drafted by a panel composed of academics specialised in the field.

Although the expert report indicated that the novel in question should be considered within the scope of Article 226 § 7 of the Turkish Criminal Code "on account of its being a work of literature", the first instance court decided to suspend the prosecution, without having the opportunity to examine the merits of the case, by virtue of the clear provision laid down by Provisional Article 1 of the newly-introduced Law no. 6352.

Article 226 § 7 of the Turkish Criminal Code stipulates that the provisions of this Article may not be applied to the works with literary value. Regard being had to the expert report's conclusion that, since the novel in question was a literary work, it should be regarded in compliance with the law as per the grounds for lawfulness laid down the said paragraph in relation to offences of obscenity, the trial court would most probably have ruled in parallel with the experts' conclusion if the Law no. 6352 had not entered into force. Nevertheless, in finding a violation, the majority made assessments on the findings contained in the report of the Board for the Protection of Minors from Sexually Explicit Materials, in the bill of indictment, and the expert report.

However, as indicated in the judgment, there is no conviction imposed by the first instance court, nor is there an assessment or finding pronounced by it with regards the impugned novel or the expert report drafted in relation thereto.

As is well-known, filing of criminal proceedings via an indictment against a person does not mean that the person concerned is found guilty. Also, it is not for the Court to review the comments and assessments made by a public prosecutor when filing criminal proceedings (see *Mustafa Ersen Erkal*, no. 2013/4770, 16 April 2015, § 20).

The suspension of prosecution, on the other hand, does not resolve the merits of the dispute and is irrelevant to whether the person concerned

has committed an offence but it is in fact a procedural decision which results in the discontinuation of the criminal case upon the lapse of the statutory time period (see *Mustafa Ersen Erkal*, § 31).

Although our Court has found violations in previous individual applications similar to the present one, those judgments concerned the applications that were lodged upon decisions on suspension of prosecution, which were delivered due to the entry into force of Law no. 6352 during the appellate review of convictions rendered by first instance courts, and the Court's examinations on those applications were based on the assessments of first instance courts in their conviction decisions. To put differently, in those previous cases, the first instance courts had already convicted the individuals but the convictions had not become final or were enforced because the prosecution was suspended on account of the entry into force of Law no. 6352 while the appeals submitted against the convictions were still pending. Therefore, our Court found violations in those cases by holding that the risk of being convicted posed by the unfinalised convictions would restrict the relevant applicants' freedom of expression for the duration of the 3-year probation.

Nonetheless, in the instant application, there is not yet a conviction or any other decision on the merits pronounced by the first instance court in relation to the criminal proceedings before it. Thus, unlike our earlier judgments finding a violation of the freedom of expression and freedom of the press due to the suspension of prosecution, what brought the majority of our Section to the finding of a violation in the present application is not based on the impugned judicial decision but on the findings reached in the aforementioned Board report, the bill of indictment, and the expert report, which have not yet been examined by the inferior courts.

In the light of the above, I agree with the general principles regarding the compliance with the requirements of the democratic order of the society and the proportionality, which were adopted in our earlier judgments and reiterated in the present case. However, it does not seem possible for me to agree with the finding of a violation when I take into account (i) the findings made by the majority on the basis of the public prosecutor's bill of indictment as well as the reports of the Board and

the panel of experts under "Application of the Principles to the Present Case" and the majority's opinions on the assessments that should have been made by the inferior courts; and (ii) the fact that the decision on suspension of prosecution relied on the purpose of Law no. 6352 which is "to expedite judicial services, further expand the freedom of expression, and conclude the proceedings concerning offences committed via press and media" (see *Mustafa Ersen Erkal*, § 29).

For these reasons, I do not agree with the majority's opinion to declare the application admissible and find a violation.

FREEDOM OF ASSOCIATION (ARTICLE 33)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

HİNT ASEEL HAYVANLARI KORUMA VE GELİŞTİRME DERNEĞİ AND HİKMET NEĞUÇ

(Application no. 2014/4711)

22 February 2017

On 23 March 2017, the First Section of the Constitutional Court found no violation of the freedom of association safeguarded by Article 33 of the Constitution in the individual application lodged by *Hint Aseel Hayvanları Koruma ve Geliştirme Derneği and Hikmet Neğuç* (no. 2014/4711).

THE FACTS

[8-27] In the present case lodged by the Hint Aseel Hayvanları Koruma ve Geliştirme Derneği ("the Association") operating in the province of Düzce and its chair Hikmet Neğuç, the Association and its members were subject to numerous criminal investigations for organizing unauthorized Hint Aseel cocks fighting events under the Charter of the Association.

The application lodged by the Association for organizing a cock fighting event was rejected in April 2012 by the Directorate General for Nature Conservation and National Parks for being contrary to the Animal Protection Act and the Law of Associations.

However, three reports issued by the police in 2013 revealed that the applicant Association continued fighting cocks in its building in spite of this decision. A criminal case was filed by the Düzce Chief Public Prosecutor's Office against the applicant and his three friends for contravening the Law of Associations. On 12 November 2013, the Düzce Criminal Court sentenced the applicant and his three friends individually to ten months' imprisonment and ordered dissolution of the Association. The applicant's petition against this decision was dismissed by the Düzce Assize Court.

V. EXAMINATION AND GROUNDS

28. The Constitutional Court, at its session of 22 February 2017, examined the application and decided as follows:

A. The Applicants' Allegations and the Ministry's Observations

29.According to the applicants, the Association was established by virtue of the Law no. 5253 and was organising competitions among Hint

Aseel cockerels as part of their activities. The applicants alleged that the police intervention in their competition events and the penalties imposed on the Association and its members were in breach of the freedom of association enshrined in Article 33 of the Constitution. The applicants requested finding of a violation and a re-trial.

30. In its observations, the Ministry mentioned the importance of the freedom of association in democracies; however, it recalled that this was not an unlimited freedom. The Ministry secondly indicated that the dissolution of the Association was justified and necessary in a democratic society. The Ministry further invited the Court, with regard to the assessment on proportionality, to take account of the fact that the Association was found to have held cock-fighting events four times and that administrative fines were imposed on the Association two times.

31. In reply to the Ministry's observations, the applicant presented a book titled "The Aseel Cockerels Bred in Turkey and Cockerel Competitions" ("*Türkiye'de Yetiştirilen Asil Horozlar ve Horoz Müsabakaları*") which was published with the contributions of the Poultry Federation.

B. The Court's Assessment

32. Relevant paragraphs of Article 33 of the Constitution, titled "Freedom of association", which will be taken as basis for the assessment on the allegation, reads as follows:

> *"Everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission. ...*
>
> *Freedom of association may be restricted only by law on the grounds of national security, public order, prevention of commission of crime, public morals, public health and protecting the freedoms of other individuals.*
>
> *The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law.*
>
> *Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. ..."*

1. Admissibility

33. The Court declared the alleged violation of the freedom of association admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of Interference

34. Due to the Association's activities, the applicant Hikmet Neğuç was sentenced to 10 months' imprisonment and a judicial fine of 820 Turkish liras (TRY) while the Association was dissolved. Therefore, there has been an interference with the applicants' freedom of association.

b. Whether the Interference Constituted a Violation

35. Article 13 of the Constitution provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution... . These restrictions shall not be contrary to ... the requirements of the democratic order of the society ... and the principle of proportionality."*

36. The above-mentioned interference shall constitute a violation of Article 26 of the Constitution unless it satisfies the requirements laid down in Article 13 of the Constitution.

37. Therefore, it must be examined whether the interference in the present case was prescribed by law as required by Article 13 of the Constitution, relied on one or more than one of the legitimate aims set out in Article 26 § 2, and was in compliance with the requirements of the democratic order of the society and the principle of proportionality.

(1) Whether the Interference was Prescribed by Law

38. The Court has concluded that Article 32 (p) of Law no. 5253 constituted the legal basis of the restriction.

(2) Whether the Interference Pursued a Legitimate Aim

39. The Court has concluded that the above-mentioned decision constituting an interference was part of a series of measures towards the prevention of crime and that it pursued a legitimate aim.

(3) Whether the Interference Complied with Requirements of the Democratic Order of the Society and the Principle of Proportionality

(a) General Principles

40. The matter before the Court is whether it was proportionate and necessary in a democratic society to shut down an association and impose punishment on its members due to the commission of an act that is listed by law as a criminal offence.

41. Right to found an association is an integral part of the freedom of association, which is the freedom of individuals to come together to protect and defend their own interests and to create collective formations to realise their ideals and needs. The basis of freedom of association is undoubtedly freedom of expression. Freedom of expression encompasses expression and dissemination of thoughts without fear, as well as coming together around these thoughts, formation of individual communities and the right to form an association within this framework.

42. Freedom of association gives individuals the opportunity to realise their political, cultural, social and economic goals as a community. Regardless of whether they have a political purpose, the existence of organisations under which citizens will come together and pursue common goals is an important element of a sound society. In democracies, such an "organisation" has fundamental rights which need to be respected and protected by the State (see, with regard to trade unions, *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, §§ 31 and 32).

43. The right to found an association, which is a form or a special aspect of freedom of association, offers individuals not only the liberty of establishing an association but also the right to become a member of the association, to participate in the activities of the association and to protect the interests of its members. Associations are groups of people who are

organised and equipped with legal personality, where they consistently bring together their knowledge and efforts for the realisation or pursuit of a specific purpose. Article 33 of the Constitution basically aims to provide protection against arbitrary interferences of public authorities during the exercise of the freedom of association.

44. Since the freedom of association and the right to found association -one of the subtypes of the former- are regarded within the Constitution as an indispensable part of a democratic society, there is a strict supervision over whether limitations to be imposed on this right are necessary in a democratic society.

45. The Court has previously explained, on many occasions, what should be understood from the expression "requirements of the democratic order of the society". Accordingly, a measure that restricts the fundamental rights and freedoms must correspond to a social need and be used as a last resort (see *Tayfun Cengiz*, §§ 50-56; see also, in the context of the freedom of expression, *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51). Inferior courts enjoy a certain margin of appreciation in the determination of whether or not such a social need is present. Nevertheless, this margin of appreciation is subject to the Court's review.

46. On the other hand, it should also be examined whether any restriction imposed on fundamental rights and freedoms is a proportional limitation that allows for the least interference possible with fundamental rights, provided that the relevant interference is required for the democratic order of the society (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; *Tayfun Cengiz*, §§ 53 and 54; see also, for explanations with regard to the principle of proportionality in the context of the freedom of expression, *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 63; *Bekir Coşkun*, §§ 53 and 54; *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, §§ 96-98; *Tansel Çölaşan*, §§ 54 and 55; and *Mehmet Ali Aydın*, §§ 70-72). The Court must therefore determine whether a fair balance was struck between the measures deemed necessary for the achievement of the legitimate aim of "prevention of commission of crime" set out in Article 33 § 3 of the Constitution and the freedom of association.

47. In striking this balance, regard should be had to the type of the criminal offence to be prevented and the corresponding punishment, as well as its potential damage or risk to the public order and safety, rule of law, public health and the environment, and social peace. Even if individual rights and freedoms are not damaged due to the commission of the offence, it is a constitutional duty to protect and guarantee the society's living conditions. One of these living conditions is the environment, together with all the living things inside. Article 56 § 1 of the Constitution which reads "*Everyone has the right to live in a healthy and balanced environment.*" lays an emphasis on this constitutional obligation. Indeed, animals are also protected by laws for this very reason. Therefore, the balance should be struck between the right to found association and the "need" for protection of animals in relation to the interest of the public.

48. Although the moral status of animals has been the subject of long-standing debates, there is no definitive consensus on the subject. It is a moral standard accepted by everyone that animals must be treated "well". It is well-known that, like humans, many animal species are capable of feeling. Animals may have numerous interests; however, it must be acknowledged that, as long as they are capable of feeling, at least avoiding pain and suffering is in their interest. This idea finds its meaning in "the principle of humane treatment" that constitutes the basis of the normative law of animal rights and dates back to the 19th century. This principle points out that the human interests can be preferred over animal interests but under unavoidable circumstances, which means that animals must not be unnecessarily exposed to pain. The existence and nature of the moral status of animals are becoming more intense day by day. Nevertheless, even if strong objections are raised against it, the principle of humane treatment accepted by modern democracies is not only a moral but also a legal rule. In fact, the laws concerning the protection of animals prohibits causing "unnecessary" pain to animals.

49. In applications similar to the present one, another point to be taken into account during the necessity test is the fact that "animal competitions" are a part of the Turkish culture, as it is so in the cultural heritage of many other nations.

50. Lastly, it must be kept in mind that the belief that ill-treatment of animals is a direct injustice against them forms the basis of animal protection laws. Therefore, when performing the necessity and proportionality tests in applications concerning the protection of animals, account should also be taken of the extent to which the animals are affected by the treatment towards them.

51. Another assessment to be made in the present application is on the question whether it is possible to completely shut down an association by a court decision where its members have committed criminal offences. It is clear that a shut-down is a highly severe interference with the freedom of association. On the other hand, it is a freedom that may be restricted if the method or instruments of managing the association gives rise to concerns. Therefore, it must be acknowledged that, under certain circumstances it is possible to shut down associations.

52. It depends on the intentions and attitude of the members of the organisation whether an association's purpose and activities are punishable under the Law no. 5253 or whether the association can be shut-down pursuant to the Turkish Civil Code (Law no. 4721, dated 22 November 2011). Only natural persons may be punished under the Criminal Code because being guilty of an offence points to the criminal liability which is only borne by natural persons. Nonetheless, as Article 32 (p) of the Law no. 5253 clearly states, it is legally possible for an association to be held criminally responsible and shut down by a criminal court. Similarly, an association may be dissolved by a court upon the request of a public prosecutor by virtue of Article 89 of the Law no. 4721 if the purpose of the association becomes unlawful or immoral. Because, with its members and representative bodies, the association can create a collective will that is separate from each of its individual members and capable of realising its own purpose and acting independently. Thus, associations may be shut down if criminal laws have been breached as a result of the association's own purpose or independent activities. The decisive factor in this context is the fact that the behaviour of its members may be imputed to the association. In other words, associations can only be shut down if they have become the centre of criminal offences. In

that case, it should be examined whether the nature of the association is shaped by the offences committed by its members.

53. A shut-down imposed on an association based on Articles 30 (b) and 32 (p) of Law no. 5253 read in conjunction with Article 33 of the Constitution is legally independent from any conviction imposed on a member or official of the association. Any consideration to the contrary would result in the punishment of other members of the association because of the unlawful attitude of its founders in case of a shut-down, thereby removing the individuality of criminal liability (see the Court's judgment no. E.1973/3, K.1973/37, 18 December 1973, 19 December 1973 and 20 December 1973). For this reason, courts do not only examine whether or not there have been breaches of criminal laws but also inspect whether the association have become "the source of the offence". Only then will it be possible to say that the main objective of the founders and members of the association was to prepare a ground to be able to commit criminal activity under the name of the association.

54. A shut-down imposed on an association on the above-mentioned grounds cannot be interpreted as the imposition of an additional punishment on persons who have violated criminal provisions of the law. The aim of these provisions is to evaluate a specific threat against the public safety and order posed by the foundation or continued existence of an organisation that plans or commits criminal acts. Such organisations which have been established with a view to committing offences or which have become a centre of criminal activity even if they were not established for the purpose of committing offences create a special threat against the interests safeguarded by laws. By using their organised human and financial resources and pursuing their inherent motives, these organisations facilitate and support criminal acts. The remaining members of such an organisation who are not involved in commission of offences either suffer a weakening in their sense of responsibility or decline in their individual resistance against committing an offence. It must be acknowledged that such organisations create a higher motivation to commit offences.

55. It is within the power of the courts of law to decide to shut down an association. In this scope, the centreline of the assessments to be made in respect of the case giving rise to the present application is to ascertain whether inferior courts were able to plausibly set forth that the grounds on which they relied in their decisions constituting the interference in question were "necessary in a democratic society" and compatible with the "principle of proportionality" in respect of the restriction imposed on the freedom of association.

(b) Application of Principles to the Present Case

56. Prior to the events giving rise to the application, the applicants had applied to the competent authorities for permission to hold a "cockerel competition". However, the administration rejected this request by indicating that it was prohibited under the Law no. 5199. It has been understood that, following the rejection, the applicants continued organising activities, which had not been permitted by the administration, under the name of "competition".

57. The accused stated that the Association had been inspected several times by the police and that fines had been imposed on them over the course of the proceedings. Besides, the applicant Hikmet Neğuç continued to make similar statements in his application form. The information in the case file also supports this conclusion. The police had found and reported, on three occasions, that the members had held cock-fights in the Association's premises during the short period of time preceding the filing of criminal proceedings against the Association and its members. Nonetheless, the applicants maintain, in brief, that what caused the police raids was not the act of holding fights between animals, which is proscribed by laws. They argue that their activities merely comprised of a contest among animals.

58. It is not the Court's duty to make assessments on the facts of the case within the meaning of the criminal law. Both the police reports and the relevant court decisions acknowledged that the activity engaged in by the applicants was animal fighting. Nevertheless, the applicants failed to demonstrate what kind of a "competition" their activity was in the proceedings before the Court. Therefore, there is no ground for

disregarding the fact that the act of holding fights among animals was committed in the Association, as described in the Law no. 5199.

59. The applicant asserted, both before the inferior courts and the Court, that cockerel competitions should be allowed under certain conditions as a part of the cultural heritage. The book submitted by the applicant mentioned that there was no particular legal regulation in our national legislation concerning cockerel competitions and stated "*It is hard to expect that allowing cockerel competitions to continue in their current form will be an option that can be adopted by the public, animal lovers and scientific circles*" ("*Horoz müsabakalarının bugünkü şekliyle sürdürülmesine izin verilmesi seçeneğinin ise gerek kamuoyu gerekse hayvan sever ve bilimsel çevreler tarafından kabul görmesi zordur*") (see *Türkiye'de Yetiştirilen Asil Horozlar ve Horoz Müsabakaları*, p. 3). The present application relates not to the matter of allowing a traditional sports competition where all kinds of supervision and control measures have been taken, but to the shut-down imposed on an association found to have organised cock-fighting events in an illegal and unsupervised manner.

60. In this respect, the Court does not find any fallacy in the first-instance court's conclusion to the effect that the association became a centre of acts and actions contrary to the Law no. 5199. Because, even though it had been founded seemingly with different aims, the association's activities turned into a platform serving and facilitating the commission of criminal offences; it mainly served for holding fights between animals for betting and other purposes under the so-called objective of "animal protection".

61. Besides, it must be acknowledged that, irrespective of differences of opinion on animal-human relationships, it is both morally and legally wrong to expose animals to pain for the sole purpose of entertainment or pleasure. It is out of question to consider such an abuse necessary.

62. It is possible that the imposition of a shut-down on the Association, which is quite severe as a measure, and punishment of its members found guilty of criminal offences might harm this right. Under the particular circumstances of the present case, on the other hand, the applicant Association's activities are not related to either the freedom of expression

as noted in general or any other right protected by the Constitution. Therefore, there has been no interference with any other rights enshrined in the Constitution.

63. Accordingly, the Court observes that the competent courts decided on the most reasonable sanction on the matter. Regard being had to the fact that it is the legislator's authority to determine the punishment prescribed by laws for the imputed offence and to the margin of appreciation afforded to the courts, the Court concludes that the shut-down of the Association and the placement of the second applicant under probation for a certain period of time by means of suspending his imprisonment sentence were necessary and proportionate in a democratic society.

64. Consequently, the Constitutional Court has found no violation of the freedom of association safeguarded by Article 33 of the Constitution.

VI. JUDGMENT

For these reasons, the Constitutional Court held UNANIMOUSLY on 22 February 2017 that,

A. The alleged violation of the freedom of association be DECLARED ADMISSIBLE;

B. The substantive aspect of the freedom of association safeguarded by Article 33 of the Constitution was NOT VIOLATED;

C. A copy of the judgment be SENT to the Ministry of Justice.

RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES (ARTICLE 34)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

DİLAN ÖGÜZ CAN

(Application no. 2014/20411)

30 November 2017

On 30 November 2017, the Plenary of the Constitutional Court found a violation of the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution in the individual application lodged by *Dilan Özgüz Canan* (no. 2014/20411).

THE FACTS

[8-21] At the material time, the applicant was twenty years old and she was a student at the Istanbul University Faculty of Law.

On 12 September 2008, an opening ceremony of the Istanbul Technical University Cultural Centre was held with the participation, inter alia, of Prime Minister and some senior politicians. The relevant date was also the anniversary of the coup d'etat of 12 September 1980.

A group of students including the applicant gathered in front of the cultural centre holding banners and chanting slogans. The group dispersed upon the warning of the police officers. Then, a second group came, which allegedly did not comply with the warning of the police officers and hence the latter intervened in.

The applicant claimed that she had been in the second group and that the police officers had intervened in the group without a warning.

A criminal case was initiated against eighteen persons including the applicant for holding and participating in an illegal meeting and demonstration march. At the end of the relevant proceedings, the criminal case against the applicant was suspended. The decision was served on the applicant on 28 November 2014.

On 29 December 2014, the applicant lodged an individual application with the Constitutional Court.

V. EXAMINATION AND GROUNDS

22. The Constitutional Court, at its session of 30 November 2017, examined the application and decided as follows:

Alleged Violation of the Right to Hold Meetings and Demonstration Marches

1. The Applicant's Allegations

23. The applicant complained of alleged violations of the right to hold meetings and demonstration marches, the freedom of expression and the right to a fair trial due to her placement into custody and, over the course of lengthy proceedings conducted because of her participation in a demonstration, the imposition of two convictions and, finally, imposition of a three-year probation imposed on her even though a conviction was not imposed at the end.

2. The Court's Assessment

24. Article 34 of the Constitution titled "Right to hold meetings and demonstration marches" reads as follows:

> *"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*
>
> *The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others.*
>
> *The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."*

25. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court considered that the applicant's complaint should be examined from the standpoint of the right to hold meetings and demonstration marches (i.e. right to assembly).

a. Admissibility

26. The alleged violation of the right to hold meetings and demonstration marches was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of Interference

27. It is clear that the dispersal of the group of protesters by taking the applicant and the other protesters into custody constituted an interference with the right to assembly. Moreover, regard should also be had to the "restrictive" effect of not only the interferences during the exercise of the right to assembly but also those after its exercise. Even though a punishment was not imposed on the applicant as a result of the criminal proceedings against her, the imposition of the three-year probation measure on the applicant must be regarded as an interference with the right to assembly (see, for the interferences with the right to assembly after the exercise of the right, *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 47; see also, for the interferences with the right to assembly during the exercise of the right, *Osman Erbil,* no. 2013/2394, 25 March 2015, § 53 and *Gülşah Öztürk and Others,* no. 2013/3936, 17 February 2016, § 72).

ii. Whether the Interference Constituted a Violation

28. The above-mentioned interference would constitute a violation of Article 34 of the Constitution unless it satisfied the requirements laid down in Article 13 of the Constitution. Article 13 of the Constitution provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution... These restrictions shall not be contrary to ... the requirements of the democratic order of the society ... and the principle of proportionality."*

29. It must be examined whether the interference was prescribed by law as required by Article 13 of the Constitution, relied on the legitimate aims set out in the relevant article of the Constitution, and in compliance with the requirements of the democratic order of the society and the principle of proportionality.

(1) Whether the Interference was Prescribed by Law

30. The Court concluded that Article 28 of Law no. 2911 and Provisional Article 1 of Law no. 6352 constituted the legal basis of the restriction.

(2) Whether the Interference Pursued a Legitimate Aim

31. The Court concluded that the police intervention on the group also including the applicant and the placement of the applicant under probation by suspending the prosecution against her pursued a legitimate aim as they were part of a series of measures aimed at "maintaining the public order".

iii. Whether the Interference Complied with Requirements of the Democratic Order of the Society and the Principle of Proportionality

(1) General Principles

32. The Court has previously explained, on many occasions, what should be understood from the expression "requirements of the democratic order of the society". Accordingly, a measure that restricts the fundamental rights and freedoms must correspond to a social need and be used as a last resort (see, in the context of the right to organise unions, *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 73; *Tayfun Cengiz*, § 56; *Adalet Mehtap Buluryer*, no. 2013/5447, 16 October 2014, §§ 103-105; see, in the context of the right to strike, *Kristal-İş Sendikası* [Plenary], no. 2014/12166, 2 July 2015, § 70; see also, in the context of the freedom of expression, *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51). Inferior courts enjoy a certain margin of appreciation in the determination of whether or not such a social need is present. Nevertheless, this margin of appreciation is subject to the Court's review.

33. On the other hand, it should also be examined whether any restriction imposed on fundamental rights and freedoms is a proportional limitation that allows for the minimum interference with fundamental rights, along with being necessary for the democratic order of the society

(see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; see, in the context of the right to organise unions, *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 73; *Tayfun Cengiz*, §§ 53-55; see also, for explanations as to proportionality in the context of the freedom of expression, *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 63; *Bekir Coşkun*, §§ 53 and 54; *Tansel Çölaşan*, §§ 54 and 55; and *Mehmet Ali Aydın*, §§ 70-72). The Court must therefore determine whether a fair balance was struck between the measures deemed necessary for the achievement of the legitimate aims set out in Article 34 § 2 of the Constitution and the right to assembly.

34. The right to hold meetings and demonstration marches aims to safeguard the individuals' opportunity of gathering in order to defend and proclaim their common ideas together. Therefore, this right is a specific aspect of the freedom of expression. The importance of the freedom of expression in a democratic and pluralistic society is also true for the right to hold meetings and demonstration marches (see *Ali Rıza Özer and Others* [Plenary], no. 2013/3924, 6 January 2015, § 115; *Osman Erbil*, §§ 31 and 45; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 72; and *Gülşah Öztürk and Others*, § 66). Under these circumstances, the present application must be examined in the light of Article 26 of the Constitution and pursuant to Article 34 of the Constitution.

(a) Freedom of Expression

35. The Court has always emphasised that the freedom of expression enshrined in Article 26 of the Constitution constitutes one of the essential foundations of a democratic society and basic conditions for its progress and for each individual's self-fulfilment. It is only possible to reach social pluralism in a free environment of debate where any idea can be freely expressed. Thus, the achievement of social and political pluralism depends on the peaceful and free expression of all kinds of ideas (see, with regard to the importance of the freedom of expression on the Internet, *Yaman Akdeniz and Others*, no. 2014/3986, 2 April 2014, §§ 25 and 26; see, with regard to the importance of the freedom of artistic expression, *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, §§ 66 and 104; see also, with regard to the thoughts of a politician expressed in a press statement, *Mehmet Ali Aydın*, §§ 74 and 84).

(b) Right to Assembly

36. Article 34 of the Constitution guarantees the right to hold meetings and demonstration marches to enable the expression of ideas in a peaceful manner, i.e. without arms or attacks. The right which is exercised in a collective manner and which gives individuals an opportunity to express their thoughts in non-violent methods guarantees the emergence, safeguarding and dissemination of different thoughts that are essential for the development of pluralistic democracies. Thus, despite its unique autonomous function and field of exercise, the right to assembly should be evaluated within the scope of the freedom of expression. The interferences with this right should be interpreted much more strictly in cases where political matters and matters of public interest are in question (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 79; *Osman Erbil*, § 45; see also, for assessments where the right to assembly and the freedom of expression are considered in conjunction with each other, *Ali Rıza Özer and Others*, §§ 115-117).

37. The right to assembly is one of the core values of a democratic society. In a democratic society, the political ideas which oppose the existing order and are defended to be realised through peaceful methods should be given the opportunity to be expressed through assembly and other legal means. Where the organisers or participants of a demonstration have violent intentions, that demonstration falls outside the scope of the notion of peaceful assembly. Within this scope, the purpose of the right to assembly is to protect the rights of individuals who are not involved in violence and who express their opinions in a peaceful manner. Apart from that, the purpose with which the meeting or demonstration march is held has no importance (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 80; *Ali Rıza Özer and Others*, §§ 117 and 118; *Osman Erbil*, § 47; and *Gülşah Öztürk and Others*, §§ 67 and 68).

38. Radical measures of a preventive nature oriented at removing the freedom of assembly, except for the cases of incitement to violence and attempt to abolishing the principles of democracy, cause harm to democracy. Therefore, it is a requirement of a pluralistic democracy for the State to display patience and tolerance towards the behaviours of the

persons who have assembled for peaceful purposes, which do not pose a threat to the public order or involve violence, in the exercise of their right to assembly.

39. The Court previously held that the right to assembly may be bound with a procedure of prior notification. Making meetings and demonstration marches subject to a procedure of notification does not generally harm the essence of the right as long as the purpose of this procedure is to provide officials with an opportunity to take reasonable and appropriate measures in order to guarantee the orderly conduct of meetings, marches or other demonstrations. The aim of the application of the notification procedure, except for special cases where an immediate reaction is justified, is to ensure that the right to assembly is exercised effectively (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 81; *Osman Erbil*, § 52; and *Ali Rıza Özer and Others*, § 122; see also, with regard to situations where the participants were justified to react immediately, *Osman Erbil*, §§ 65 and 67 and *Ali Rıza Özer and Others*, § 119).

40. According to the conclusion drawn from the above, it must be acknowledged that the authorities can take measures that will eliminate any real threats arising out of the exercise of the right to assembly that may endanger the public order. The measures to be taken may vary depending on the characteristics and necessities of the situation. Therefore, it must be accepted that the State enjoys a certain margin of appreciation in its regulations and practices in this regard. Organising meetings that are not in compliance with those measures or peaceful, participating in such meetings, or committing offences in such meetings may be subject to punishment (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 81; see also, for an application where it was held that an interference with the right to assembly due to disruption of public order was found necessary in a democratic society, *Gülşah Öztürk and Others*, §§ 76-86).

41. On the other hand, the mere fact that a meeting or demonstration march is held without complete compatibility with the procedures set out in laws does not, by itself, remove the peacefulness of the meeting or march. Similarly, it should be kept in mind that any kind of demonstration march held in a public space might cause some level of disorderliness in

the flow of daily life and give rise to hostile reactions. The presence of such circumstances does not justify a violation of the right to assembly (see *Ali Rıza Özer and Others*, § 119; *Gülşah Öztürk and Others*, § 69).

42. Any other measures taken or punishments envisaged cannot be allowed to indirectly become unlawful restrictions on the right to hold peaceful assemblies. Individuals must also be protected from arbitrary interferences of the State forces during the enjoyment of the guaranteed right to assembly (see *Eğitim ve Bilim Emekçileri Sendikası and Others* § 82; *Gülşah Öztürk and Others*, § 76).

(c) Duties and Responsibilities

43. Article 12 § 2 of the Constitution ("*The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals.*") refers to the duties and responsibilities of persons in the exercise of their fundamental rights and freedoms. Article 12 of the Constitution emphasises the intrinsic connection that links rights and freedoms with duties and responsibilities. Duties and responsibilities become particularly important in complaints, such as the present one, concerning a restriction imposed on a fundamental right or freedom of persons who allegedly failed to fulfil their duties or responsibilities. In examining the complaints before it, the Court takes the duties and responsibilities of individuals into consideration. It must be noted that individuals' ability to fully enjoy their rights and freedoms is dependent upon their respect for the duties and responsibilities that are inherent in those rights and freedoms.

44. The Court will now examine the impugned interference as a whole to determine whether the interference was proportionate and whether it was proven based on reasonable grounds, with a view to avoiding arbitrary practices and unlawful restrictions, that such an interference in the form of punishing individuals who had participated into a peaceful meeting was necessary in a democratic society.

(2) Application of Principles to the Present Case

45. The matter before the Court is the question whether it was proportionate and necessary in a democratic society to perform the

interference at issue that was caused by preventing a demonstration organised to protest against a group comprised of the Prime Minister, politicians, high-level bureaucrats and academic instructors; ordering the arrest and custody of the applicant who had participated in that demonstration; and imposing three years' probation on the applicant.

46. It must be acknowledged that there is a risk of Article 28 of Law no. 2911 being applied in indirect interferences with peaceful demonstrations. The said rule stipulates the imposition of punishment on those who organise, participate in, or lead the meetings or demonstration marches against the Law. Article 23 titled "*Unlawful meetings and demonstration marches*" of Law no. 2911 includes a long list of the conditions under which a meeting or demonstration march shall be against the law, i.e. "unlawful". On the basis of the judgment of the first instance court, the impugned demonstration was against the Law because it was held without prior notification as per the procedures set out in the Law and the demonstrators refused to disperse willingly despite the police's announcement that the assembly had to be dispersed.

47. It is not the Court's concern whether the conditions required for the application of the provision of law regarding this offence were present in the instant case or what should be the elements of the offence. On the other hand, the Court is indeed concerned by an interference in which a criminal conviction sentencing those who participated in a meeting or demonstration march, as in the present case, constitutes an interference with a constitutional right.

48. In cases where a person was punished for merely participating in a meeting or demonstration march and it has been acknowledged by the Court that there was an interference with the fundamental rights and freedoms, the Court will then firstly examine whether the meeting or demonstration march caused a public disorder, whether a risk of disorder arose or whether there was any reality in the public authorities' assessments to that end (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 88).

49. At the outset, it must be recalled that the mere existence of a meeting or demonstration march that is not organised in due compliance with

the procedure cannot be deemed as a sufficient justification by the Court for interfering with fundamental rights and freedoms. For this reason, the first instance court's reasoning that the impugned demonstration had been held without duly making a prior notification cannot be *per se* accepted as a relevant and sufficient reason.

50. The first instance court secondly relied on its finding that the demonstrators' refusal to disperse in spite of the police's instruction was against the law. Given the fact that the Prime Minister and certain other politicians and State officials were attending an opening ceremony near the place where the demonstration was held in the present case, it is understandable that the security measures were stricter than ordinary. In addition, the day of the incident is the anniversary of the coup d'état of September 12, and typically numerous meetings and demonstrations are held across the country on that day. Certain extremist groups wishing to steer their anger towards official bodies due to what was done during the military regime may sometimes cause violence and remove the peaceful nature of meetings and demonstrations. Therefore, it would be acceptable in such times to take broader security measures, observe them in a stricter manner, and act more diligently in terms of ensuring the demonstrators' compliance with the rules.

51. Nonetheless, to reiterate, it must be shown in applications such as the present one in any event that there was public disorder or the risk of disorder to justify an interference with the right to assembly. Therefore, any act or procedure carried out by public authorities which constitute an interference with fundamental rights pose a risk of violating fundamental rights and freedoms if it cannot be shown with relevant and sufficient reasons that there was public disorder or such risk when the impugned incidents were taking place (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 89).

52. An interference with a meeting such as the one subject to the present application may be regarded as necessary in a democratic society to the extent that it corresponds to a social need. In the present case, neither the bill of indictment nor the decisions and judgments of inferior courts contained an assessment as to whether the impugned protest had

disrupted certain activities, caused public disorder, or debilitated the security measures taken.

53. It must be demonstrated by the competent authorities (e.g. in police reports, indictments, or reasoned decisions and judgments of the inferior courts) that the interference with a meeting or demonstration performed for certain special reasons was necessary to maintain the public order; that the punishments were imposed due to the emergence of public disorder or such a risk; or that the participants failed to comply with their duties and responsibilities that are inherent in their rights and freedoms during the exercise of this constitutional right (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 92).

54. In the present case, there were two groups of protesters: the second group, which gathered after the first group had dispersed upon the police warning, was dispersed without any warning at all. According to the bill of indictment and the judgment of the inferior court, the first group (that dispersed on its own upon the police warning) and the second group (that was dispersed by the authorities) were comprised of different people. Besides, there is no indication that the applicant's group (i.e. the group of protesters of which the applicant was a part) acted in such a way that would remove the peaceful nature of the demonstration.

55. In cases where demonstrators have not been involved in violent acts, the public authorities should be tolerant up to a certain extent towards the right to hold meetings and demonstration marches. In principle, a peaceful demonstration or press statement should not be subjected to a threat of criminal sanction. If, as in the present case, the demonstration is held in a university campus and the participants are university students, the extent of tolerance to be displayed should be even higher since universities come first among the places where ideas are freely expressed and debated. Furthermore, the demonstration in question was held on the anniversary of the coup d'état of September 12. Preventing the individual and collective expression of opinions regarding social and political matters through various means such as holding meetings and demonstrations on the anniversary of such an important event would undermine the foundations of the democratic society.

56. In conclusion, the Court observed in the present case that a fair balance had not been struck between the measures deemed necessary for achievement of the legitimate aims provided in Article 34 § 2 of the Constitution and the applicant's rights enshrined in Article 34 § 1. The Court concluded that dispersing the demonstration by the use of police force, taking the applicant into custody, and placing the applicant under a three-year probation period by suspending the prosecution against her was not necessary for achieving the legitimate aim of maintaining the public order envisaged in Article 34 § 2 of the Constitution.

57. Consequently, the Court has found a violation of the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution.

Justices Mr. Kadir ÖZKAYA and Mr. Recai AKYEL did not agree with this conclusion.

B. Alleged Violation of the Right to a Trial within a Reasonable Time

58. The applicant complained of an alleged violation of the right to a trial within a reasonable time.

1. Admissibility

59. The alleged violation of the right to a trial within a reasonable time was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

60. In the calculation of the length of criminal proceedings, the period to be taken into account begins to run as soon as a person is informed by the competent authorities of the fact that he is charged or on the date when the person is first affected by the charge due to the application of certain measures such as search and custody; and it ends once the final decision is delivered in respect of the criminal charge or when, with regard to on-going proceedings, the Court renders its ruling on an alleged violation of the right to a trial within a reasonable time (see *B.E.*, no. 2012/625, 9 January 2014, § 34).

61. Matters such as the complexity of a case, levels of the jurisdiction, the attitude of the parties and the relevant authorities during the trial and the quality of the interest of the applicant in the speedy conclusion of the case are the criteria which are taken into consideration in the determination of whether or not the period of a criminal case is reasonable (*ibid*., § 29).

62. In view of the above-mentioned principles and the Court's previous judgments in similar applications, the length of the proceedings in the present case that lasted for nearly 6 years and 3 months must be considered unreasonable.

63. For these reasons, it must be held that there was a violation of the right to a trial within a reasonable time protected under Article 36 of the Constitution.

C. Application of Article 50 of Code no. 6216

64. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."

65. The applicant claimed non-pecuniary compensation.

66. In the present application, the Court found that there were violations of the right to hold meetings and demonstration marches and the right to trial within a reasonable time.

67. Since there is legal interest in holding a retrial to remove the consequences of the violation of the right to hold meetings and demonstration marches, a copy of the judgment must be remitted to the 55th Chamber of the İstanbul Criminal Court (no. E.2014/39) for retrial.

68. As regards the non-pecuniary damages sustained by the applicant due to the violation of her right to hold meetings and demonstration marches and right to a trial within a reasonable time, which cannot be redressed by a mere finding of a violation, the Court awarded 6,000 Turkish liras ("TRY") (net) to the applicant as non-pecuniary compensation.

69. The total court expense of 2,006.10 Turkish liras (TRY) including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

V. JUDGMENT

For these reasons, the Constitutional Court held on 30 November 2017:

A. 1. UNANIMOUSLY that the alleged violation of the right to hold meetings and demonstration marches be declared ADMISSIBLE;

2. UNANIMOUSLY that the alleged violation of the right to a trial within a reasonable time be declared ADMISSIBLE;

B. 1. By MAJORITY and by dissenting opinion of Mr. Kadir ÖZKAYA and Mr. Recai AKYEL, that the right to hold meetings and demonstration marches safeguarded by Article 34 of the Constitution was VIOLATED;

2. UNANIMOUSLY that the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the 55th Chamber of the İstanbul Criminal Court (no. 2014/39) for a retrial to remove

the consequences of the violation of the right to hold meetings and demonstration marches;

D. A net amount of TRY 6,000 be PAID to the applicant as non-pecuniary compensation;

E. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and counsel fee of TRY 1,800 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; and

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

DISSENTING OPINION OF JUSTICES KADİR ÖZKAYA AND RECAİ AKYEL

1. On 12 September 2008 an opening ceremony of the academic year was held at the Süleyman Demirel Cultural Center ("the Center") of İstanbul Technical University ("ITU"). The Prime Minister attended the ceremony along with certain high-ranking State officials and politicians.

2. It has been understood from the documents in the file that an announcement was made on an online forum that the ITU opening ceremony would be held on 12 September 2008 (the date of the incident), to which the Prime Minister was also invited but, contrary to the traditional practice, students would not be admitted to the ceremony that year. The announcement in question invited the students to participate in the press statement planned to be held on that date and it contained the text of the statement. Although it is unclear whether the applicant had any knowledge, some of the persons participating in the meeting were informed of the announcements made in the forum website.

3. As the ceremony was starting, a group of protesters gathered in front of the Center, carrying banners and uttering slogans such as "AKP outside" ("*AKP dışarı*"), "Universities are ours, we won't leave them to so-called 'liberal' bigots" ("*Üniversiteler bizimdir, liboşa, yobaza bırakmayız*"), and "The Child of September 12, celebrate your birthday somewhere else" ("*12 Eylül Çocuğu doğum gününü başka yerde kutla*"). This group dispersed upon the warning and intervention of the police. Shortly after, another group which may or may not have been comprised of the same persons as the first group came to the incident scene at around 10.40 a.m. and uttered slogans. This second group carried banners reading "The turning point at ITU in its 235th year: the person on the right side of the photograph, the Keynote Speaker of the ITU Opening Ceremony" ("*235. Yılda İTÜ'de dönüm noktası fotoğrafın sağındaki insan, İTÜ Açılış Töreni Baş Konuşmacısı*"), "A Film of the AKP Government: the Great Occupation .... the story of AKP's occupation of the university..." ("*Bir AKP Hükümeti Filmi, Büyük İşgal .... AKP'nin üniversite işgalinin hikayesi...*"), and "ITU is not a Madrassa, the Rector's Office is not an AKP Branch Office" ("*İTÜ Medrese, Rektörlük AKP Şubesi değildir*").

4. The group did not march but, as indicated above, only gathered in front of the Center, where they uttered slogans and read out a press statement. The police did not use any violence against the group but gave a warning and a call to disperse. When the group refused to disperse and the university's private security staff expressed a request, the police conducted the procedures necessary for initiation of criminal proceedings against 18 individuals (including the applicant) for the offence of organising and participating in an unlawful meeting or demonstration march due to the non-fulfilment of the legal requirements for holding the meeting and also due to the rising concerns for security and public order.

5.At the end of the trial, the 55th Chamber of the İstanbul Criminal Court decided on 29 November 2014 to suspend the criminal proceedings against the applicant on the ground that her act fell within the scope of the Law on Amendment of Certain Laws to Increase the Efficiency of Judicial Services and the Suspension of Penalties and Cases Regarding Crimes Committed via the Press (Law no. 6352, dated 2 July 2012).

6. The applicant contended, in particular and in brief, that her constitutional rights were violated due to the fact that "the liberty of imparting thoughts and opinions" had beensubjected to trial, irrespective of the verdict rendered in the end. She further argued that, even though it did not entail a conviction, the imputed offence was regarded as an offence that had been committed "via the methods of imparting thoughts and opinions", which caused a violation of her constitutional rights.

7. The Court considered that the applicant's complaints, other than the one concerning the right to a trial within a reasonable time, should be examined under the right to hold meetings and demonstration marches. We agree with this consideration.

8. After holding an examination on the alleged violation of the right to hold meetings and demonstration marches, the majority of our Court arrived at the conclusion that the interferences with the applicant's right at issue (i.e. the police intervention and the court decision) were prescribed by law and pursued a legitimate aim, which did not constitute a violation from those aspects, but the interference in question was not necessary for maintaining the public order.

9. We do not agree with this conclusion due to the reasons listed below.

10. In line with the case-law of the Court, the majority held that, in cases involving an interference with the right to assembly, the State institutions were required to show with relevant and sufficient reasons that there was public disorder or the risk of disorder when the impugned incidents were taking place. Within that scope, the majority concluded that the interference with the right to assembly was not justified with relevant and sufficient reasons in the present case. In our opinion, the esteemed majority of the Court assessed the circumstances of the case insufficiently.

11. It has been understood from the file that

- The organisers of the impugned meeting had known about the date and venue of the opening ceremony and that the Prime Minister would be attending to the ceremony but they did not give prior notice to the authorities regarding the meeting and demonstration;

- The police and especially the private security staff of the university considered, in view of the banners held and the slogans uttered by the demonstrators (though no legal action was taken due to the contents of the banners or slogans), that the demonstration had reached to such a level that would prevent the performance of the on-going ceremony in a peaceful, calm and safe environment; therefore, the police initially warned the demonstrators and then, as they refused to disperse, intervened in the assembly by initiating a legal process;

- There has been no allegation or finding suggesting that the police applied violence on those participating in the assembly.

12. The demonstration in question was held on the anniversary of the coup d'état of September 12. It is common knowledge that, every year, certain groups hold non-peaceful meetings and demonstrations on that day. Secondly, the Prime Minister of the Republic of Turkey was present at the place where the applicant and other individuals were holding a demonstration. It might have been deemed necessary to take stricter and more escalated measures for the security of the Prime Minister due to certain special circumstances.

13. At a ceremony held for such a non-political purpose as the opening of the academic year of a university and the inauguration of a cultural center, certain individuals held a demonstration meeting which is considered not to be related to the ceremony or in compliance with the law due to the way it was held and in which participants uttered such slogans that caused a constant concern of a potential disruption to the peace and safety in the security officers, who were charged with the duty of maintaining the peace and calm around the ceremony. Furthermore, it cannot be said that the opening ceremony, which had a completely peaceful purpose and which was held in a peaceful manner, was not negatively affected by the atmosphere created by the slogans chanted.

14. In the case in question, at a time when the need for security was at a high level, the police initially warned the demonstrating group to disperse with a view to maintaining the security and ensuring the peaceful and calm conduct of the opening ceremony. Nevertheless, the demonstrators gathered once again while the Prime Minister's programme was still under way. The police officers assigned with ensuring the Prime Minister's safety saw the crowd, who had re-grouped despite the warning, as a threat and intervened in the demonstration. It was the law enforcement officers who were in a position to analyse the circumstances of the instant case the best. On the basis of the incident reports related to the impugned case, there are no reasons not to arrive at the conclusion that the police showed with a relevant and sufficient justification that there was public disorder or a risk of disorder when the incident was taking place.

15. Therefore, in the light of these explanations, we cannot say that it was not necessary in a democratic society to forcefully disperse the demonstration, which was considered to be posing a threat and which refused to disperse despite all warnings, and to initiate a legal procedure against the applicant, who was established to have taken part in the demonstration.

16. On the other hand, the applicant was not punished. The prosecution conducted against her was suspended. Accordingly, as long as she did not commit an offence within the same scope in the three-year

period following the decision of suspension, the pending case would be discontinued. If she did, in fact, commit such an offence in that period, the prosecution against her would be continued. In other words, the applicant was not punished but simply placed under supervision for a period of three years. The applicant will not be subject to any other legal procedure at the end of this period. In fact, the three-year period running as from the delivery of the first instance court's decision (28 November 2014) has been completed as of the date of the Court's judgment (30 November 2017). Seeing no other information to the contrary in the file, we conclude that the case at issue was discontinued as of 30 November 2017. Therefore, no legal action or procedure has been performed against the applicant due to the above-mentioned decision of suspension. This being the case, we reach the conclusion that the impugned interference cannot be regarded as unnecessary or disproportionate.

17. For these reasons, in our opinion, it should be held that there has been no violation of the right to hold meetings and demonstration marches protected under Article 34 of the Constitution in the present case. Thus, we do not agree with the opinion of the esteemed majority in so far as relevant to this part of the case.

RIGHT TO PROPERTY (ARTICLE 35)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

RECEP TARHAN AND AFİFE TARHAN

(Application no. 2014/1546)

2 February 2017

On 2 February 2017, the First Section of the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *Recep Tarhan and Afife Tarhan* (no. 2014/1546).

THE FACTS

[7-39] "Kahraman Kadın" Street, where the real property of which the applicants are the co-owners is located, was closed to vehicles or pedestrians by the decision of 15 March 2001 rendered by Ankara Transportation Coordination Center (ATCC) with a view to providing the security of the Embassy of Israel. Upon the application lodged by the community dwellers, the TCC decided that the blocks and barriers in the street be removed. Yet, this decision has not been executed.

The applicants and the other two community dwellers requested, through the petitions they filed to Ankara Governor's Office, that the necessary procedures be carried out in order for the decision of ATCC to be executed. Upon the fact that this request was not answered but rejected implicitly by the Governor's Office, the applicants filed an action with the 3rd Chamber of Ankara Administrative Court for the cancellation of the act of implicit rejection of the request. The decision of 23 February 2007 rendered by the court on the dismissal of the action was upheld on 21 October 2009 by the 8th Chamber of the Supreme Administrative Court; and the request for the rectification of the decision was rejected on 20 January 2010.

Meanwhile, during the meeting of the Plenary Assembly of ATCC held on 30 December 2005, it was decided that the Ankara Governor's Office be inquired of whether there was a security problem or not in the area where the Embassy of Israel was located. After the Ankara Governor's Office had delivered such an opinion that the removal of blocks and barriers would constitute a security vulnerability, it was decided by the Plenary Assembly of ATCC on 26 May 2006 that those blocks and barriers which had been determined to be removed previously should remain in place.

According to the statements in the application petition, once the street was closed by barriers on 1 December 2003, the applicants who had earlier rented their real properties located in the aforesaid place for 3,000 TRY ("Turkish Liras") per month had to reduce the rental price to TRY 1,000 with a view to settling with the tenant. Even though the applicants reset the rental price which they had received as TRY 1.000 for 49 months as 3.000 TL as of 1 January 2008, the rental contract was terminated on 31 August 2008 and the real property was evacuated *de facto* since the tenant could not do any business.

The applicants lodged an application with the 9th Chamber of the Ankara Administrative Court and requested the cancellation of the procedure carried out by ATCC on 26 May 2006 and of the decision rendered by the Governor's Office which constituted the basis of this procedure. The Court decided on the cancellation of the procedure through its decision of 31 March2010. It was underlined in the reasoning of the decision that implementation of the measure of closing the street by barriers without a detailed research and examination by the administration, without predicating on concrete facts justifying the restriction but merely considering the existence of the potential danger, was contrary to law. It is indicated in the decision appealed by the defendant Administration that occurrence of certain serious incidents which would point out the necessity of the afore-mentioned measures found, by the judgment of 6 May 2011 rendered by the 8th Chamber of the Supreme Administrative Court, to be taken –without any hesitation - for ensuring the security of the Embassy of Israel, and making of concrete assessments would be contrary to the ordinary flow of life and the nature of diplomatic relations.

The first instance court, having abided by the judgment rendered by the Chamber, rendered a dismissal decision on the same grounds. The request of appeal filed against the mentioned decision was rejected on 4 June2013 and the request for the rectification of the decision was rejected on 6 November 2013; and the decision then became final.

The applicants brought a full remedy action before the 15th Chamber of the Ankara Administrative Court against the Ankara Governor's Office and the Ankara Metropolitan Municipality and claimed pecuniary and

non-pecuniary damages of TRY 210,000 and TRY 5,000 respectively, plus any statutory interest. The first instance court decided to dismiss the action through its decision of 15 June 2011. In the decision, the liability of the administration based on fault (tort liability) was discussed but no discussion was held as to whether principles of absolute liability would be applied in the incident or not.

The 8th Chamber of the Supreme Administrative Court, rejecting the applicants' request of appeal through its judgment of 1 November 2012, upheld the decision. The request for the rectification of the decision where the same allegations of the applicants were set forth was also rejected by the same Chamber by its judgment of 6 November 2013.

IV. EXAMINATION AND GROUNDS

40. The Constitutional Court, at its session of 2 February 2017, examined the application and decided as follows:

A. Alleged Violation of the Right to Property

1. The Applicants' Allegations

41. The applicants alleged that there was a violation of their right to property, stating that their rental income obtained from the immovable property had been reduced since the street on which the property, leased out as a workplace, was located was closed to pedestrian and vehicular traffic.

42. The applicants asserted that closing a street to vehicles and pedestrians with a view to protecting an Embassy of a foreign state did not comply with the principle of being a social state of law. They added that, in case of an obligation to take such a measure on this ground, the consequences thereof should be compensated in accordance with the principle of balancing equity.

43. The applicants complained that, even though they had asserted during the proceedings that the damages arising from the acts and actions of the administration should be compensated without seeking the condition of fault (tort) pursuant to the last paragraph of Article 125 of the Constitution, this issue was discussed neither by the first-instance court nor by the Supreme Administrative Court in their decisions.

44. The Ministry did not submit any observations.

2. The Court's Assessment

45. Article 35 of the Constitution on the "Right to property", which will be taken as a basis for the assessment of the alleged violation, reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of public interest. The exercise of the right to property shall not contravene public interest."

46. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16).

47. As the applicants' allegation that neither the first-instance court nor the Supreme Administrative Court deliberated upon the applicants' assertion in the trial process that the damages arising from the acts and actions of the administration should be compensated without seeking the condition of fault (tort) pursuant to the last paragraph of Article 125 of the Constitution concerns the proportionality of the interference with the right to property, the Court considers that this allegation must be examined from the standpoint of the right to property.

a. Admissibility

48. The alleged violation of the right to property was declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of Property

49. The right to property is guaranteed under Article 35 § 1 of the Constitution, which stipulates that "Everyone has the right to own and inherit property". The right to property safeguarded by the said Article of the Constitution encompasses the rights over any kind of assets

which represents an economic value and is assessable with money (see the Court's judgment no. E.2015/39, K.2015/62, 1 July 2015, § 20). In this framework, along with movable and immovable properties, which undoubtedly have to be considered as property, the limited real rights and intellectual property rights established over those properties as well as any enforceable claims fall within the scope of the right to property.

50. The right to property enshrined in Article 35 of the Constitution is a safeguard that protects existing possessions, properties and assets. A person's right to obtain a property which is not already owned by that person does not fall within the notion of the property protected by the Constitution, no matter how strong his or her interest is in this matter. As an exception to this, an "economic value" or a "legitimate expectation" to obtain an enforceable "claim" may benefit from the guarantee of the right to property which is protected under certain circumstances. The legitimate expectation is a sufficiently concrete expectation that arises from an enforceable claim that has been reasonably demonstrated, that is based on a certain provision provided for in the national law or an established case-law which indicates that the prospects for success are high. The existence of an unsubstantiated expectation to acquire a right or a claim which may only be raised within the scope of the right to property is not enough to acknowledge a legitimate expectation (see *Kemal Yeler and Ali Arslan Çelebi*, no. 2012/636, 15 April 2014, §§ 36 and 37).

51. The subject matter of the present complaint is the fact that the applicants received less rental income than they should have received since their immovable property was leased out at a rent lower than the market value due to an act of the public administration. The applicants' complaint does not concern a right to claim in a narrow and technical sense but rather the power to benefit from the fruits which the right to property provides for the owner.

52. As is known, the right to property entitles the owner to the powers to use the thing he owns, benefit from its fruits, and dispose of that thing. In this context, "fruit" stands for the economic value that comes into being in addition to the net worth of the property as a result of its utilization or use in line with its purpose and function; and "the power to

benefit from the fruit" indicates the fact that this economic value belongs to the owner. Benefiting from the fruits bears an economic value in and of itself as an intangible power/right; it is not required to actually produce an economic value to that end. In other words, even the capacity of the "thing" to produce additional value is inherent in the right to property established over the principal property. In the light of the above, the Court has concluded that, although it did not turn into a concrete rent claim, the economic loss incurred by the applicants as they were unable to lease out their immovable property at the actual market value due to an act of the public administration must be considered as property.

ii. Existence of an Interference and its Type

53. The right to property safeguarded as a fundamental right under Article 35 of the Constitution is such a right that enables an individual to use the thing he owns, benefit from its fruits, and dispose of that thing provided that he does not prejudice the rights of others and respects the restrictions imposed by law (see *Mehmet Akdoğan and Others,* no. 2013/817, 19 December 2013, § 32). Therefore, restricting any of the owner's powers to use his property, benefit from its fruits, and dispose of the property constitutes an interference with the right to property.

54. In the case giving rise to the present application, the immovable property which was owned by the applicants and leased out as a workplace was leased at a rate lower than the market value because the street on which it is located was closed to vehicular and pedestrian traffic. Consequently, the applicants earned less rental income than they normally should have. It is clear that the economic loss suffered by the applicants by earning less rental income due to the act of the administration constitutes an interference with the right to property.

55. In view of Article 35 of the Constitution read together with other articles that touch upon the right to property (Article 43 on the coasts; Article 44 on land ownership; Article 46 on expropriation; Article 63 on the protection of historical, cultural and natural assets; Article 168 on natural wealth and resources; Articles 169 and 170 on forests; and Articles 28 § 8, 30, and 38 § 10 concerning confiscation), the Constitution lays

down three rules in regard to interference with the right to property. The first paragraph of Article 35 of the Constitution provides that everyone has the right to property, setting out the "right to peaceful enjoyment of possessions", and the second paragraph draws the framework of interference with the right to peaceful enjoyment of possessions.

56. Article 35 § 2 of the Constitution lays down the circumstances under which the right to property may be restricted in general and also draws out the general framework of conditions of "deprivation of property". Furthermore, Article 46 of the Constitution regulates a particular method of deprivation of immovable property, which is the expropriation procedure.

57. The last paragraph of Article 35 of the Constitution forbids any exercise of the right to property in contravention to the interest of the public; thus, it enables the State to control and regulate the enjoyment of property. The fact that the right to property cannot be exercised in contravention to public interest requires the State to ensure that the enjoyment of property complies with public interest. This, therefore, necessitates the acknowledgement that the State has the power to control the use of property. Moreover, Article 43 on the coasts, Article 44 on land ownership, Article 63 on the protection of historical, cultural and natural assets, Article 168 on natural wealth and resources, Articles 169 and 170 on forests, as well as Articles 28 § 8, 30, and 38 § 10 concerning confiscation encompass other specific constitutional provisions that enable the State to control property.

58. Deprivation of property and regulation/control of property are specific forms of interference with the right to property. An interference in the form of deprivation of property involves the loss of ownership. Whereas in the control of the use of property, the ownership is not lost but the way how the owner will use the powers he is granted by the right to property will be determined or limited on the basis of public interest. Interference with the right to peaceful enjoyment of possessions is a general kind of interference. Any "meddling" other than deprivation of property or control of the use of property should be examined under the framework of interference with the right to peaceful enjoyment

of possessions. In addition, the "meddlings" of especially the public authorities which do not directly target the use of property but impact the right to property in terms of consequences should be regarded as interference with the right to peaceful enjoyment of possessions.

59. The subject matter of the dispute at hand arose from the fact that the street on which the applicants' immovable property is located was closed to pedestrian and vehicular traffic. The closure of the street to pedestrians and vehicles is not a direct regulation over the right to property with regard to the immovable property but it, in fact, concerns the freedom of movement. The reduction in the applicants' rental income from the property in question is an indirect consequence of the restriction imposed on the freedom of movement. Therefore, the interference performed cannot be considered as control of property. For this reason, the Court has concluded that the interference with the right to property resulting from the restriction imposed on the freedom of movement should be examined within the scope of the first rule, i.e. "peaceful enjoyment of possessions".

iii. Whether the Interference Caused a Violation

60. Article 35 of the Constitution does not envisage the right to property as an unlimited right; accordingly, this right may be limited by law and in the interest of the public. In interfering with the right to property, Article 13 of the Constitution must also be taken into consideration as it governs the general principles concerning the restriction of fundamental rights and freedoms.

61. Article 13 of the Constitution provides as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

62. Pursuant to the article cited above, fundamental rights and freedoms may only be restricted by law, on the basis of the reasons laid down in relevant articles of the Constitution, and in conformity with the requirements of a democratic order of the society and the principle of proportionality. In order for the interference with the right to property to be in compliance with the Constitution, the interference must have a legal basis, pursue the aim of public interest, and be carried out in accordance with the principle of proportionality.

(1) Whether the Interference was Prescribed by Law

63. The measure involving the closure of the street on which the applicants' immovable property is located to pedestrian and vehicular traffic, which constituted an interference with the applicants' right to property in the present case, was based on the Vienna Convention on Diplomatic Relations of 18 April 1961 which became a part of Turkish law upon its ratification by the Law no. 3042 and dated 4 September 1984. Article 22 § 2 of this Convention reads "*The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity*". The inferior courts found the administrative act, imposed on the basis of this rule, in conformity with law. Finding no reasons to rule that this finding of the inferior courts was not proper, the Court has considered that the interference had a legal basis.

(2) Whether the Interference Pursued a Legitimate Aim

64. According to Article 35 of the Constitution, the right to property may only be restricted in the interest of the public. There is obviously public interest in taking measures to ensure the security of buildings of the diplomatic missions as a requirement of the obligations of the Republic of Turkey originating from international treaties. Therefore, the Court has concluded that the closure of the street on which the Embassy of Israel is located to pedestrian and vehicular traffic, which is understood to be a measure taken in this framework, pursued a constitutionally legitimate aim.

(3) Proportionality

(a) General Principles

65. Proportionality, which is one of the criteria to be taken into account in restricting the rights and freedoms under Article 13 of the Constitution, stems from the principle of state of law. Since the restriction of rights and freedoms in a state of law is an exceptional power, it may only be justified on the condition that it is used to the extent that is required in the situation. Imposing restrictions on individuals' rights and freedoms to a degree that is more than what is required by the circumstances of the case would mean exceeding the limits of power enjoyed by the public authorities and, therefore, be incompatible with the state of law (see the Court's judgment no. E.2013/95, K.2014/176, 13 November 2014).

66. The principle of proportionality comprises of three sub-principles, which are "suitability", "necessity" and "proportionality". "Suitability" means that the prescribed interference is suitable for achieving the aim sought to be achieved; "necessity" means that the interference is absolutely necessary for the aim pursued, in other words, it is impossible to attain the same aim with a less severe interference; and "proportionality" refers to the need for striking a reasonable balance between the interference with the individual's right and the aim sought (see the Court's judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2012/102, K.2012/207, 27 December 2012; no. E.2012/149, K.2013/63, 22 May 2013; no. E.2013/32, K.2013/112, 10 October 2013; no. E.2013/15, K.2013/131, 14 November 2013; no. E.2013/158, K.2014/68, 27 March 2014; no. E.2013/66, K.2014/49, 29 January 2014; no. E.2014/176, K.2015/53, 27 May 2015; no. E.2015/43, K.2015/101, 12 November 2015; no. E.2016/16, K.2016/37, 5 May 2016; no. E.2016/13, K.2016/127, 22 June 2016; and *Mehmet Akdoğan and Others*, cited above, § 38).

67. The right to property set out in Article 35 of the Constitution also imposes certain positive obligations on the State. While positive obligations, as a rule, provide constitutional protection against interferences performed by private persons, the State may have certain positive procedural obligations also in cases of any interference by public

authorities. These include legal, administrative and actual measures that remove, in other words offer reparation for, the interference performed by the public authority.

68. Where there is an interference with the right to property carried out by public authorities, not only is it a requirement of the State's positive obligations to create a set of administrative or judicial legal mechanisms capable of restitution if possible, i.e. removal of the negative consequences for the owner arising from this interference to reinstate the original state of affairs, or compensation of the owner's loss and damages, but also the existence of such mechanisms is a matter to be taken into account in the assessment on the proportionality of the interference. In this context, the interference may be found in breach of the principle of proportionality if such a reparative mechanism has never been created or the mechanism in force lacks the capability of offering restitution to the state prior to the interference or redress for the damages incurred.

(b) Application of Principles to the Present Case

69. In the present case, it is clear that closure of the street to pedestrian and vehicular traffic in front of the Embassy of Israel is capable of achieving the aim of ensuring the security of the Embassy in question.

70. It is primarily within the powers of the relevant public authorities to assess whether the closure of the street to pedestrians and vehicles would lead to a security vulnerability or whether the security concern at issue would necessitate the street to be closed to pedestrians and vehicles. The authorised administrations are responsible for the effective and efficient conduct of security services; therefore, the responsible and competent authorities are in a better position to decide which measures should be taken in order to offer the best service in this regard. For this reason, the administrations enjoy discretionary powers to a certain extent with respect to the measures to be implemented. Nonetheless, this discretion enjoyed by the administrations in regard to the necessity of the means chosen is not an unlimited power. Where the means chosen has aggravated the interference distinctly in comparison with the aim it sought to achieve, the Constitutional Court may conclude that the interference was not

necessary. However, the Constitutional Court's review in this context is not directed towards the degree of appropriateness of the means chosen but the gravity of its interference with rights and freedoms.

71. In the case giving rise to the application, setting up a barrier to close off the street as a measure did not aggravate the interference distinctly when compared to the aim of ensuring the security of the Embassy of Israel. Hence, there is no reason to reach a conclusion different than that of the public authorities regarding the necessity of the interference.

72. The essential criterion of the principle of proportionality to be taken into account in the instant case is how proportionate the interference was. In cases where the prescribed measure imposes an extra-ordinary and excessive burden on the owner, the interference cannot be considered as proportionate. Therefore, the Court must examine whether the measure in question imposed an excessive and disproportionate burden on the applicants.

73. The applicants contended that the closure of the street on which the immovable property they rented out was located to pedestrian and vehicular traffic significantly reduced the property's potential to be rented at the market value under normal circumstances. They enclosed certain bank receipts with their petition, which indicated that their rental income decreased from TRY 3,000 to TRY 1,000 over the period following the implementation of the measure. The competent authorities did not object to the fact that the rental income from the immovable property decreased. Nor did the inferior courts reached any finding to the contrary.

74. If a certain number of people have to bear the negative consequences of an interference by public authorities, which is performed for public interest and whose results appeal to the whole society, this may impair the balance to be struck between the public interest sought to be achieved via the interference and the rights of individuals as well as may place an excessive and unbearable burden on the individual. Given that the positive outcomes sought in implementing the measure benefit the whole society, the burden borne by the person or persons whose right was interfered with must be shared by the whole society, thereby striking

a fair balance between the aims of public interest and the protection of the individuals' right to property. Otherwise, only a certain person or group of persons will have to bear the burden stemming from an act or action of the administration while the whole society benefits from its products. In other words, the persons subjected to an interference with their right might face the obligation to sacrifice more than other members of the society. This would not be compatible with the principle of democratic state of law based on equality of individuals.

75. It is obvious that the decrease in the economic value yielded from the immovable property due to the decrease of rental income imposed a burden on the applicants. It is a requirement of the principle of proportionality to compensate for the burden imposed on the applicants with the measure involving the closure of the street on which the Embassy of Israel is located to pedestrian and vehicular traffic as a requirement of the obligations of the Republic of Turkey arising from the international law. Nevertheless, the first-instance court dismissed the case on the ground that the administration had not had any service fault, without giving the applicants a chance to prove the existence of the damage or the causal link between the act/action and the damage. This interpretation made by the trial court which limited the administration's liability to finding of a fault prevented the applicants' burden to be alleviated and balanced.

76. However, the right to property guaranteed under Article 35 of the Constitution requires that, even in cases where the interference is prescribed by and in conformity with the law, the owner must be afforded a set of possibilities capable of balancing his interest. Such possibilities aimed at protecting the owner's interest at the same time may, though not necessarily, include payment of compensation under the circumstances of the case in issue. Even though it is within the trial court's discretion to decide whether it is necessary to award compensation depending on the conclusion to be reached with regard to the existence of the damage and the causal link between the interfering measure and the damage, the fact that compensation was bound to a condition of existence of fault prevents carrying out a proportionality test from the very beginning.

77. The principle of balancing sacrifices which has been developed via case-law and implemented by both the Joint Administrative Chambers of the Supreme Administrative Court and other chambers of the Supreme Administrative Court for many years is capable of striking a reasonable balance between the applicants' right to property and the public interest aims pursued by the measure constituting an interference with the right, thus having the quality and sufficiency to offer reparation for the burden imposed on the applicants. In accordance with this principle of balancing sacrifices, it is possible to compensate, provided that other criteria are also satisfied, for the damages suffered due to administrative acts and actions, even if those are lawful. In the present case, however, no deliberation was held as to whether the application criteria of this principle were met although it had been raised by the applicants.

78. In conclusion, since the trial court sought the condition of finding of a fault on the part of the administration in order to hold an examination as to the existence of a damage and a causal link in the action for compensation brought by the applicants wishing to claim redress for the damage allegedly incurred due to the street's closure to pedestrians and vehicles, the applicants were deprived of the possibility of receiving compensation by proving the existence of the damage and the causality between the administration's act and the damage; hence, they were deprived of the possibility of balancing the burden imposed on them. The fact that the applicants were forced to bear the burden arising from this measure taken for the benefit of the whole society has resulted in the disturbance, to the detriment of the owner, of the reasonable balance needed to be struck between the aim of public interest and the owner's right to property. Thus, it has rendered the interference with the right to property disproportionate.

79. For these reasons, it must be held that there was a violation of the right to property protected under Article 35 of the Constitution.

B. The Applicants' Other Allegations

80. Having regard to its finding of a violation above, the Court has not considered it necessary to examine the remainder of the applicants' allegations.

C. Application of Article 50 of Code no. 6216

81. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

82. The applicants requested finding of a violation and claimed 210,000 Turkish liras ("TRY") in respect of the pecuniary damages they suffered due to the decrease in their rental income as well as TRY 17,200 which was paid to the administration for lawyer's fees, plus the statutory interest running from the date of filing of the action to the date of payment, or remission of the judgment to the first-instance court for a retrial.

83. The Court found a violation of the applicants' right to property.

84. Since there is legal interest in holding a retrial to remove the consequences of the violation of the right to property, a copy of the judgment must be remitted to the 15th Chamber of the Ankara Administrative Court for a retrial.

85. The total court expense of TRY 2,212.20 including the court fee of TRY 412.20 and counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed jointly to the applicants.

V. JUDGMENT

For these reasons, the Constitutional Court held UNANIMOUSLY on 2 February 2017 that

A. The alleged violation of the right to property be DECLARED ADMISSIBLE;

B. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. There is NO NEED TO EXAMINE other allegations of the applicants;

D. A copy of the judgment be REMITTED to the 15th Chamber of the Ankara Administrative Court for a retrial to remove the consequences of the violation of the right to property;

E. The total court expense of TRY 2,212.20 including the court fee of TRY 412.20 and the counsel fee of TRY 1,800 be JOINTLY REIMBURSED TO THE APPLICANTS;

F. The payment be made within four months as from the date when the applicants apply 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; and

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

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ANO İNŞAAT VE TİCARET LTD. ŞTİ.

(Application no. 2014/2267)

21 February 2017

On 21 December 2017, the Plenary of the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *ANO İnşaat ve Ticaret Ltd. Şti.* (no. 2014/2267).

THE FACTS

[9-43] The applicant is a company, established in 1970 in Ankara, and engages in construction works.

On 9 May 1977, the applicant company signed a contract with the General Directorate for State Hydraulic Works for the construction of a hydroelectric power plant, namely the Karacaören Dam and Hydroelectric Power Plant.

While the construction works were continuing, on 14 March 1980 a second contract was signed. However, upon the applicant's request and administration's approval, the said construction works were ended and liquidated. Afterwards, the administration calculated the expenses. The applicant company objected to the expenses calculated by the administration.

The applicant brought an action before the Ankara Civil Court. After a series of subsequent proceedings before the Civil Chambers of the Court of Cassation, the applicant was paid a certain amount of money on 23 September 2002.

The applicant lodged an application with the European Court of Human Rights ("the ECHR") on 4 December 2002, alleging that both his right to a trial within a reasonable time and the right to property due to the delay in the payment of the amount stated in the contract with a low interest rate, which resulted in his financial loss.

The ECHR, found a violation of the applicant's right to a trial within a reasonable time; however, it found inadmissible the alleged violation of his right to property for non-exhaustion of domestic remedies.

The action brought by the applicant on 16 March 1995 to redress the further loss it had sustained due to the delayed payment of its receivables by the General Directorate for State Hydraulic Works was separated on 16 March 1995. The proceedings were continued before the same court (Ankara Civil Court).

During the proceedings, expert reports were issued. According to one of these reports, the files pertaining to the enforcement proceedings constituting a basis for the applicant's further loss claims had been sent to a paper mill, and it was not possible to have access to the relevant documents.

Hence, the applicant's case was dismissed. The applicant's subsequent appeal was also dismissed. The final judgment was served on the applicant's lawyer on 27 January 2014.

The applicant lodged an individual application with the Constitutional Court on 20 February 2014.

V. EXAMINATION AND GROUNDS

44. The Constitutional Court, at its session of 21 December 2017, examined the application and decided as follows:

A. Alleged Violation of the Right to Property

1. The Applicant's Allegations and the Ministry's Observations

45. The applicant firstly underlined the finding that some of the files pertaining to the enforcement proceedings constituting a basis for its further loss (*munzam zarar*) claims had been sent to a paper mill while others had been lost and could not be found again due to a flood. According to the applicant, the public authorities displayed negligence with regard to the protection of evidence and it suffered damage due to that negligence. The applicant further asserted that the proceedings were lengthy in the action it had brought for its claim and that the payment it had received late had fallen into depreciation due to the high inflation rate in the country during that time period. The applicant stated that it had lodged an application with the European Court of Human Rights ("the

ECtHR") concerning an alleged violation of the right to property and that the ECtHR had explicitly held in its decision that inflation rates must be taken into account to prevent any loss of value in the money owed. The applicant complains that its case was rejected by the inferior courts despite the decision of the ECtHR on the ground that the further loss had not been proven. On those accounts, the applicant alleges that there have been violations of the right to a fair trial and the right to property.

46. In its observations, the Ministry pointed out that the Court of Cassation follows two different practices on matters of further loss. Accordingly, the Court of Cassation has required the further loss to be tangibly proven in some of its decisions while in others it held that it must be presumptively acknowledged that creditors are to maintain the value of their money in an inflationary environment. The Ministry noted that, in the present case, the inferior courts arrived at a resolution of the dispute in line with their first observations. After referring to the ECtHR's judgment on the case of *Aka v. Turkey*, in which the Strasbourg Court held that the difference between the expropriation price plus default interest paid to Mr Aka and the value of the amounts due adjusted for higher inflation rates had to be paid to the applicant, the Ministry declared that it is within the Court's discretion to take account of these points in reaching a conclusion.

47. In its counter-statements against the Ministry's observations, the applicant reiterated its arguments in the application form.

2. **The Court's Assessment**

48. Article 35 of the Constitution provides as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of public interest.

The exercise of the right to property shall not contravene public interest."

49. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). In addition to the alleged violation of the right to property, the applicant contends that there has also been

a breach of the right to a fair trial on account of the disappearance of the files pertaining to the enforcement proceedings constituting a basis for its claim for compensation of the further loss. On the other hand, the applicant's primary complaint concerns the allegation that the money it was owed was paid after falling into loss of value. For this reason, the Court has found that all the complaints, except for the allegedly unreasonable length of trial, should be examined within the scope of the right to property.

a. Admissibility

50. The alleged violation of the right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

Mr. M. Emin KUZ and Mr. Kadir ÖZKAYA did not agree with this conclusion.

b. Merits

i. Existence of Property

51. A person complaining that his/her right to property was violated must prove in the first place that such a right existed (see *Mustafa Ateşoğlu and Others*, no. 2013/1178, 5 November 2015, § 54).

52. The right to property safeguarded by Article 35 of the Constitution encompasses the rights over any kind of assets which has an economic and monetary value (see the Court's judgment no. E.2015/39, K.2015/62, 1 July 2015, § 20). In this framework, along with movable and immovable properties, which undoubtedly have to be considered as property, the limited real rights and non-material rights established over those properties as well as any enforceable claims fall within the scope of the right to property (see *Mahmut Duran and Others*, no. 2014/11441, 1 February 2017, § 60).

53. In the present case, on 9 May 1977 the applicant company contracted with the National Water Board (*Devlet Su İşleri*) to construct a dam and began construction as per this contract. However, on 9 June 1988 the

applicant and the National Water Board decided to liquidate the contract. As a result of liquidation, the National Water Board issued a final account for the works completed by the applicant by that date but the applicant challenged this final account by bringing an action on 10 October 1990 to claim payment of receivables. At the end of the proceedings, the trial court held on 19 April 2002 that the applicant was to receive 62,969.69 Turkish liras (TRY) and this judgment became final on 6 June 2002 once it was rectified and upheld by the Court of Cassation. This amount was paid to the applicant on 23 September 2002.

54. In the instant case, the applicant claimed that the receivable ruled by the said court constituted a possession and that it had lost value due to the high inflation rates experienced over the period between 1990 (when the action was brought before a court) and 2002 (when the payment was made); therefore, the applicant alleged that its right to property had been violated. The action for compensation of further loss, which was brought at a later date by the applicant, concerned reparation of the damage caused by the loss of value in the amount of the receivable in question, which the applicant considered as falling within its right to property. Therefore, the existence of property should be determined on the basis of the applicant's original receivable, regardless of whether there was any further loss. In this scope, there is no doubt that the receivable in question established by a final court decision is encompassed, by virtue of its definite and enforceable nature, by the right to property. Accordingly, the process regarding the compensation of further loss, on the other hand, should be examined from the standpoint of proportionality in connection with the question of whether the receivable considered within the scope of the right to property was subjected to a loss of value.

55. Hence, as regards the impugned receivable ruled by a court, it is beyond doubt that the applicant enjoys the right to property within the meaning of Article 35 of the Constitution.

ii. Existence of an Interference and its Type

56. In view of Article 35 of the Constitution read together with other articles that touch upon the right to property, the Constitution lays

down three rules in regard to interference with the right to property. In this respect, the first paragraph of Article 35 of the Constitution provides that everyone has the right to property, setting out the "right to peaceful enjoyment of possessions", and the second paragraph draws the framework of interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution lays down the circumstances under which the right to property may be restricted in general and also draws out the general framework of conditions of "deprivation of property". The last paragraph of Article 35 of the Constitution forbids any exercise of the right to property in contravention to the interest of the public; thus, it enables the State to control and regulate the enjoyment of property. Certain other articles of the Constitution also contain special provisions that enable the State to have control over property. It should further be pointed out that deprivation of property and regulation/control of property are specific forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, §§ 55-58).

57. In the case giving rise to the present application, the fact that the applicant's receivable was paid after a loss of value has constituted, without any doubt, an interference with the right to property. It is understood that the late reception of the amount receivable by the applicant did not have the nature of deprivation of property, neither did it pursue the aim of controlling or regulating property. In this case, the interference with the applicant's right to property must be examined within the framework of the first rule concerning the principle of "peaceful enjoyment of possessions".

iii. Whether the Interference Caused a Violation

58. Article 35 of the Constitution does not envisage the right to property as an unlimited right; accordingly, this right may be limited by law and in the interest of the public. In interfering with the right to property, Article 13 of the Constitution must also be taken into consideration as it governs the general principles concerning the restriction of fundamental rights and freedoms. Pursuant to the article cited above, fundamental rights and freedoms may only be restricted by law, on the basis of the reasons laid down in relevant articles of the Constitution, and in conformity with

the requirements of a democratic order of the society and the principle of proportionality. In order for the interference with the right to property to be in compliance with the Constitution, the interference must have a legal basis, pursue the public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, cited above, § 62).

(1) Whether the Interference was Prescribed by Law

59. Article 35 § 2 of the Constitution stipulates that any interference with the right to property must be prescribed by law as it provides that the right to property may be limited by law and in the interest of the public. Similarly, governing the general principles surrounding the restriction of fundamental rights and freedoms, Article 13 of the Constitution adopts the basic principle that "rights and freedoms may only be restricted by law" (see *Mehmet Arif Madenci*, no. 2014/13916, 12 January 2017, § 69). Therefore, pursuant to Articles 13 and 35 of the Constitution, the first criterion to be sought in the interference with the right to property is whether it had a legal basis.

60. Equally important as the existence of the law is the necessity that the text and application of the law has legal certainty to a degree that individuals may foresee the consequences of their actions. In other words, the quality of the law plays an important role in the determination of whether the requirement of legality has been satisfied (see *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 56).

61. In the present case, the inferior courts applied rediscount interest at varying rates to the receivable ruled to be paid to the applicant by the National Water Board, a public institution. This practice was based on Article 2 of the Law no. 3095. Nonetheless, the applicant raised an allegation of damage that exceeded the interest to be paid on the receivable ruled in its favour. The action for compensation of further loss filed by the applicant within the scope of Article 105 of the now-repealed Law no. 818 (Article 122 of the Law no. 6098) in this regard was dismissed by the first-instance court. The Court of Cassation upheld the court's decision and rejected the applicant's subsequent request for rectification, thereby rendering the decision final (see §§ 22-29 above).

62. The question of further loss (*munzam zarar*) was described by Article 105 of the now-repealed Law no. 818 and Article 122 of the Law no. 6098. Accordingly, where the creditor has incurred a loss that is greater than the default interest, i.e. if the damage suffered by the creditor exceeds the amount of interest accrued in the days of non-payment of the debt, the debtor shall be liable to compensate for that loss unless he/she is proven to be faultless.

63. However, as observed by the Ministry, the Court of Cassation has adopted two different practices with regard to the matters of further loss. In some cases, the Court of Cassation held that, pursuant to Article 122 of the Law no. 6098 (Article 105 of the now-repealed Law no. 818), the creditor had to prove with concrete evidence that he/she had suffered a loss beyond the default interest due to late payment of the amount receivable. According to those decisions, the increase in the foreign exchange rate or the high rate of inflation in the market will not relieve the creditor from the burden of proving that a further loss had been incurred. On the other hand, according to the second approach adopted in the practices of the Court of Cassation, the fault that would cause a liability of compensation stemming from further loss is the debtor's very fault in going into default. No link of fault causing the loss will be sought or deliberated upon. According to these decisions, it should be presumptively acknowledged that an individual's efforts and attempts to maintain the value of his/her money and to return a profit in an inflationary environment, at least by investing in term deposit accounts or foreign exchange accounts with continually rising rates, conforms to the ordinary flow and experiences of life. It was concluded that the debtor has the onus of proving this presumption otherwise, i.e. the absence of fault or liability on his/her own part (see §§ 37 and 38 above).

64. The Court's duty is limited by virtue of the subsidiary nature of the individual application mechanism; in this context, the Court cannot intervene in the discretion of the inferior courts with regard to interpretation of provisions of law and examination of evidence unless there is a manifest arbitrariness or a manifest error of discretion. In this scope, it is not for the Court to interpret the rules of law regarding

further loss or to examine the allegations and evidence submitted by the applicant in that respect.

65. Notwithstanding, the question that is important for the purposes of the individual application is that whether the interference with the right to property satisfied the criteria laid down in Articles 13 and 35 of the Constitution. Accordingly, the interference must be prescribed by law, pursue a legitimate aim, and also be proportionate to that aim. Having further regard to the nature of the interference, the Court will reach a conclusion as to whether the public authorities' approach regarding the practice of law met the requirements in Article 35 of the Constitution after examining whether the interference was successful in achieving the legitimate aim pursued (for a similar approach, see *Arif Güven*, no. 2014/13966, 15 February 2017, § 52).

(2) Whether the Interference Pursued a Legitimate Aim

66. According to Articles 13 and 35 of the Constitution, the right to property may only be restricted in the interest of the public. The notion of public interest serves both a restrictive instrument, which allows for imposition of restrictions on the right to property where the public interest requires it, and an effective protection mechanism, which sets out limits to restrictions by preventing the imposition of any restrictions on the right to property outside public interest aims (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, § 53).

67. The notion of public interest is considerably broad by its very nature. Taking into account the needs of the public, the legislative and executive organs have broad discretionary powers in the determination of what is in the public interest. If there is a dispute on the public interest, it is clear that the specialised first-instance courts and the courts of appeal are in a better position to resolve such disputes. The Constitutional Court cannot intervene in the discretion of the authorised public organs with regard to the determination of public interest, unless their decisions are understood to be manifestly ill-founded or arbitrary, in the individual application examination. The onus of proving that the interference is

not in line with the public interest rests with the party raising such an allegation (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, §§ 34-36).

68. The fact that statutory and default interest rates to be applied unless it was decided otherwise has a significant role for the proper functioning of economic life. In this connection, the Court considers in the present case that the application of interest to the applicant's receivable in accordance with the legal provisions regulating default interest pursued a legitimate aim based on public interest.

(3) Proportionality

(a) General Principles

69. Pursuant to the principle of proportionality, a fair balance must be struck between the public interest sought in restricting the right to property and the individual's rights. This fair balance will have been upset where it is found out that the applicant has personally borne an excessive burden (see *Arif Güven*, cited above, § 58). In the assessment of proportionality of the interference, the Court will take account of the burden imposed on the applicant from two perspectives: on the one hand, it will examine the importance of the legitimate aim sought to be achieved; and, on the other, it will have regard to the nature of the interference along with the behaviour of the applicant and the public authorities (see *Arif Güven*, cited above, § 60).

70. Being an instrument of exchange in economies, money represents an economic value which provides benefits for its owner such as profit, rent and interest when used in various commercial, industrial, agricultural activities and so on. The utilisation of money by persons and entities other than its owner results in the owner's deprivation of this economic value and, in economies under the effect inflation, causes it to lose its value (i.e. its purchasing power) based on the inflation rate.

71. Where the inflation rate and, by extension, foreign exchange rates, term deposit, Treasury bill and State bond interest rates are much higher

than the fixed statutory and default interest rates, the consequence turns in favour of the debtor but to the detriment of the creditor. For this reason, the debtor does not pay the debt when it is due and makes an effort to extend the length of proceedings when a legal action is filed. Thus, the number of actions and proceedings before the judiciary accumulates, the public confidence in the judiciary diminishes, the idea of obtaining claims on one's own spreads, thereby disturbing the public order and undermining the personal and public safety (see the Court's judgment no. E.1997/34, K.1998/79, 15 December 1998).

72. In cases where an amount receivable under the right to property is paid late, not only does the real value of the property decrease with a considerable depreciation in value of the money due to inflation during the default period, but also the creditor cannot have an opportunity to yield a return from the amount as a savings or investment tool. In this way, persons are subjected to unfairness through deprivation of their right to property (see the Court's judgment no. E.2008/58, K.2011/37, 10 February 2011).

73. In previous applications concerning alleged suffering because of late payment of the amounts due that are prescribed by the legislature as a right or have become public debt, the Court found breaches of the right to property if the depreciations of the receivable or the amount guaranteed under a right had imposed a disproportionate burden on applicants (see *Mehmet Akdoğan and Others*, cited above; and *Akel Gıda San. ve Tic. A.Ş.*, no. 2013/28, 25 February 2015). Likewise, the Court found a violation of the right to property under the proportionality aspect in an application where it was concluded that the amount of compensation awarded by courts had lost value against inflation due to the time spent over the course of legal proceedings (see *Abdulhalim Bozboğa*, no. 2013/6880, 23 March 2016). Furthermore, the Court held that there had been a violation of the right to property on the ground that an applicant's retirement bonus -established by a court decision within the framework of social security payments- had been paid after depreciation and it had imposed an excessive and extraordinary burden on the applicant (see *Ferda Yeşiltepe* [Plenary], no. 2014/7621, 25 July 2017).

(b) Application of the Principles to the Present Case

74. The action brought by the applicant for the collection of its receivable under the dam construction contract was accepted in part by the first-instance court on 19 April 2002 and upheld by the 15th Civil Chamber of the Court of Cassation on 6 June 2002 upon an appeal. Accordingly, the inferior courts ruled that the National Water Board was to pay the applicant TRY 62,969.69 for the works completed by the applicant within the scope of the contract for dam construction. However, the mere ruling on a payment in favour of the applicant has not removed the applicant's victim status by itself. In order for the applicant's victim status to be remedied, it is necessary to offer reparation in view of both the time of the alleged violation and the period of time during which the victim was unable to use this right.

75. In the present case, the applicant received the original due amount of TRY 62,969.69 as well as the interest payment of TRY 348,027.70. Nonetheless, the applicant complaints that its receivable lost value due to late payment and the inflationary environment witnessed in the country during the default period.

76. As mentioned above, in various judgments held on both constitutionality review and individual application, the Court has underlined that the amounts receivable fall within the right to property and that, in case of late payment of amounts due by the State, it is important to pay such an interest that is not below the inflation rates not only for the protection of individual rights but also for the purposes of public order. In this context, the Court has already acknowledged that the loss of value of receivables that are regarded to be falling within the individuals' right to property caused by a late payment made by public authorities due to unreasonable reasons constitutes a breach of the right to property.

77. In the present case, the inferior courts established four different dates from which default interest would run in respect of the applicant's receivables. Accordingly, the amount of TRY 486.69 became payable to the applicant on 10 October 1990; the amount of TRY 2,870.82 on 9 June 1988;

the amount of TRY 55,569.36 on 16 March 1995; and the VAT-excluded amount of TRY 4,041.82 also became payable on 16 March 1995. The total amount of these receivables (TRY 62,968.91), together with the interest accrued (TRY 348,027.70), was paid to the applicant on 23 September 2002.

78. According to the Central Bank data, the rises in the inflation rates observed in the relevant periods were as follows:

- June 1988 - September 2002: 203,613% (TRY 100 in June 1988 corresponded to TRY 203,512.50 in September 2002 in real value).

- October 1990 - September 2002: 60,427% (TRY 100 in October 1990 corresponded to TRY 60,326.70 in September 2002 in real value).

- March 1995 - September 2002: 4,392% (TRY 100 in March 1995 corresponded to TRY 4,291.59 in September 2002 in real value).

79. However, for its total receivable of TRY 62,968.91 falling within the right to property, the applicant was paid TRY 348,027.70 as interest at the same period of time. It has been observed on the basis of these data that, despite the amount of interest paid, the cumulative inflation rate in the same period had been 13,254%; in other words, the applicant's receivable was paid after having fallen into a severe depreciation against inflation, consequently amounting to less than 1% of its value. Indeed, the expert report submitted to the trial court clearly indicated that the applicant's receivable had undergone a loss of value against inflation.

80. As a rule, public authorities are expected to pay the amounts owed to persons without a need arising for a judicial process or enforcement proceedings. In the present case, there was no reasonable justification for the late payment of the applicant's receivable. Besides, it has been understood that the public authorities were only able to pay the receivable -ruled retrospectively by inferior courts in favour of the applicant- after the end of the proceedings and that the public authorities gained a benefit because of the length of the proceedings.

81. In conclusion, regard being had to the fact that the applicant's receivable protected by the right to property was paid after having fallen into depreciation to a large extent against inflation, it has been found that

a personally excessive and extraordinary burden was imposed on the applicant. Therefore, the Court has observed that the fair balance which needed to be struck between public interest and the applicant's right to property was upset to the detriment of the applicant in the instant case because of the inferior courts' strict interpretation requiring the applicant to separately prove having incurred losses.

82. Consequently, the Constitutional Court has found a violation of the right to property safeguarded by Article 35 of the Constitution.

Mr. M. Emin KUZ and Mr. Kadir ÖZKAYA did not agree with this conclusion.

B. Alleged Violation of the Right to a Trial within a Reasonable Time

83. The applicant alleged that there had been a violation of its right to a trial within a reasonable time on account of the lengthiness of the proceedings it had brought to claim compensation for its further loss.

1. Admissibility

84. The alleged violation of the right to a trial within a reasonable time must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

85. In the determination of the length of the proceedings on disputes concerning civil rights and liabilities, the period shall run from the date on which the case was filed and it shall be deemed to end when the proceedings have been completed -including, most of the time, the execution stage- or, as regards the proceedings that are still on-going, when the Court has ruled on the complaint concerning a breach of the right to a trial within a reasonable time (see *Güher Ergun and Others*, no. 2012/13, 2 July 2013, §§ 50 and 52).

86. Matters such as the complexity of the proceedings, the number of their levels, the attitude of the parties and the relevant authorities during the trial and the quality of the applicant's interest in the speedy

conclusion of the case are the criteria which are taken into consideration in the determination of whether or not the length of the proceedings on disputes concerning civil rights and liabilities is reasonable (see *Güher Ergun and Others*, cited above, §§ 41-45).

87. It is observed that the applicant filed the action for compensation of further loss on 16 March 1995 and the proceedings came to an end once the Court of Cassation dismissed the request for rectification on 26 December 2013.

88. In view of the above-mentioned principles and the Court's previous judgments in similar applications, the length of the proceedings in the present case that lasted for nearly 18 years and 9 months must be considered unreasonable.

89. For these reasons, it must be held that there has been a violation of the right to a trial within a reasonable time protected under Article 36 of the Constitution.

C. Application of Article 50 of Code no. 6216

90. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

91. The applicant requested pecuniary compensation and retrial.

92. In the present application, the Court has concluded that there have been violations of the right to property and the right to a trial within a reasonable time.

93. Since there is legal interest in holding a retrial to redress the consequences of the violation of the right to property, a copy of the judgment must be sent to the 7th Chamber of the Ankara Civil Court of General Jurisdiction for retrial.

94. While the Court has found a violation of the applicant's right to a trial within a reasonable time, the applicant did not request any non-pecuniary compensation. The applicant's request for pecuniary compensation, on the other hand, concerns the alleged violation of the right to property. The finding of a violation and the ruling in favour of a retrial on the basis of that violation offers the applicant sufficient redress.

95. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 21 December 2017:

A. 1. By MAJORITY and by dissenting opinion of Mr. M. Emin KUZ and Mr. Kadir ÖZKAYA, that the alleged violation of the right to property be DECLARED ADMISSIBLE;

2. UNANIMOUSLY that the alleged violation of the right to a trial within a reasonable time be declared ADMISSIBLE;

B. 1. By MAJORITY and by dissenting opinion of Mr. M. Emin KUZ and Mr. Kadir ÖZKAYA, that the right to property safeguarded by Article 35 of the Constitution was VIOLATED;

2. UNANIMOUSLY that the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution was VIOLATED;

C. UNANIMOUSLY that a copy of the judgment be SENT to the 7th Chamber of the Ankara Civil Court of General Jurisdiction (no. E.2008/145, K.2011/544) for a retrial to redress the consequences of the violation of the right to property;

D. UNANIMOUSLY that the total court expense of TRY 2,006.90 including the court fee of TRY 206.90 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. UNANIMOUSLY that the payment be made within four months as from the date when the applicants apply 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; and

F. That a copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF JUSTICES M. EMİN KUZ AND KADİR ÖZKAYA

In the individual application lodged by the applicant upon dismissal of the action it had brought to claim compensation for further loss, the Court has declared admissible the alleged violation of the right to property and found a violation of the said right.

The reasoning of the judgment indicates that the action brought by the applicant for the collection of its receivable under the dam construction contract was partly accepted by the first-instance court and subsequently upheld by the Court of Cassation; however, considering that the victim status could have only been removed if the payment of receivable plus its interest had been coupled with a compensation for the loss of value experienced in an inflationary environment, the Court has concluded that there has been a breach of the right to property on account of the fact that the applicant's receivable was paid after having fallen into a severe depreciation against inflation (see §§ 74-82).

In this context, even though the judgment summarises the subject matter of the application as a violation of the right to property due to the fact that the receivable ruled on by a court was paid after the amount had undergone depreciation, the present case differs from the previous judgments cited therein in which we had found violations. From this standpoint, the present case does not concern a depreciated payment of a receivable due to a delay in the execution phase of the judgment which was rendered by an inferior court and which became final, neither does it involve an alleged violation of the right to property due to the calculation of the amount subject to a case accepted by inferior courts (see, for instance, *Ferda Yeşiltepe* [Plenary], no. 2014/7621, 25 July 2017).

As indicated in the Court's judgment, the application concerns the dismissal of the applicant's "action for compensation of further loss" filed on the basis of the Code of Obligations as even the interest accruing on the amount awarded to the applicant by the first-instance court would not cover its losses (see § 61).

Article 105 § 1 on "Further loss" of the Code of Obligations (Law no. 818), which was in force when the applicant filed the claim for compensation of further loss giving rise to the present application, and Article 122 § 1 of the Turkish Code of Obligations (Law no. 6098), which repealed the Law no. 818 and was in force when the first-instance court dismissed the compensation claim at issue, stipulate that, if the damage suffered by the creditor exceeds the amount of interest accrued in the days of non-payment of the debt, the debtor shall be liable to compensate for that loss unless he/she is proven to be faultless.

It is understood that, prior to the case concerning a claim for compensation of further loss at issue in the present application, the applicant company had signed a contract to construct a dam and a hydroelectric power plant but the work had been stopped via liquidation upon the applicant's request. Subsequently, the applicant company filed an action to challenge the final account calculated for the costs of the works completed thus far. The trial court partly accepted the applicant's case and awarded payment of interest in addition to the main amount owed to the applicant. Furthermore, the applicant did not consider the payments made in 2002 sufficient and filed another action for compensation in 2005, which was joined with the preceding action for compensation. In 2011 the trial court dismissed the action on the grounds that "... the report dated 9 June 1988 drawn up with respect to the liquidation of dam construction indicated that no payment of costs or compensation would be made to the claimant (applicant) company due to liquidation" and there had been no further loss incurred according to expert reports except for the interest applied to the applicant's receivable which had been established within the main set of proceedings (and paid along with the receivable 9 years before the delivery of the judgment). That judgment became final when the Court of Cassation upheld it and dismissed the request for rectification.

In other words, although the applicant company, having failed to fulfil its commitment, requested and reached an agreement with the administration, in which it agreed not to receive any payment of compensation or costs with a view to being relieved from its contractual

obligations and responsibilities, it seemingly claimed compensation for further loss as it did not find the interest accruing on the amount awarded by the trial court at the end of the action it had filed to receive payment for the costs related to the works completed by then.

In arriving at the conclusion of admissibility and violation, the majority has apparently regarded the claim for compensation of further loss as a continuation of the judgment rendered in the proceedings concerning the applicant's partly-accepted claim for payment of receivables. Nonetheless, given that the case in question was not a claim for receivables (*alacak davası*) but for compensation of damages (*tazminat davası*), we consider that it was not appropriate to disregard the fact that, when requesting termination of the construction by way of liquidation, the applicant -as explained above- had agreed not to claim compensation in return for being relieved of its contractual commitment and the legal liability arising from its inability to fulfil it, as well as the applicant's declaration of intent regarding its waiver of compensation claims which had been relied on by the inferior courts.

It is observed that the first-instance court initially rejected the action for compensation giving rise to the application as it found the respondent administration's defence sufficient on the grounds that the applicant had agreed not to claim compensation and that the further loss claim fell within this scope.

As is well-established, the Court's duty is limited on account of the subsidiary nature of the individual application mechanism; thus, the Court cannot intervene in the discretion of the inferior courts with regard to the interpretation of rules of law and examination of evidence so long as there is no manifest arbitrariness or manifest error of discretion in this respect. While this principle has been reiterated in this judgment (see § 64), the applicant's complaints have been declared admissible without indicating any findings as to whether there had been a manifest arbitrariness or error of discretion in the rejection of the compensation claim by the inferior courts through interpretation of the relevant provisions of the Code of Obligations and examination of evidence.

In other words, the inferior courts rejected the action for compensation on the grounds that, although the Code of Obligations stipulated the filing of an action for compensation for reparation of further loss, the applicant company had waived this claim in exchange for the administration's agreement to liquidate the construction work. Nevertheless, the majority of our Court considers the alleged violation of the applicant's right to property admissible without establishing whether there has been any manifest arbitrariness or error of discretion in such interpretation of rules of law or regarding the assessment of the report signed between the applicant company and the administration.

On the other hand, while the judgment reads that the first-instance court held in 2004 that "the expert report submitted to the trial court clearly indicated that the applicant's receivable had undergone a loss of value against inflation", it is also noted that another expert report obtained by the same court in 2010 did not find any substantiated further loss incurred by the claimant (i.e. the applicant company) that had exceeded the default interest already paid on its receivables calculated for the works it had completed. The discretionary power with respect to which of the two expert reports would be used as a basis for a ruling rests with the inferior courts of instance, which have indeed been acknowledged within the Court's judgment as having the authority over examination of evidence.

In sum, it is not possible for us to agree with the said conclusions as they are incompatible with our general principle which has been mentioned above and also reiterated in the judgment. For these reasons, while sharing the opinion on the declaration of admissibility and finding of a violation in respect of the allegation concerning the right to a trial within a reasonable time, we disagree with the majority's decision to declare admissible the complaint concerning an alleged violation of the right to property. Understanding that the inferior court rulings did not contain a manifest error of discretion or arbitrariness and that the applicant's assertions regarding an alleged violation of the right to property are manifestly ill-founded, we opine that this part of the application should be declared inadmissible.

Furthermore, on the basis of the reasons explained above, we cannot agree with the finding of a violation of the right to property or with the grounds relied on for this finding; namely, (i) the consideration that first-instance court's judgment that "required the applicant to separately prove having incurred losses" was a "strict interpretation", and (ii) the conclusion that "the fair balance which needed to be struck between public interest and the applicant's right to property was upset to the detriment of the applicant" that has been reached without having regard to the conditions in the liquidation agreement allowing for the termination of the construction work undertaken by the applicant company or which legal liabilities did the applicant wished to be relieved of in exchange for waiving any claims for compensation (see § 81).

In this scope, we observe in the present application that the applicant company agreed not to claim any compensation with a view to being relieved of the obligations it had undertaken under a construction contract and any liabilities that might have arisen from its failure to fulfil those obligations. We further understand that the applicant company was not entitled to any receivables other than the default interest accruing due to late payment of the amounts due for the works it had completed until liquidation. Therefore, considering that a fair balance was struck between the applicant's right to property and public interest and that the applicant was not subjected to an excessive an extraordinary burden, we disagree with the majority's judgment finding a violation.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

İRFAN ÖZTEKİN

(Application no. 2014/19140)

5 December 2017

On 5 December 2017, the First Section of the Constitutional Court found a violation of the right to property safeguarded by Article 35 of the Constitution in the individual application lodged by *İrfan Öztekin* (no. 2014/19140).

THE FACTS

[7-33] The immovable, which is located in the Kozluk District of Batman and where there is a structure including a house, animal shelter, storehouse and 15-year old fruit trees, is registered in the applicant's name in the land registry record. This structure with no building license and occupancy permit has been utilizing electricity and water as a subscriber.

During the foundation excavation works for the construction of a Regional Boarding Primary School, a landslide took place on 1 July 2005, which caused damage to the fruit trees and the building constructed by the applicant on his immovable property.

Along with the criminal proceedings which were conducted against those responsible, the applicant brought an action for compensation against the relevant administrations. The applicant's claim for compensation for the damaged fruit trees was accepted by the inferior courts. However, his claim for compensation for the building he had constructed was rejected although it had become uninhabitable as a result of the landslide. The main reasons given by the first instance court in rejecting his claim were based on the fact that the building had not had a building licence or occupancy permit. The first instance court arrived at the conclusion that the applicant could not claim compensation due to an unlawfully-built structure which had to be had demolished.

Thereafter, the applicant appealed the first instance decision; however, it was ultimately upheld by the Supreme Administrative Court. The applicant's request for rectification of the judgment was also dismissed by the Supreme Administrative Court, thereby rendering it final.

The applicant then lodged an individual application.

V. EXAMINATION AND GROUNDS

34. The Constitutional Court ("the Court"), at its session of 5 December 2017, examined the application and decided as follows:

A. The Applicant's Allegations

35. The applicant indicated that his house was also registered in the land registry record of the immovable property under his ownership. Adding that this immovable property fell within the housing area previously designated in the zoning plan, the applicant asserted that his house was a building that could be licensed. The applicant maintained that no public initiative was taken in terms of zoning or urban planning in Kozluk district and that 99% of the structures in the district lacked building licences. The applicant emphasised that the faulty administration's refusal to compensate for the damage caused to the structure, even if it was not licensed, contravened the judgments of the European Court of Human Rights ("the ECtHR"). The applicant drew attention to the fact that, even without a licence, the building on his immovable property was connected to the electricity and water networks and received municipal services and he underlined that his house was damaged due to the uncontrolled foundation excavation conducted by the administration. The applicant considered that expecting him to bear all of the damage incurred despite these would be incompatible with the rule that the administration must be accountable for the services it conducted; therefore, he alleged that there had been a violation of his right to property.

B. The Court's Assessment

36. Article 35 of the Constitution, which will be taken as a basis of the assessment on the allegation, reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of public interest.

The exercise of the right to property shall not contravene public interest."

1. Admissibility

37. The alleged violation of the applicant's right to property must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of Property

i. General Principles

38. A person complaining that his/her right to property has been violated must prove in the first place that such a right existed in the first place (see *Mustafa Ateşoğlu and Others*, no. 2013/1178, 5 November 2015, §§ 49-54). The right to property is guaranteed under Article 35 § 1 of the Constitution, which stipulates that "Everyone has the right to own and inherit property". The right to property safeguarded by the said Article of the Constitution encompasses the rights over any kind of assets which represents an economic value and is assessable with money (see the Court's judgment no. E.2015/39, K.2015/62, 1 July 2015, § 20). In this framework, along with movable and immovable properties, which undoubtedly have to be considered as property, the limited real rights and non-material rights established over those properties as well as any enforceable claims fall within the scope of the right to property (see *Mahmut Duran and Others*, no. 2014/11441, 1 February 2017, § 60).

39. The right to property safeguarded by the Constitution is a fundamental right that protects existing properties, possessions and economic values. A person's entitlement to gain property rights over a possession which he does not already own, irrespective of how strong the interest he may have in this regard, does not fall within the meaning of the concept of property (see *Kemal Yeler and Ali Arslan Çelebi*, no. 2012/636, 15 April 2014, § 36).

40. It is possible in some situations for an economic interest originating from the use of structures built in contravention to regulations/

plans related to urban planning on immovable properties (land) that are considered as public property to constitute a possession/property within the meaning of Article 35 of the Constitution. In this scope, where the formation of a social environment and a family environment has been allowed in such places that could have been demolished by administrative authorities at any time on account of the fact that they had been built in contravention to urban planning regulations but no initiative to that effect nor any measures were taken and the situation was let to persist for a long time while, at the same time, the structure at issue was held subject to taxation or granted access to public services, the economic value originating from the use of the structure built must be considered as a "possession" due to its significant asset value within the framework of Article 35 of the Constitution (see *Nazif Kılıç*, no. 2014/5162, 15 June 2016, § 35).

41. In the case of *Nazif Kılıç*, the Court drew attention to the fact that the rudimentary house had been had built by the applicant and that it had been in his use for a long time. In that judgment, the Court acknowledged the applicant's right to property by indicating that while the administration had had the possibility and resources to demolish the illegally-built rudimentary house and remove the trees planted without permission, it had not taken any action for a long time but still provided municipal services to that structure, thereby allowing a social and family environment to be formed in that area. According to the Court, the use of the rudimentary house demolished and the trees removed had constituted a significant economic interest in respect of the applicant (see *Nazif Kılıç*).

42. On the other hand, the case of *Ayşe Öztürk* (no. 2013/6670, 10 June 2015, § 85) concerned the demolition of a house located on an immovable property bound with a title allocation deed (*tapu tahsis belgesi*) without payment of compensation. In that judgment, as well, the Court underlined that the applicant had built and used the building on a piece of land allocated to the applicant by means of a title allocation deed. The Court continued that the Treasury had not prevented either the construction or use of the building and that the real estate taxes regarding the building had indeed been collected. Having regard to the

fact that the building on the land in question had been built and used by the applicant and that the Treasury had not objected to that situation, the Court concluded that the applicant had property rights over the building.

ii. Application of Principles to the Present Case

43. In the case giving rise to the present application, the immovable property (land) under the building at issue was registered in the name of the applicant in the land registry. During the foundation excavation works for the construction of a Regional Boarding Primary School, a landslide took place on 1 July 2005, which caused damage to the fruit trees and the building constructed by the applicant on his immovable property. The applicant's claim for compensation for the damaged fruit trees was accepted by the inferior courts and the applicant has not raised any complaints in this regard. On the other hand, the applicant's claim for compensation for the building he had constructed was rejected although it had become uninhabitable as a result of the landslide. The main reasons given by the inferior courts in rejecting his case were based on the fact that the building had not had a building licence or occupancy permit. Indeed, as acknowledged by the applicant, the damaged building in question did not have a building licence or an occupancy permit. The applicant has recognised this fact.

44. Nonetheless, the applicant maintained that he had had this building constructed and it had been granted subscription to electricity and water services in 1982; he had lived in this building with his family without facing any obstacles and had used all the municipal services until the landslide incident in 2005. On the basis of the information and documents enclosed with the application form, the Court observes that a water service subscription (no. 2524) was executed between the applicant and the Municipality and the building was connected to an electricity subscription on 1 January 1983. In fact, the immovable property accommodated a number of nearly 15-year old fruit trees as of 2005. What is more, the land registry record of the immovable property shows that it was registered as a "load-bearing masonry house and its yard". Furthermore, it is observed that the structure located on the immovable property was indicated on the zoning status map submitted by the

applicant. From this standpoint, there is no question that the structure in question was built and used for a long time by the applicant.

45. Although the public authorities enjoy wide discretionary powers with regard to making planning and zoning implementation within the framework of modern urban planning principles, the public authorities are required to use these powers in a timely, reasonable and consistent manner. In the present case, however, not only did the administration fail to show any initiative for a long time, despite having the necessary means, to demolish this structure that was understood to have been built clandestinely, but also a social and family environment was allowed to be formed in this building by offering municipal services from at least 1983 to the landslide of 2005, i.e. approximately 22 years. There is no doubt that the use of this building constitutes a significant economic interest for the applicant and his family who had lived in the said building for such a long period of time. In view of the public authorities' passive position which gave rise to uncertainty, the applicant could not be expected to foresee that this situation might change in an instant. Besides, Article 32 of Law no. 3194 allowed for a possibility of rendering the structure compliant with zoning regulations upon a warning to be issued by the municipality. Therefore, the Court acknowledges that the applicant had the right to property as the use of the building at issue for such a long time constituted a significant economic interest for the applicant.

b. Existence of an Interference

46. In view of Article 35 of the Constitution read together with other articles that touch upon the right to property, the Constitution lays down three rules in regard to interference with the right to property. In this respect, the first paragraph of Article 35 of the Constitution provides that everyone has the right to property, setting out the "right to peaceful enjoyment of possessions", and the second paragraph draws the framework of interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution lays down the circumstances under which the right to property may be restricted in general and also draws out the general framework of conditions of "deprivation of

property". The last paragraph of Article 35 of the Constitution forbids any exercise of the right to property in contravention to the interest of the public; thus, it enables the State to control and regulate the enjoyment of property. Certain other articles of the Constitution also contain special provisions that enable the State to have control over property. It should further be pointed out that deprivation of property and regulation/control of property are specific forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan,* no. 2014/1546, 2 February 2017, §§ 55-58).

47. The structure belonging to the applicant was damaged due to a landslide that took place during the construction of a school conducted by the Governor's Office. Therefore, there has been a clear interference with the applicant's right to property in the present case since the impugned damage is understood to have been caused during an activity under the direct conduct of public authorities. This interference with the applicant's right to property does not bear the nature of deprivation of property, neither does it pursue an objective such as the control or regulation of the use of property in the interest of the public. In this case, the interference must be examined within the framework of the first rule concerning the principle of "peaceful enjoyment of possessions".

c. Whether the Interference Caused a Violation

48. Article 13 of the Constitution provides as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

49. Article 35 of the Constitution does not envisage the right to property as an unlimited right; accordingly, this right may be limited by law and in the interest of the public. In interfering with the right to property, Article 13 of the Constitution must also be taken into

consideration as it governs the general principles concerning the restriction of fundamental rights and freedoms. Pursuant to the article cited above, fundamental rights and freedoms may only be restricted by law, on the basis of the reasons laid down in relevant articles of the Constitution, and in conformity with the requirements of a democratic order of the society and the principle of proportionality. In order for the interference with the right to property to be in compliance with the Constitution, the interference must have a legal basis, pursue public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

(1) Whether the Interference was Prescribed by Law

50. Article 35 § 2 of the Constitution stipulates that the interferences with the right to property must be prescribed by law as it provides that the right to property may be limited by law and in the interest of the public. Similarly, governing the general principles surrounding the restriction of fundamental rights and freedoms, Article 13 of the Constitution adopts the basic principle that "rights and freedoms may only be restricted by law" (see *Ali Ekber Akyol and Others*, no. 2015/17451, 16 February 2017, § 51).

51. The first criterion to be sought in interferences with the right to property is whether it relied on a legal basis. Where it is established that this criterion was not met, the Court will arrive at the conclusion that there has been a breach of the right to property, without holding any examination under the remaining criteria. For an interference to be prescribed by law, there must be sufficiently accessible and foreseeable rules within the domestic law regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44). Equally important as the existence of the law is the necessity that the text and application of the law has legal certainty to a degree that individuals may foresee the consequences of their actions. In other words, the quality of the law plays an important role in the determination of whether the requirement of legality has been satisfied (see *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55).

52. In the present case, the inferior courts dismissed the applicant's compensation claims in relation to the damaged building on the ground that it lacked a building licence and an occupancy permit, which contravened Articles 21 and 30 of Law no. 3194. According to the inferior courts, it is a legal obligation to demolish unlicensed structures pursuant to Article 32 of Law no. 3194 and, therefore, the damage incurred by the applicant could not be compensated by the administration. However, the Court observes that the said Article set out an administrative procedure to be followed in respect of structures incompatible with the licence. Accordingly, the situation of incompatibility with the licence must be established by the administration and notified to the person concerned. Following this discovery and notification, the owner of the structure would be allowed to ensure that his structure complied with the licence or obtain a licence within one month at the latest. In the case giving rise to the present application, nonetheless, the Municipality did not either make such a discovery of zoning incompatibility or serve a notification on the applicant in that regard. What is more, the land registry records demonstrate that the presence of a house was indeed registered and this structure is also indicated on the zoning status map. Therefore, there is no possibility that the Municipality was unaware of the existence of this building. Nevertheless, for approximately 22 years, the Municipality did not show any initiative to ensure this structure's compliance with the licence or, in the event of failure to do so, arrange its demolition. In the circumstances, account should be taken of both the aforementioned passive attitude of the public authorities and the administrative procedure prescribed by law which granted the owner to get his building duly licensed when assessing the status of the unlicensed building.

53. On the other hand, it has been emphasised in previous judgments that the Court's duty as regards the complaints concerning the application of rules of law is limited by virtue of the subsidiary nature of the individual application mechanism; in this context, the Court cannot intervene in the discretion of the inferior courts with regard to implementation and interpretation of rules of law that constitute an interference with the rights and freedoms within the scope of individual

application unless there is a manifest arbitrariness or a manifest error of discretion (see *Ahmet Sağlam*, no. 2013/3351, 18 September 2013, § 42). Having further regard to the nature of the interference, the Court will reach a conclusion as to whether the public authorities' approach regarding the practice of law met the requirements stipulated in Article 35 of the Constitution after examining whether the interference was successful in achieving the legitimate aim pursued and whether it was proportionate.

(2) Whether the Interference Pursued a Legitimate Aim

54. According to Articles 13 and 35 of the Constitution, the right to property may only be restricted in the interest of the public. The notion of public interest serves both a restrictive instrument, which allows for imposition of restrictions on the right to property where the public interest requires it, and an effective protection mechanism, which sets out limits to restrictions by preventing the imposition of any restrictions on the right to property outside public interest aims (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, § 53).

55. The notion of public order is considerably broad by nature. Taking into account the needs of the public, the legislative and executive organs have broad discretionary powers in the determination of what is in the public interest. If there is a dispute on the public interest, it is clear that the specialised first-instance courts and the courts of appeal are in a better position to resolve such disputes. The Court cannot intervene in the discretion of the authorised public organs with regard to the determination of public interest, unless their decisions are understood to be manifestly ill-founded or arbitrary, in the individual application examination. The onus of proving that the interference does not pursue public interest rests with the party raising such an allegation (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, §§ 34-36).

56. Article 56 of the Constitution guarantees everyone the right to live in a healthy and balanced environment and stipulates that it is the duty of the State and citizens to improve the natural environment,

to protect the environmental health and to prevent environmental pollution. In order to create healthy, safe, quality and economical living environments, it is important to make sure that the structures to be erected are built in accordance with the zoning legislation and, in this scope, ensure that the development is compatible with the scientific, health-related and environmental conditions by way of subjecting all structures to licensing, with the exception of such constructions that are clearly permitted by law without a licence requirement. In this respect, it must be acknowledged that there is public interest in ensuring structures' compatibility with scientific, health-related and environmental conditions, as well as in setting forth regulations in that connection (see *Osman Yücel*, no. 2014/4874, 15 June 2016, §§ 82-84). As regards the instant case, as well, the Court concludes that the inferior courts' decision to reject the compensation claim on account of the structure's lack of a building licence and an occupancy permit pursued a legitimate aim based on public interest.

(3) Proportionality

(a) General Principles

57. Lastly, the Court should examine whether there was a reasonable balance of proportionality between the objective sought to be achieved by the interference with the applicant's right to property and the means used to this end.

58. Proportionality, which is one of the criteria to take into account in restricting the rights and freedoms under Article 13 of the Constitution, stems from the principle of state of law. Since the restriction of rights and freedoms in a state of law is an exceptional power, it may only be justified on the condition that it is used to the extent that is required in the situation. Imposing restrictions on individuals' rights and freedoms to a degree that is more than what is required by the circumstances of the case would mean exceeding the limits of power enjoyed by the public authorities and, therefore, be incompatible with the state of law (see the Court's judgment no. E.2013/95, K.2014/176, 13 November 2014).

59. The principle of proportionality (*ölçülülük*) comprises of three subprinciples, which are "suitability" (*elverişlilik*), "necessity" (*gereklilik*) and "proportionality" (*orantılılık*). "Suitability" means that the prescribed interference is capable of achieving the objective aspired for; "necessity" shall mean that the interference is absolutely necessary for that objective, that is when achieving such objective with a lighter intervention is not possible; and "proportionality" shall refer to the need for striking a reasonable balance between the interference with the individual's right and the objective sought (see the Court's judgments no. E.2011/111, K.2012/56, 11 April 2012; no. E.2014/176, K.2015/53, 27 May 2015; no. E.2016/13, K.2016/127, 22 June 2016; and *Mehmet Akdoğan and Others*, § 38).

60. Pursuant to the principle of proportionality, a fair balance must be struck between the public interest sought in restricting the right to property and the individual's rights. This fair balance will have been upset where it is found out that the applicant has personally borne an excessive burden (see *Arif Güven*, no. 2014/13966, 15 February 2017, § 58). In the assessment of proportionality of the interference, the Court will take account of the burden imposed on the applicant from two perspectives: on the one hand, it will examine the importance of the legitimate aim sought to be achieved; and, on the other, it will have regard to the nature of the interference along with the behaviour of the applicant and the public authorities (see *Arif Güven*, cited above, § 60).

(b) Application of Principles to the Present Case

61. The building constructed on the immovable property belonging to the applicant was used by the applicant as residence for many years without obtaining a building licence or an occupancy permit. A landslide incident took place on 1 July 2005 during the foundation excavation works for a Regional Boarding Primary School conducted by the Governor's Office. The applicant asserted that his house had sustained damage because of this construction activity. The reports and official records drawn up by public authorities indicate -in corroboration of the applicant's assertion- that the building was damaged as a result of

the landslide caused by the said construction activity. The applicant requested discovery of evidence in relation to the incident, upon which a panel of experts also reported that the applicant's building had become uninhabitable and that the damage had been caused by the construction activity conducted by the Governor's Office. Finally, the inferior courts acknowledged that the applicant's house had sustained damage and what had led to that damage was the landslide originating from the construction activity under the supervision of the administration. In fact, the inferior courts accepted the applicant's claim for pecuniary compensation for the damage inflicted on the fruit trees found on the same immovable property. Therefore, it is well-established according to these facts that, in essence, the applicant's immovable property was damaged due to the landslide resulting from the administration's construction activity.

62. The applicant was not able to reach any successful outcome in the administrative and judicial remedies he pursued with a view to claiming redress for his loss. In the action for compensation brought by the applicant, the first-instance court arrived at the conclusion that the applicant could not claim compensation due to an unlawfully-built structure which had to be had demolished. The applicant's requests for an appeal and rectification against this judgment were dismissed by the Supreme Administrative Court, thereby rendering it final. On the other hand, the Court notes that no examination was held on nor any account was taken of the attitude or behaviour of the public authorities.

63. Public authorities enjoy wide powers of discretion in the context of urban planning and zoning practices. That being said, when using those discretionary powers, public authorities are expected to act in a timely, reasonable and consistent manner for the protection of individuals' property rights. In the instant case, however, the public authorities displayed a passive attitude in terms of establishing the building's lack of a building licence and launching the necessary administrative procedures. To the contrary, they allowed the building to use municipal services in contravention to the stipulation in Article 31 of the Law no. 3194; the applicant and his family resided in this building for at least 22 years. Moreover, it is noted that the immovable property's quality

recorded in the land registry was registered by taking cognisance of this structure. As mentioned above, an economic interest within the scope of the right to property arose in respect of this building where the applicant and his family formed a social environment; hence, they could not have been expected to foresee a sudden change in the long-standing passive attitude displayed by the public authorities with regard to demolition of the building in question.

64. Furthermore, the Court finds it necessary to draw particular attention to the fact that the Municipality failed to apply the administrative procedure envisaged by Article 32 of Law no. 3194. In this scope, even though the inferior courts held that the building had to be demolished in any case on account of its illegality, the Court observes that there may not have been such an obligation to demolish it according to the said legal provision. Indeed, this provision offered the owner of the structure the opportunity to obtain a building licence within a time-limit of one month from the notification date. Demolition would be possible only if the structure was not rendered compatible with the building licence or a building licence was not obtained at all within the said time-limit.

65. Besides, whether or not the building was granted an occupancy permit or a building licence does not change the fact that a damage occurred in the applicant's house due to the administration's fault. As acknowledged by the administration and the inferior courts, the applicant's house was damaged as a result of the landslide that took place during a construction activity conducted under the supervision and control of the public authorities. The expert report on the matter indicates that the landslide took place as a result of the lack of requisite geological screening and surveying and the failure to take appropriate measures accordingly during the construction activity. Nonetheless, in view of the failure to apply in advance the procedure which would allow for a possibility of rendering the building compliant to the licence, the fact that his compensation claim was rejected since the building would be demolished in any event has resulted in an outcome in which the applicant has to bear all the damage while the administration is also at fault.

66. In the case giving rise to the present application, the applicant's request for compensation of the damage brought to his house by the landslide resulting from the administration's construction activity was dismissed on the ground that the building did not have a licence. Therefore, the applicant's house was damaged because of the administration's fault but the applicant was not paid any compensation despite that. On that account, the inferior courts' strict approach involving a disregard for the public authorities' attitude and behaviour in the course of events imposed a personally excessive and extraordinary burden on the applicant. In the light of the above, the Court concludes that the fair balance which needed to be struck between public interest and the applicant's right to property was upset to the detriment of the applicant and that the interference was not proportionate.

67. Consequently, the Court has found a violation of the right to property protected under Article 35 of the Constitution.

3. Application of Article 50 of Code no. 6216

68. Article 50 §§ 1 and 2 of the Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

69. The applicant claimed pecuniary and non-pecuniary compensation.

70. The Court has found a violation of the applicant's right to property.

71. Since there is legal interest in holding a retrial to redress the consequences of the violation of the right to property, a copy of the judgment must be sent to the 1st Chamber of the Diyarbakır Administrative Court for retrial.

72. The applicant's claims for compensation, on the other hand, must be rejected as the Court considers that ordering a retrial on the basis of the finding of a violation of the right to property offers him sufficient redress.

73. The total court expense of TRY 2,006.10, including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicants jointly.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 5 December 2017 that

A. The application be DECLARED ADMISSIBLE;

B. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. A copy of the judgment be SENT to the 1st Chamber of the Diyarbakır Administrative Court (no. E.2005/1047, K.2009/1283) to conduct retrial for redress of the consequences of the violation of the right to property;

D. The applicant's claims for compensation be REJECTED;

E. The total court expense of TRY 2,006.10, including the court fee of TRY 206.10 and counsel fee of TRY 1,800, 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; and

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

RIGHT TO EDUCATION (ARTICLE 42)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ÖZCAN ÖZSOY

(Application no. 2014/5881)

15 February 2017

On 15 February 2017, the Second Section of the Constitutional Court found a violation of the right to education safeguarded by Article 42 of the Constitution in the individual application lodged by *Özcan Özsoy* (no. 2014/5881).

THE FACTS

[8-28] The applicant, 35 years old, is a lawyer practising in İstanbul.

In March 2002, many students in various universities simultaneously submitted petitions to the university administration requesting that the Kurdish language lesson be included in the elective courses. The applicant submitted a similar petition to the administration of the Faculty of Law of the Istanbul University.

The Istanbul University Rectorate initiated an investigation against many students who had submitted such petition. According to the university administration, the said petitions had been submitted within the scope of a campaign organized by the PKK terrorist organization.

The applicant stated that he had no concern with the alleged terrorist campaign and that he individually supported the content of the petition. On 7 March 2002, the Deanship of the Faculty of Law of the Istanbul University dismissed the applicant as a disciplinary punishment.

The applicant's request for the stay of execution was also rejected. However, on 31 December 2004, the Istanbul Administrative Court annulled the disciplinary sanction imposed on the applicant, finding it unlawful. The applicant could attend the university only after this date.

The applicant claimed both pecuniary and non-pecuniary compensation from the University, stating that he had been deprived of his right to education for approximately three years. Upon the rejection of his request, on 29 May 2008 he brought an action for compensation before the administrative court.

On 20 March 2009 the Istanbul Administrative Court dismissed the case. The applicant's subsequent appeal was also rejected by the Council of State on 4 December 2012. The final judgment was served on the applicant on 7 March 2014.

On 7 April 2014, the applicant lodged an individual application with the Court.

V. EXAMINATION AND GROUNDS

29. The Constitutional Court, at its session of 15 February 2017, examined the application and decided as follows.

A. Alleged Violation of the Right to Education

1. The Applicant's Allegations and the Ministry's Observations

30. The applicant complained that a disciplinary punishment had been imposed on him due to his application for taking the Kurdish lesson into the scope of elective courses and that the action which he had subsequently brought for the redress of his pecuniary and non-pecuniary damages was dismissed. In this regard, he maintained that his freedom of expression had been violated and that his act could not be regarded as a crime. The applicant claimed that he had been deprived of his right to education due to the rejection by the domestic courts of his requests for the stay of execution of the disciplinary decisions, which was in breach of Articles 5, 14, 15 and 42 of the Constitution.

31. The Ministry, referring to the ECHR's judgments in its observations, specified that the right to education might be subject to certain restrictions, on the condition that such restrictions did not impair the essence of the right, as well as did not hinder its effectiveness. According to the Ministry, the restrictions on the right to education must not contradict with the other rights enshrined in the Constitution.

32. The applicant, in his counter statements, reiterated the facts stated in his application letter.

2. The Court's Assessment

33. Relevant part of Article 42 of the Constitution, titled "*Right and duty of education*", provides as follows:

> *"No one shall be deprived of the right of education.*
>
> *The scope of the right to education shall be defined and regulated by law…*
>
> *The freedom of education does not relieve the individual from loyalty to the Constitution..."*

34. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicant's complaints must be examined within the scope of the alleged violation of his right to education (see *Selçuk Taşdemir* [Plenary], no. 2013/7860, 3 March 2016, § 47).

a. Admissibility

35. The alleged violation of the right to education must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of Interference

36. The applicant was admitted to the university to study at the department he had preferred according to the results he had obtained from the university entrance exam. As the applicant was imposed a disciplinary punishment of being dismissed from the higher education institution, he would not be admitted to another university. Regard being had to the fact that the right to education ensures the access to the educational institutions available at a certain time (see *Mehmet Reşit Arslan and Others*, no. 2013/583, 10 December 2014, § 68), the applicant's inability to attend the school for approximately three years constituted an interference with his right to education

ii. Whether the Interference Constituted a Violation

37. Relevant part of Article 13 of the Constitution provides as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution ... These restrictions shall not be contrary to … the requirements of the democratic order of the society … and the principle of proportionality."

38. The above mentioned interference will constitute a violation of Article 42 of the Constitution, unless it fulfils the conditions specified in Article 13 of the Constitution.

39. Therefore, it must be determined whether the interference was prescribed by the relevant laws specified in Article 13 of the Constitution, whether it was based on the reasons set out in the relevant article of the Constitution, whether it complied with the requirements of the democratic order of the society, and whether it was proportionate.

(1) Lawfulness

40. The applicant alleged that there had been a violation of the requirement that any interference must be prescribed by law, which was stipulated in Article 13 and Article 42 § 2 of the Constitution. The applicant claimed that he had been deprived of his right to education on the sole ground of the relevant provision of the Regulation. The Ministry did not submit any observations in this respect.

41. Investigation procedures, authorizations and punishments as regards the disciplinary proceedings against the students attending higher education institutions are set out in Article 54 of Law no. 2547. The disciplinary punishment imposed on the applicant, which resulted in his dismissal from the university, is also included in the same article. Article 10 of the Regulation has also been introduced on the basis of this article. No further assessment as to whether the above mentioned provisions were "foreseeable" enough in the circumstance of the present case was deemed necessary. It was concluded that Article 54 (a) of Law no. 2547 and Article 10 of the Regulation fulfilled the criteria of restriction by law.

(2) Legitimate aim

42. It has been concluded that imposition of a disciplinary punishment on the applicant had been an extension of the objectives and activities set by the State in terms of the fight against the activities of the PKK terrorist organization.

43. According to Article 42 § 4 of the Constitution, which provides that "*The freedom of education does not relieve the individual from loyalty to the Constitution*", freedom of education may be restricted for the purpose of safeguarding the fundamental philosophy and principles of the Constitution. There is no doubt that the fundamental philosophy of the Constitution is the democracy where fundamental rights and freedoms are ensured and secured to the greatest extent. It is clear that activities of the terrorist organizations that have adopted violence as a method to achieve their political aims are in contradiction with the democratic constitutional order adopted by the Constitution and therefore not compatible with the loyalty to the Constitution. For this reason, it was concluded that the said interference had pursued a legitimate aim within the meaning of Article 42 § 4 of the Constitution.

(3) Conformity with the Requirements of the Democratic Order of the Society and Proportionality

44. The administrative court in the first place held that the opinions stated in the applicant's petition and the manner in which he expressed these opinions could not be regarded as carrying out activities leading to polarization in terms of language, race, religion and sect. The applicant was imposed disciplinary punishment on the ground that he had submitted a petition to the administration of the university indicating that it had been necessary to teach the Kurdish language and there had been an individual and social need in this respect and therefore requesting that the Kurdish language lesson be included in the elective courses. In this regard, neither the university administration nor the inferior courts claimed that the applicant had resorted to violence and thus disturbed the security and order in the university. Therefore, the present applicant must be examined under Article 42 and in the light of Article 26 of the Constitution.

45. Being a requirement of the democratic order of the society order means that a restriction serves the purpose of meeting a pressing social need in a democratic society. Accordingly, if the restrictive measure does not meet a social need or is not the last resort likely to be applied, it cannot be considered as a measure which is compatible with the requirements of the democratic order of the society (in terms of freedom of expression, see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; Mehmet Ali Aydın [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51).

46. It must be examined whether any restriction to the fundamental rights and freedoms -in addition to being necessary in the democratic order of the society- is a proportionate restriction allowing for the least interference with the fundamental rights. Therefore, in terms of the interference with the freedom of expression, it must be assessed whether the means of interference chosen to achieve the aim pursued have been convenient, necessary and proportionate (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; and *Bekir Coşkun* §§ 53, 54; for explanations on the principle of proportionality, see also *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, §§ 96-98; Sebahat Tuncel, no. 2012/1051, 20 February 2014, § 84; Tansel Çölaşan, §§ 54, 55; and Mehmet Ali Aydın, §§ 70-72).

47. In this context, freedom of expression, safeguarded by Article 26 § 1 of the Constitution, constitutes one of the basic foundations of a democratic society and is a prerequisite for the development of the democratic society and the self-realization of the individuals. Social pluralism can only be achieved in an environment of free discussion where all kinds of ideas can be freely expressed. In this context, social and political pluralism can only be achieved by peaceful and free expression of all kinds of thoughts (see *Yaman Akdeniz and Others*, no. 2014/3986, 2 April 2014, § 25).

48. The Court, in its many judgments, has made reference to the ECHR's case-law which states that the freedom of expression applies not only to "information" or ''thoughts'' which are considered to be in

favour, harmless or not worthy of attention, but also to those which are against the State or a part of the society or disturbs them. The Court has confirmed that these are the requirements of pluralism, tolerance and open-mindedness which are the fundamental principles of a democratic society (see *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 94; *Bejdar Ro Amed*, no. 2013/7363, 16 April 2015, § 63; and *Abdullah Öcalan*, § 95).

49. It is also clear that the right to education has an indispensable and fundamental contribution to the consolidation and continuation of human rights in a democratic society (for explanations on the significance of the right to education in a democratic society, see *Mehmet Reşit Arslan and Others*, § 66). Despite its significance, the right to education is not an absolute and unlimited right and is subject to certain regulations by its very nature. There is no doubt that the rules governing the educational institutions may vary according to the needs and sources of the society and the characteristics of different levels of education. For this reason, it must be accepted that the State is afforded a certain discretion in the regulations and practices to be carried out in this respect (see *Ünal Yıldırım*, no. 2013/6776, 5 November 2014, § 42; and *Savaş Yıldırım*, no. 2013/6258, 10 June 2015, § 42). Therefore, the right to education, in essence, does not preclude the application of disciplinary measures, including suspension or dismissal from an educational institution, with a view to ensuring that the rules are obeyed. There is no doubt that the disciplinary punishments are an important part of the means that will ensure the development of students and through which the school will achieve its goals. However, it must be clearly set forth that application of such measures is one of the requirements of the democratic order of the society. In addition, the relevant practice must not contradict with the other rights enshrined in the Constitution.

50. In the present case, the applicant was dismissed from the university as he had exercised his freedom of expression. In the light of the circumstances of the case and in view of the reasons above, such a disciplinary sanction cannot be regarded as necessary in the democratic

order of the society. As a matter of fact, also the administrative court considered the applicant's act within the scope of the freedom of expression and found the said sanction unlawful and therefore lifted it.

51. Although the said sanction was lifted by the inferior courts, the applicant had lost six terms until that date. The applicant's claims for compensation was also rejected by the school administration and the courts on the ground that there had not been a serious legal error or gross fault which would result in the administration's liability for paying compensation. Accordingly, even though the applicant could subsequently return to his school, pecuniary and non-pecuniary damages sustained by him could not be redressed and therefore his grievances continued. The outcome of the domestic proceedings also failed to redress the applicant's grievances.

52. Consequently, the Constitutional Court has found a violation of the applicant's right to education safeguarded by Article 42 of the Constitution, as he had been dismissed from the university due to exercising his freedom of expression that is safeguarded by Article 26 of the Constitution.

B. Alleged Violation of the Right to a Trial within a Reasonable Period

53. The applicant claimed that his right to a trial within a reasonable period was violated.

1. Admissibility

54. The alleged violation of the right to a trial within a reasonable period must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

55. In determination of the length of the administrative proceedings concerning the disputes related to civil rights and obligations, the starting date shall be taken as the date on which the action was brought, while

the ending date shall be taken as the date on which the proceedings are concluded (usually covering the execution stage) and, as regads the pending cases, the date of the Constitutional Court's judgment on the alleged violation of the right to a fair trial (see *Selahattin Akyıl*, no. 2012/1198, 7 November 2013, §§ 45, 47).

56. In the assessment of whether the length of the administrative proceedings concerning civil rights and obligations was reasonable, the issues such as the complexity of the proceedings, its levels, conducts of the parties and the competent authorities in the course of the proceedings and the applicant's interest in the speedy conclusion of the proceedings are taken into consideration (see *Selahattin Akyıl*, § 41).

57. In view of the principles mentioned above and the Constitutional Court's judgments in similar applications, it has been concluded that the length of the proceedings which lasted 5 years and 8 months was not reasonable.

58. Consequently, the Constitutinal Court has found a violation of the right to a fair trial safeguarded by Article 36 of the Constitution.

C. Application of Article 50 of Code no. 6216

59. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."

60. The applicant requested 50,000 Turkish liras (TRY) and TRY 100,000 for respectively pecuniary and non-pecuniary damages.

61. It has been concluded that the applicant's right to education as well as his right to a trial within a reasonable period have been violated.

62. It has been concluded that in order to redress his non-pecuniary damages that would not be redressed with the sole finding of a violation, the applicant will be awarded, in respect of non-pecuniary damages, TRY 6,000 for the violation of his right to a trial within a reasonable period and TRY 24,000 for the violation of his right to education, which is TRY 30,000 in total.

63. In order for the Constitutional Court to be able to award pecuniary compensation, there must be a causal link between the pecuniary damage alleged to have been sustained by the applicant and the violation found. Since the applicant has failed to submit any document in this respect, his request for pecuniary compensation must be rejected.

64. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, 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 February 2017 that

A. 1. Alleged violation of the right to education be DECLARED ADMISSIBLE;

2. Alleged violation of the right to a trial within a reasonable period be DECLARED ADMISSIBLE;

B. 1. The right to education safeguarded by Article 42 of the Constitution was VIOLATED;

2. The right to a trial within a reasonable period safeguarded by Article 36 of the Constitution was VIOLATED;

C. The applicant be AWARDED, in respect of non-pecuniary damages, TRY 6,000 for the violation of his right to a trial within a reasonable period and TRY 24,000 for the violation of his right to education, which is TRY 30,000 in total; and his other requests for compensation be REJECTED;

D. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be REIMBURSED to the applicant;

E. 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;

F. A copy of the judgment be SENT to the 6th Chamber of the İstanbul Administrative Court; and

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

RIGHT TO UNION (ARTICLE 51)

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

EĞİTİM VE BİLİM EMEKÇİLERİ SENDİKASI (EĞİTİM SEN) AND OTHERS

(Application no. 2014/920)

25 May 2017

On 25 May 2017, the Plenary of the Constitutional Court found a violation of the right to union safeguarded by Article 51 of the Constitution in the individual application lodged by *Eğitim ve Bilim Emekçileri Sendikası and Others* (no. 2014/920).

THE FACTS

[8-31] Eğitim ve Bilim Emekçileri Sendikası ("*Education and Science Workers Union*") ("EĞİTİM SEN"), the applicant, alleged that during the two years period before the date of application, its members were many times imposed administrative fines under the Misdemeanor Law due to union-related activities.

By a decision dated 3 June 2013, the Confederation of Kamu Emekçileri Sendikaları Konfederasyonu ("Public Employees Trade Unions") ("the KESK"), to which the EĞİTİM SEN is affiliated, decided to go on strike for two days on 4-5 June 2013. Twenty-one members of the applicant union made a press statement in the yard of the Çanakkale Fine Arts and Sports High School and started a strike.

In two separate police reports issued against Telat Koç, one of the applicants, for personally attending the press statement and being the provincial representative of the union, it was stated that the press statement was made in the yard of the high school, which blocked the gate, and that the high school in question was not among the places allowed for a press statement. Therefore a judicial fine was imposed on the applicant by the Provincial Security Directorate on 6 August 2013. Telat Koç's petition against the judicial fine was accepted by the 1st Chamber of the Çanakkale Magistrates' Court on 29 November 2013 and the fine was revoked.

The petition lodged by Telat Koç, on behalf of the applicant union, against the administrative sanction imposed on it on 2 October 2013 was dismissed by the 3rd Chamber of the Çanakkale Magistrates' Court on 2 December 2013.

Although the above-mentioned activity was exclusively mentioned in the application form, administrative sanctions were imposed on the members of the applicant union countrywide in the same period. According to the court decisions which were not mentioned in the application form but included in the file, some of the administrative fines were revoked, but some others were not.

Gülhan Oktay, one of the applicants, as well as a member of the Batman Branch of the Union, attended the press statement of this union held in front of the building of the Batman Provincial Directorate of National Education on 8 May 2013. She alleged that she was imposed administrative fine and that her petition against the relevant decision was rejected by the 2nd Chamber of the Batman Magistrates' Court. By its letter dated 17 February 2014, the Constitutional Court requested criminal records and other documents pertaining to Gülhan Oktay. Although, the applicant's representative submitted documents with respect to many members of the union, he did not submit documents concerning Gülhan Oktay.

V. EXAMINATION AND GROUNDS

32. The Constitutional Court, at its session of 25 May 2017, examined the application and decided as follows.

A. The Applicants' Allegations and the Ministry's Observations

33. The applicants maintained that their being imposed an administrative fine for having made a press statement constituted a violation of their right to hold meetings and demonstrations. According to them, the union meetings and press statements did not constitute an offence in terms of criminal law; however, the administration considered their activities within the scope of Law no. 5326. Therefore, arbitrary punishments were imposed on them. They considered that the administrative fines imposed on them were unpredictable; and that the press statements posed a threat neither the public order nor to public safety.

34. They further asserted that while the challenges against administrative fines were accepted by many courts, their challenges were dismissed without justification, which resulted in a violation of their right to a fair trial. In this respect, the applicants requested the Court to find a violation, to award compensation for pecuniary damage as well as to require the administration imposing the administrative fine to apologize to them.

35. In its observations, the Ministry noted that the right to freedom of assembly was applicable to both those holding meetings and the participants; and that the State was obliged not only to protect this right but also to abstain from imposing unreasonable restrictions. It was further indicated that the orders issued by the Governor's Office intended to ensure safety of those attending the meetings and demonstrations and citizens as well as to maintain public order; and that as the fines imposed on the applicants, who had acted contrary to this order, were in insignificant amounts, "the minimum level of severity" had not been attained.

36. In their counter-statements against the Ministry's observations, the applicants reiterated their arguments in the application form.

B. The Court's Assessment

37. Relevant part of Article 34 of the Constitution, titled *"Right to hold meetings and demonstration marches"*, reads as follows:

> *"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*
>
> *The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others.*
>
> *The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."*

38. Relevant provisions of Article 51 of the Constitution, titled *"Right to union"* read as follows:

"Employees and employers have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations. No one shall be forced to become a member of a union or to withdraw from membership.

The right to form a union shall be solely restricted by law on the grounds of national security, public order, prevention of commission of crime, public health, public morals and protecting the rights and freedoms of others.

The formalities, conditions and procedures to be applied in exercising the right to form union shall be prescribed by law…"

39. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The discrete and unfounded complaints raised by the applicants Telat Koç and Gülhan Oktay that their rights to a reasoned decision had been violated must be examined, as a whole, within the ambit of the right to hold meetings and demonstration marches.

40. Before the strike, a press statement revealing the purpose of the strike was issued in all workplaces where the workers associated under this union, and the union members then left their workplaces. Thereafter, the applicant union was imposed an administrative fine due to a union-related activity falling into the scope of its right to hold meetings and demonstration marches. Therefore, the applicant union's complaints must be examined within the ambit of the right to form a union.

1. Admissibility

a. As Regards the Applicant Telat Koç

41. As set out in Article 46 of the Code on the Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011 and

numbered 6216 (Law no. 6216), an individual application may be lodged with the Court only when an applicant has been personally and directly affected by the impugned public act or action allegedly having resulted in violation (see *Onur Doğanay*, no. 2013/1977, 9 January 2014, §§ 42-45).

42. In the present case, the case filed by the applicant against the administrative sanction was accepted by the first instance court which then revoked the decision imposing the sanction. It has been therefore seen that the applicant was not personally affected by the public act or action allegedly giving rise to the violation.

43. For these reasons, the application lodged by Telat Koç was declared inadmissible for *being incompatible ratione personae*, without any further examination as to the other admissibility criteria.

b. As Regards the Applicant Gülhan Oktay

44. Pursuant to Article 47 § 3 as well as Article 48 §§ 1 and 2 of Law no. 6216, the facts as to the violation allegedly caused by a public authority must be summarized chronologically, and the way how the rights safeguarded by the individual application mechanism have been violated, as well as the reasons and evidence with respect thereto, must be explained in the individual application form (see *Veli Özdemir*, no. 2013/276, 9 January 2014, §§ 19 and 20).

45. In the present case, the applicant was asked to submit the evidence she relied on; however, she failed to fulfil her obligation to submit the evidence related to the alleged violation. It has been accordingly concluded that the applicant failed to substantiate her allegations.

46. For these reasons, the application lodged by Gülhan Oktay was declared inadmissible *for being manifestly ill-founded*, without any further examination as to the other admissibility criteria.

c. As Regards the Applicant EĞİTİM SEN

47. The application lodged by the applicant union was not manifestly ill-founded and there being no other grounds for its inadmissibility.

Accordingly, the alleged violation of the applicant's right to union was declared admissible.

2. Merits

a. Existence of Interference

48. Not only the actions performed during the exercise of the right to union but also those performed subsequent to its exercise have a "restraining" effect on the right (for a judgment within the context of the right to assembly, see *Osman Erbil*, no. 2013/2394, 25 March 2015, § 53). It must be therefore acknowledged that even if there was no interference by the police with the press statement organized by the applicant union and attended by its members, the applicant union's being sentenced to an administrative fine constituted an interference with its right to union.

b. Whether the Interference Constituted a Violation

49. Relevant part of Article 13 of the Constitution reads as follows:

"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution... These restrictions shall not be contrary to … the requirements of the democratic order of the society and … the principle of proportionality."

50. The said interference would constitute a breach of Article 51 of the Constitution unless it satisfied the conditions set out in Article 13 of the Constitution.

51. Therefore, it must be determined whether the restriction complied with the requirements set out in Article 13 of the Constitution and applicable to the present case, namely being prescribed by law, relying on the reasons specified in the relevant provision of the Constitution as well as not being contrary to the requirements of a democratic society and the proportionality principle.

i. Lawfulness

52. The applicant alleged that there had been a breach of the requirement that the interference be made by law, which was set out in Articles 13 and 51 § 3 of the Constitution. It asserted that Article 32, titled "*Disobedience of an Order"*, of the Misdemeanour Law no. 5326 was not foreseeable and required to be interpreted; and that the administrative authorities invoking this provision could arbitrarily impose punishments. The Ministry expressed no opinion on this matter.

(1) General Principles

53. In case of any interference with a right or freedom, the issue to be primarily determined is whether there is any provision of law allowing the interference to subsist. An interference may be considered to have satisfied the lawfulness requirement within ambit of Article 34 of the Constitution only when it has a "legal" basis (for judgments pointing out the lawfulness requirement in different contexts, see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 82; *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36; and *Hayriye Özdemir*, no. 2013/3434, 25 June 2015, §§ 56-61).

54. As regards the restrictions on fundamental rights and freedoms, the lawfulness requirement primarily necessitates the formal existence of a law. Law as a legislative act is a product of the will of the Grand National Assembly of Turkey ("the Assembly") and is enacted by the Assembly by complying with the law-making procedures enshrined in the Constitution. Such an understanding affords a significant safeguard for fundamental rights and freedoms.

55. Nevertheless, the lawfulness requirement also encompasses a material content, and thereby, the quality of the wording of the law becomes more of an issue. In this sense, this requirement guarantees "accessibility" and "foreseeability" of the provision imposing restriction as well as its "clarity" which amounts to its certainty.

56. Certainty means that content of a provision must not lead to arbitrariness. Legal arrangements concerning the restriction of

fundamental rights must be precise in terms of its content, aim and scope as well as clear to the extent that the addressees could know their legal status. A provision of law must certainly indicate the acts or actions which shall be subject to any criminal sanction and thereby, the power of interference afforded to the public authorities. Thus, individuals may foresee their rights and obligations and act accordingly. Thereby, legal certainty is ensured, and bodies exercising public power are prevented from performing arbitrary acts (see *Hayriye Özdemir*, §§ 56, 57).

57. In the present case, it was alleged that the administration had been afforded an unlimited power by Article 32 of Law no. 5326 where the scope of the administration's discretionary power and the manner how it would be exercised were not specified clearly to the required extent.

58. First, as per Article 8 of the Constitution, it is possible for the legislator to only determine the main rules on the issues likely to be regulated by law and to leave the subsidiary and implementing rules to the administration which would determine them through its regulatory acts. In other words, any issue not required -by virtue of the Constitution- to be certainly prescribed by law may be regulated through the administration's regulatory acts, on condition of having a legal basis (see *Tuğba Arslan*, §§ 85-87).

59. In the sphere of fundamental rights and freedoms, there is a requisite for the legislator to make foreseeable arrangements that would not allow for arbitrariness. It may be in breach of the Constitution to afford the administration a wide margin of appreciation so as to result in arbitrary practices. Measures to be taken by the executive, relying on a provision of law, in the sphere of fundamental rights and freedoms must be objective and must not provide the administration with a broad discretionary power that would lead to arbitrary practices (see the Court's judgment no. E.1984/14, K.1985/7, 13 June 1985; and *Tuğba Arslan*, § 89).

60. Uncertainty in such assessments renders the safeguards introduced for fundamental rights ineffective. That is because, if a provision of law fails to certainly indicate the acts or actions which shall be subject to

any criminal sanction and the power afforded to the public authorities for interference, the individuals may be precluded from foreseeing their rights and obligations and from acting accordingly (see *Hayriye Özdemir*, § 57).

61. However, even if a provision is complex or is of abstract nature to a certain extent and could therefore become fully comprehendible only through legal assistance or the concepts used therein could be defined only after a legal assessment, this does not *per se* fall foul of the principle of legal foreseeability. Besides, the more the extent of the interference by the relevant legal arrangement with fundamental rights is, the higher the extent of certainty to be sought in this arrangement will be (see *Hayriye Özdemir*, § 58).

62. Otherwise, it will be concluded that the provision is not accessible, foreseeable and definite to the extent that would preclude arbitrary acts of the bodies exercising public power and enable individuals to know the law, as enshrined in Article 13 of the Constitution (see *Tuğba Arslan*, § 91).

63. It is not for the Court to interpret the provision of law forming a basis for the impugned interference. Besides, in applying the relevant provision, the public authorities notably the judicial bodies must adopt a style of interpretation compatible with the Constitution. In this regard, the Court's task is limited to review the compliance of the interpretation and practice in question with the Constitution (see *Hayriye Özdemir*, § 61).

(2) Application of Principles to the Present Case

64. The present case must be assessed within the framework of the above-mentioned principles. In the first place, Article 32 of Law no. 5326 was enacted by the Assembly complying with the procedures of enacting a law that are prescribed in the Constitution, and it undoubtedly constitutes a law in its form. In the second place, there is no problem as to the accessibility of the impugned provision as the laws adopted by the Assembly are promulgated by the President in the Official Gazette pursuant to Article 89 of the Constitution. In the last place, it must be examined whether the said provision is foreseeable or not.

65. As required by Article 32 of Law no. 5326, the competent authorities deem, as a misdemeanour, the failure to abide by an order which has been lawfully issued by competent authorities within the scope of any judicial act or for the purposes of maintaining public safety, public order or public health. A person guilty of this misdemeanour is imposed an administrative fine which is determined by the authority issuing the relevant order.

66. In 1973, the Court examined the alleged unconstitutionality of the provision which is set forth in Article 526 of the repealed Turkish Criminal Code no. 765 and dated 1 March 1926 under the main heading "Disobedience of Orders Issued by Competent Authorities" and which is quite similar to the provision set out in Article 32 of the current Misdemeanour Law. In this decision, the Court considered that the legislator was entitled, in making laws, to exhaustively establish all rules by paying regard to all possibilities; and that however, the legislator may −as an exercise of its legislative power− confer the authority to take measures upon the government or certain authorities in emergency cases after establishing the main provisions, as it was functioning slowly, by its very nature, in the face of frequently changing circumstances and needs and it was difficult for the legislator to follow-up events taking place on daily basis and to take the necessary measures. The Court accordingly found the provision not in breach of the Constitution (see the Court's judgment no. E.1973/12, K. 1973/24, 7 June 1973). In its a more recent decision, the Court dismissed, on similar grounds, the alleged unconstitutionality of the provision which is set forth in Article 66 § 1 of the Law no. 5442 on Provincial Administration and which provides for that in case of any social events to jeopardize public order and safety or safety of individuals' lives and properties, those who act contrary to the orders and measures, which have been taken by the Governor for ensuring public order and announced properly, shall be deprived of their liberty (see the Court's judgment no. E. 2015/41, K.2017/98, 4 May 2017, § 184). The Court indicated therein that provisions of law -where the subject-matter of the offence and the envisaged punishment were defined in doctrine but which did not indicate the concrete act that would

constitute the offence but left such determination to the administration-were called as "*framework law*" or "*open-ended criminal provision*"; and that the impugned provision was one of them. In its many decisions, the Court noted that the acts and actions performed relying on an open-ended criminal provision would not fall foul of the principle of legality in criminal offences and penalties (see the Court's judgments no. E.1962/198, K.1962/111, 10 December 1962; no. E.1963/4, K.1963/71, 28 March 1963; no. E.2001/143, K.2004/11; and no. E.2011/64, K.2012/168, 1 November 2012). The Court indicated that in order for an "*open-ended criminal provision*" to be found constitutional, the subject-matter of the offence and its penalty must be clearly defined in law to the extent that would cause no doubt, and individuals must be afforded legal safeguard which would ensure them to already know the said criminal act. According to the Court, the relevant provision could be only thereby ensured to be accessible and foreseeable (see the Court's judgment no. E. 2015/41, K. 2017/98, 4 May 2017, §§ 180-187).

67. As per Article 32 § 2 of Law no. 5326, scope and conditions of certain misdemeanours may be established by laws which may nevertheless leave the task of determining its content to the administration's general and regulatory acts. In other words, types and amounts of sanctions to be imposed in case of a misdemeanour are clearly specified in the said provision; however, which authorities may issue an order and on which matters have been left to the other laws. By Article 11 of Law no. 5442, governors have been entrusted with the authority to take the decisions and measures required for ensuring peace, security and public welfare within the provincial boundaries. According to Article 66 of the same Law, these decisions shall be properly notified or announced, and those acting contrary to these measures or decisions shall be punished by the governor pursuant to Article 32 of Law no. 5326.

68. In the present case, the Çanakkale Governor's Office ordered, by its decision of 20 December 2012 and relying on the authority conferred by Law no. 5442, that no press statement would be issued at the buildings and premises of educational institutions. It notified and announced this decision to all official bodies and non-governmental organizations. In this respect, nor did the applicant in his capacity as the chairperson of the

branch of the union maintain that he had not been aware of this order. It is explicit that any act contrary to the Governor's order will constitute a misdemeanour which will require a penalty pursuant to Law no. 5326.

69. For the reasons explained above, it has been concluded that Article 32 of Law no. 5326 was an accessible, foreseeable and precise provision of law and satisfied the requirement of "being restricted by law".

ii. Legitimate Aim

70. It has been concluded that the decision imposing an administrative fine on the applicant was a part of the measures for maintaining "public order", which are set out in Article 51 § 2 of the Constitution, and pursued a legitimate aim.

iii. Compatibility with the Requirements of the Democratic Order of the Society and Proportionality

(1) General Principles

71. The issue before the Court is whether the interference with the press statement issued at the building and premises of a secondary educational institution was necessary in a democratic society and proportionate.

72. As explained above, the applicant was imposed an administrative fine on account of a union-related activity falling within the ambit of the right to hold meetings and demonstration marches. This right intends to protect the opportunity afforded to the individuals for uniting in order to collectively defend and announce their ideas. Therefore, this right is a special aspect of the freedom of expression safeguarded by Articles 25 and 26 of the Constitution. That is why the significance of the freedom of expression in a democratic society is also applicable to this right. In this regard, the present application must be examined in the light of Articles 26 and 34 of the Constitution and pursuant to Article 51 thereof.

73. The Court on numerous occasions explains what should be inferred from the concept "requirements of a democratic order of the society". Accordingly, a measure restricting fundamental rights and freedoms

must meet a pressing social need and must be of last resort (see *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, § 56; *Adalet Mehtap Buluryer*, no. 2013/5447, 16 October 2014, §§ 103-105; *Kristal-İş Union* [Plenary], no. 2014-12166, 2 July 2015, § 70; and see, in the context of the freedom of expression, *Bekir Coşkun* [Plenary], no. 23014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51). The inferior courts are afforded a certain margin of appreciation to consider whether such a need exists. However, this margin of appreciation is subject to the Court's review.

74. Besides, it must be examined whether a restriction on fundamental rights and freedoms is a proportionate restriction allowing minimum interference with the fundamental rights, along with being necessary in a democratic society (see the Court's judgment no. E.2007/4, K.2007/81, 18 October 2007; and for explanations as to the principle of proportionality within the meaning of the right to union, see *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 63; *Bekir Coşkun* §§ 53, 54; *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, §§ 96-98; *Tansel Çölaşan* §§ 54,55; and *Mehmet Ali Aydın* §§ 70-72). Therefore, it must be considered whether a fair balance was struck between the measures −specified in Article 51 § 2 of the Constitution and deemed necessary for attaining legitimate aims− and the right to union. In making such an examination, the freedom of expression and the right to hold meetings and demonstration marches must also be taken into consideration.

Right to Union

75. In democracies, existence of organizations whereby citizens unite and may pursue common aims is a significant element of a sound society. Such an "organization" is afforded fundamental rights required to be respected and protected by the State. Unions that are the organizations aiming to protect the interests of their own members in the professional area form a significant part of the freedom of association whereby individuals establish collective formations in order to secure their own interests (for explanations on the freedom of association, see *Tayfun Cengiz*, §§ 30-32; and *Selda Demir Taze*, no. 2014/7668, 10 June 2015, §§ 29, 30).

76. In its recent judgments, the Court emphasizes that the freedom of association in general and the right to union in private are among the freedoms enshrined in the Constitution as a basic value and embodying the democracy; and that they form one of the basic values of a democratic society. According to the Court, the manner how the unions express their opinions within the framework of a union-related activity also benefits from the safeguards afforded by the right to union, even if not acceptable to the competent authorities. The Court indicates that the democracy, by its very nature, provides an opportunity for public discussion and resolution of matters; and that individuals exercising their right to union will also benefit from the safeguards afforded for the basic principles of a democratic society, such as pluralism, tolerance and open-mindedness, as in the field of the freedom of expression (see *Tayfun Cengiz*, § 52; and *Selda Demir Taze*, §§ 48, 49).

Freedom of Expression

77. The freedom of expression safeguarded in Article 26 § 1 of the Constitution is one of the essential foundations of the democratic society and constitutes one of the primary conditions for progress of the democratic society and self-fulfilment of each individual. Social pluralism may be achieved only in a free platform where any kind of opinion may be expressed freely. In this sense, ensuring social and political pluralism depends on the peaceful and free expression of any kind of opinion (see *Yaman Akdeniz and Others*, no. 2014/3986, 2 April 2014, § 25).

78. In its many judgments, the Court has made a reference to the judgments of the European Court of Human Rights where it is indicated that the freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. The Court has endorsed that these kinds of opinions are the demands of pluralism, tolerance and broadmindedness without which there was no 'democratic society' (see *Fatih Taş* [Plenary], no. 2013/1461, 12 November 2014, § 94; *Bejdar Ro Amed*, no. 2013/7363, 16 April 2015, § 63; and *Abdullah Öcalan*, § 95).

Right to Hold Meetings and Demonstration Marches

79. The right to hold meetings and demonstration marches safeguards manifestation, protection and dissemination of different thoughts that are *sine qua non* for the improvement of pluralist democracies. Therefore, interferences with the right to hold meetings and demonstration marches must -in spite of its unique function and field of exercise- be interpreted more narrowly in political matters and other matters of public interest, as in the freedom of expression (see *Osman Erbil*, no. 2013/2394, 25 March 2015, § 45).

80. The right to hold meetings and demonstration marches is one of the basic values of a democratic society where individuals should be provided with an opportunity for expressing, by way of meetings and other legal means, their opposing political views that are aimed to be materialized through peaceful means. Therefore, radical measures of a preventive nature which preclude the exercise of the freedom of assembly impair democracy, except in cases where there is incitement to violence and where it is intended to eliminate the principles of democracy (see *Ali Rıza Özer and Others* [PA], no. 2013/3924, 6 January 2015, § 117; and *Osman Erbil*, § 47).

81. It is a requisite of the pluralist democracy that the State must show patience and tolerance towards the acts of individuals -who have assembled for peaceful objectives- that do not constitute any threat to, and include any violence for, public order in exercising their freedom of assembly. However, if there is a real threat to public order stemming from the exercise of the freedom of assembly, competent authorities may take the measures to eliminate such threats. Individuals who have held, attended, or committed offences during, meetings contrary to these measures may also be punished.

82. However, it cannot be permitted that the taken measures or the imposed punishments would indirectly turn into undue restrictions. In enjoying his freedom of assembly that is safeguarded, the individual must be protected also against the arbitrary interferences of the public authorities (see *Ali Rıza Özer and Others*, § 118).

83. Therefore, it must be shown with reasonable grounds that the interference -whereby measures have been taken or those acting contrary to these measures have been punished- with a peaceful meeting which falls within the scope of a union activity or is held for any other motive is necessary in a democratic society.

(2) Application of Principles to the Present Case

84. In the present case, the Çanakkale Governor's Office issued an order for not delivering a press statement at, *inter alia*, buildings and premises of the primary and secondary educational institutions. Regard being had to the order of the Çanakkale Governor's Office, it has been observed that the places where no press statement would be made were certain buildings such as the intelligence department, security directorate and penitentiary institutions. Therefore, the legal framework forming a basis for the applicant's punishment in the present case cannot be considered as a restraining order of general nature.

85. In addition, the State is to take precautions that will protect the children studying at primary and secondary educational institutions as well as the educational order. Rules on the educational institutions may vary by the social needs and resources as well as features specific to different levels of education. Therefore, it must be acknowledged that the State is afforded a certain margin of appreciation in regulations and practices it will make on this issue.

86. It is acceptable that holding a meeting or demonstration, for any purpose other than education, at the school building and its premises during the school time may disturb the children or impair the educational order. Therefore, it must be acknowledged that such interference with a meeting as in the present case is necessary in a democratic society so long as it meets a social need. However, in the police report issued with respect to the impugned incident, there was no assessment as to the fact that the press statement in question had, as a foreseeable consequence thereof, caused delay in certain activities or disturbed public order.

87. Lastly, it must be admitted that the misdemeanour *"disobedience of an order"* set out in Article 32 of Law no. 5326 may be probably in question in cases where there are indirect interferences with peaceful demonstrations. Pursuant to this Article, the aim pursued by the order given by the competent authorities is to protect public safety, public order or public health. It is not for the Court to determine whether the conditions prescribed by law for existence of a misdemeanour are present in the instant case as well as what the elements of the misdemeanour must be. However, if the order issued by a competent authority or the punishment imposed on account of disobedience of the order constitutes an interference with a constitutional right, this interference falls within the jurisdiction of the Court.

88. In the event that an individual is punished merely for acting contrary to an order and the Court upholds that there is an interference with fundamental rights and freedoms, the primary question to be subsequently dealt with by the Court is to whether disobedience of the order has disrupted public order or whether such risk exists.

89. The Court cannot find merely disobedience of a properly issued order sufficient for an interference with fundamental rights and freedoms. It must be also proven that public safety, public order or public health -which is the aim pursued by the order issued- has been disrupted or such a risk exists, which would justify the interference with the fundamental right. Any act or action performed by a public authority whereby the fundamental rights have been interfered may be in breach of the fundamental rights and freedoms, unless it is demonstrated with relevant and sufficient grounds that the public order has been disrupted.

90. In the present case, neither the administration nor the inferior courts maintained that the press statement issued by the members of the applicant union had interrupted the educational activities, intimidated and disturbed the students, impaired public order or caused such a risk. On the contrary, the law-enforcement officers or the administration did not need to intervene in the press statement. The administrative

fine imposed on the applicant was subsequently issued by the law-enforcement officers. As a matter of fact, the administrative fine imposed on Telat Koç was revoked by the first instance court which pointed out the peaceful nature of the said press statement and also noted that the press statement did not include violence.

91. As in the present case where the demonstrators were not involved in any acts of violence, public authorities must tolerate, to a certain extent, the actions falling within the ambit of the right to hold meetings and demonstration marches. A peaceful demonstration or press statement must be, in principle, exempted from the risk of being criminally sanctioned.

92. In cases where this right is restricted for special reasons such as the specific nature of the place where demonstration or press statement is held, it must be shown in the decisions of the competent authorities using public power (for instance, in the relevant police reports or reasoning of the inferior courts) that the interferences to be made -pursuant to the orders given by the competent authorities- are necessary for maintenance of public order or that the punishments are imposed for disturbing public order or for the existence of such risk.

93. Consequently, in the present case, a fair balance could not be struck between the measures deemed necessary for attaining the legitimate aims specified in Article 51 § 2 of the Constitution and the rights afforded under the same provision to the applicant union. It has been accordingly concluded that the administrative fine imposed on the applicant was not necessary, pursuant to Article 13 of the Constitution, for maintaining order in the educational institution.

94. For these reasons, the Court found a violation of the right to union safeguarded by Article 51 of the Constitution.

Mr. Kadir Özkaya and Mr. Recai Akyel did not agree with this conclusion.

3. Application of Article 50 of Code no. 6216

95. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."*

96. The applicant union requested the Court to order the reimbursement of the administrative fine as pecuniary damage.

97. It was concluded that the applicant's right to union had been violated.

98. For the Court to award pecuniary compensation, there must be a casual link between the pecuniary damage allegedly sustained by the applicant union and the violation found. As the applicant did not submit any document in this respect, the Court dismissed its claim for pecuniary damage.

99. The total court expense of TRY 2,006.90 including the court fee of TRY 206.90 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicant union.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 25 May 2017:

A. 1. UNANIMOUSLY that the applicant Telat KOÇ's application be DECLARED INADMISSIBLE for *being incompatible ratione personae*;

2. UNANIMOUSLY that the applicant Gülhan OKTAY's application be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

3. UNANIMOUSLY that the alleged violation of the applicant EĞİTİM SEN's right to union be DECLARED ADMISSIBLE;

B. By MAJORITY and by dissenting opinions of Mr. Kadir Özkaya and Mr. Recai Akyel, that the right to union safeguarded under Article 51 of the Constitution was violated;

C. The applicant union's claim for compensation as well as its other claims be DISMISSED;

D. The total court expense of TRY 2,006.90 including the court fee of TRY 206.90 and the counsel fee of TRY 1,800 be REIMBURSED TO THE APPLICANT;

E. 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;

F. A copy of the judgment be REMITTED to the 3rd Chamber of the Çanakkale Magistrates' Court; and

A copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINIONS OF JUSTICES KADİR ÖZKAYA AND RECAİ AKYEL

In the present case, the labour union decided to issue a press statement at workplaces prior to the strike to be enforced at all workplaces where the labour union was organized, in order to announce the purpose of the strike. Accordingly, certain members of the union made a press statement at a place where issuing a statement was forbidden by the Governor's Office. Therefore, a fine was imposed on the union. After the union's challenge against the fine had been dismissed, the applicants including the union requested the Court to find a violation of their right to union by maintaining that their act fell within the ambit of the right to union safeguarded by Article 51 of the Constitution and could not be considered as a misdemeanour; that besides, the act neither caused damage or posed a threat to public order and safety nor included violence; and that it was not a criminal act.

Upon examination of the application, it was unanimously acknowledged that there was an interference with the applicant union's right to union; that the interference was found to be lawful and to pursue a legitimate aim; and that the question to be dealt with by the Court in the present case was to determine whether the interference whereby an administrative fine had been imposed on account of a press statement issued at the building and premises of a secondary educational institution was necessary in a democratic society and proportionate.

Majority of the Court did not consider the legal framework forming a basis for the fine imposed on the union as a restraint measure of general nature, but considered that the State must take measures that would protect the children studying at primary and secondary educational institutions and the order at these institutions; that the rules concerning educational institutions might vary by social needs and resources and features specific to different levels of education; that the State was afforded a certain margin of appreciation in legal arrangements and practices to be made in this field; that holding a meeting and demonstration at the

school building and its premises during school time might disturb the students or impair the educational order; and that an interference with a meeting as the one in the present case might be necessary in a democratic society to the extent it met a social need. However, it was emphasized that the police report included in the case-file did not include any assessment as to the fact that the impugned press statement had foreseeably caused delay in certain activities or had disrupted public order. Following the establishment of these findings, it was further indicated that the Constitutional Court could not find merely disobedience of a lawful order sufficient for an interference with fundamental rights and freedoms; that it must be also proven that public safety, public order or public health -which was the aim pursued by the order issued- had been impaired or such a risk existed, which would justify the interference with the fundamental rights and freedoms; that any act or action performed by a public authority whereby the fundamental rights have been interfered might be in breach of the fundamental rights and freedoms, unless it was demonstrated with relevant and sufficient grounds that the public order had been impaired; and that however, in the present case, neither the administration nor the inferior courts maintained that the press statement issued by the members of the applicant union had interrupted the educational activities, intimidated and disturbed the students, impaired public order or caused such a risk. It was further indicated that as in the present case where the demonstrators did not get involved in the acts of violence, public authorities must tolerate, to a certain extent, the actions falling within the ambit of the right to hold meetings and demonstration marches; that a peaceful demonstration or press statement must be, in principle, exempted from the risk of being criminally sanctioned; that in the present case, a fair balance could not be struck between the measures deemed necessary for attaining the legitimate aims specified in Article 51 § 2 of the Constitution and the rights afforded under the same provision to the applicant Union; and that it was accordingly concluded that the applicant's right to union had been infringed as the administrative fine imposed on it was not necessary for maintaining order in the educational institution pursuant to Article 51 § 2 of the Constitution.

We completely agree with the explanations and conclusions of the judgment rendered by the Court's majority under the headings "(3) Compatibility with the Requirements of the Democratic Order of the Society and Proportionality" and sub-headings "General Principles", "Right to Union", "Freedom of Expression" and "Right to Hold Meetings and Demonstration Marches". However, we do not agree with the considerations under the heading "application of principles into the present case" and the conclusion of violation reached by the esteemed majority of the Court for the following reasons.

In Article 34 of the Constitution, it is set forth that everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission; that the right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others; and that the formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law. The relevant provisions of Article 51 of the Constitution titled "Right to form unions" set out that employees and employers have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations; that no one shall be forced to become a member of a union or to withdraw from membership; that the right to form a union shall be solely restricted by law on the grounds of national security, public order, prevention of commission of crime, public health, public morals and protecting the rights and freedoms of others; and that the formalities, conditions and procedures to be applied in exercising the right to form union shall be prescribed by law.

Accordingly, the right to union may be restricted for the purpose of maintaining public order.

In Article 13 of the Constitution, it is set forth that fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence; and that these restrictions shall not be contrary to the requirements of the democratic order of the society and the principle of proportionality.

In Article 11 of the European Convention on Human Rights ("the Convention") titled "Freedom of assembly and association", it is set out that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests; and that no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Article 11 of the Law no. 5442 on Provincial Administration sets out that the governor shall have the duty, inter alia, to secure peace and security, personal immunity, safety of private property, public well-being and the authority of preventive law enforcement; that the governor shall take necessary decisions and measures to this end; and that provisions of Article 66 shall apply to those who do not comply with such decisions and measures. In Article 66, it is prescribed that the local civil administrator shall impose penalties, pursuant to Article 32 of the Misdemeanour Law, on those who resist or make difficulty or disobey the implementation and execution of decisions and measures duly taken and notified or announced by the general provincial council or administrative committee or the highest civil administrator based on the powers conferred by laws; and that however, in the event of an outbreak of social events which endanger the public order and public security or safety of people's life and property, those who act contrary to the measures taken by the governor in order to secure the public order, shall be punished by a prison term of 3 months to 1 year.

In Article 32, titled "disobedience of an order", of the Misdemeanour Law no. 5326, it is set forth that persons acting contrary to the lawful

orders given by competent authorities within judicial proceedings or in order to secure public safety, public order or public health shall be punished with an administrative fine (100 Turkish liras); and that the punishment is imposed by the authority who has issued the order.

In the Turkish Criminal Code no. 765, which was in force until 1 June 2005, the acts qualified as an offence are divided into two groups: offences and misdemeanours. The question whether a criminal act is misdemeanour or an offence is determined by the punishments prescribed in the law (for instance, if heavy imprisonment or imprisonment is imposed on account of a criminal act, it is classified as an office while if light imprisonment is imposed, the act is classified as a misdemeanour). However, as it was subsequently considered that if imposition of a non-criminal sanction was found sufficient for an act for the protection of a legal value, this act must be qualified as a misdemeanour, certain changes were introduced in the Turkish criminal system. Accordingly, some of the misdemeanours specified in the former Turkish Criminal Code no. 765 are prescribed as an offence in the Turkish Criminal Code no. 5237, whereas some of these acts in respect of which imposition of an administrative sanction is found sufficient are qualified as a misdemeanour in Law no. 5326.

In Article 1 of the Misdemeanour Law no. 5326, it is set forth that the legal arrangements therein were introduced with a view to maintaining social order, public morality, public health, environment and economic order. In Article 2, the notion of "misdemeanour" is defined as a grievance on account of which imposition of a sanction is prescribed by law.

As is known, through the provisions of the misdemeanour law, the State unilaterally dictates that what must or must not individuals do in order to maintain social order, public moral, public health, environment and economic order, and also notes that in case of any infringement, a sanction shall be imposed. The reason why an act is subject to a sanction in the misdemeanour law is the fact that this act has violated a norm. Accordingly, regardless of its result, the reason why a sanction is imposed due to violation of a norm is to prevent the occurrence of acts which may take place due to violation of this norm and may impair, or pose a threat to, social order. For instance, the act of running a red light either cause loss of life and property or cause no public damage. Nevertheless, this

act is subject to a sanction in order to prevent accidents likely to take place on account thereof. Therefore, in qualifying an action or inaction as a misdemeanour and subjecting it to a sanction, the question taken into consideration is not whether the impugned action or inaction has impaired social order, but what is intended is to prevent such risk from materializing. In other words, an action or inaction may be sometimes prescribed as a misdemeanour with a view to protecting public order. The public interest at this stage is the prevention of materialization of such risk.

In the present case, within the above-mentioned legal framework, the Çanakkale Governor's Office ordered, by its decision of 20 December 2012, that no press statement shall be made at places such as mosques, hospitals, quarters as well as at buildings and premises of educational institutions. This decision was announced and notified to all official institutions and non-governmental organizations. In this respect, nor did the applicant union maintain that it had not been aware of this decision or no press statement had been issued at a place prohibited by the order (at the entrance of the school building). Therefore, issuing a press statement at the yard of the school building undoubtedly constitutes a misdemeanour.

States are obliged not only to protect the right to peaceful assembly, but also to avoid imposing unreasonable and indirect restrictions on the enjoyment of this right. Besides, the States may stipulate formal conditions for holding meetings -such as notification or place restriction- with a view to maintaining or protecting peace and order; in other words to ensuring safety of both those attending the demonstration and other individuals having no connection and link with the demonstration as well as to protecting public order.

In the present case, the Çanakkale Governor's Office did not issue an order only for labour unions, or for the purpose of restricting or prohibiting their union activities or press statement. Moreover, no order was issued with respect to the contents of union activities or press statements. The fine was not imposed due to these reasons but on account of the fact that the applicant union had disrupted public order by enjoying its right to organize meeting and demonstration (press statement) at a place prohibited by the Governor's Office.

The order issued by the Governor's Office prohibited making press statement at, inter alia, buildings and premises of primary and secondary educational institutions. Regard being had to this order as a whole, it has been observed that the places where no press statement can be issued are limited to certain places such as buildings of intelligence department, security directorate and penitentiary institutions. Therefore, as also noted in the majority's opinion, the legal framework forming a basis for the applicant's punishment cannot be considered as a restraint measure of general nature.

Besides, as also indicated in the majority's opinion, the State must take measures that would protect the children studying at primary and secondary educational institutions and the order at these institutions. The rules concerning educational institutions might vary by the needs and resources of the society and features specific to different levels of education. Therefore, the State was afforded a certain margin of appreciation in arrangements and practices to be made in this field. It is highly probable that holding a meeting and demonstrating at a school building and its premises at any time when educational activities are going on, for any purposes other than education, will cause disturbance to students or impair the order within the educational institution.

Accordingly, even if the demonstrators were not involved in any acts of violence, the meeting was of peaceful nature and the impugned act did not cause a substantial deterioration in public order, merely issuing a press statement at educational institutions where the right to education was exercised would be in breach of the order (public order established through this order) intending to protect the public interest (meeting a social need) which was in the form of avoiding disturbance of the students or preventing the risk of impairment of educational order. It is therefore admitted that even a formal breach of the order would lead to disturbance of public order. There is also no need to concretely demonstrate that the impugned act disrupted public order. Otherwise, if running a red light has not caused an accident and has not thereby disrupted public order, no sanction will need to be imposed.

Therefore, it cannot be said that vesting the legislator by the Constitution as well as the administration by laws with an authority

to prohibit issuing press statements at educational institutions where the right to education is exercised and qualifying the failure to abide by this prohibition as a misdemeanour which requires imposition of an administrative fine do not meet a social need and are not necessary in a democratic society. Nor can it be said that imposition of fine on the applicant did not meet a social need and was not necessary in a democratic society on the ground that the police report in the present case had contained no assessment as to the fact that the impugned press release had foreseeably caused delay in certain activities or disrupted public order (*Although in the case of Akarsubaşı v. Turkey, which may be deemed to be similar to the present case, the European Court of Human Rights (the ECtHR) found a violation. However, there are significant differences between that case and the present one. In the case of Akarsubaşı, an administrative fine was imposed, pursuant to Article 32 of the Misdemeanour Law no. 5326, on the applicant, who was a civil servant and also a member of the union confederation and who merely attended the demonstration which was held by a union on the stairs of the entrance of a courthouse (not at an educational institution) and where a press statement was issued for the establishment of a kindergarten at their institution (the applicant was not involved in the organization of the demonstration and did not read out the press statement), which was in breach of the order properly issued by the Governor's Office concerning the places where no press statement would be issued. The applicant's challenge against the fine was dismissed. Thereafter, the applicant lodged an application with the ECtHR which reiterated that States were liable not only to protect the right to peaceful meeting but also to abstain from imposing indirect and unlawful restrictions on this right. It further pointed out the peaceful nature of the press statement and noted that in interfering with a peaceful demonstration, the public authorities had to strike the balance between the right to a peaceful demonstration and the local authorities' right to protect public order. The ECtHR indicated that the first instance court failed to strike such balance and to consider the aim and peaceful nature of the demonstration. It concluded that imposition of fine on the applicant merely for attending a demonstration where a press statement had been issued would deter everyone who were members of a labour union from exercising their right to meeting and demonstration safeguarded by Article 11 of the Convention for the fear of being punished. It accordingly concluded that as it could not be demonstrated with relevant and sufficient grounds that the interference allowed by Article 32 of Law no. 5326 had met "a pressing social need", the fine imposed*

on the applicant could not be found "necessary in a democratic society" within the meaning of Article 11 of the Convention.).

Under these circumstances, it must be assessed whether the fine imposed on the applicant union (the interference with the right to union) was proportionate.

In the present case, an administrative fine of 182 Turkish liras, which is not a significant amount, was imposed on the applicant union on 6 August 2013 for having breached the order issued for the protection of public interest which might be defined as the elimination of the disturbance likely to be caused to the students and the risk of impairment of educational order due to issuing a press statement at the educational institutions. The punishment cannot be said to be disproportionate when the public interest sought to be protected by the said order is compared to the amount of the imposed fine.

Accordingly, it has been concluded in the present case that the administrative fine imposed on the applicant was necessary, pursuant to Article 51 § 2 of the Constitution, for maintaining order in an educational institution and did not upset the balance to be struck between the measures deemed necessary for attaining the legitimate aims specified therein and the applicant union's rights safeguarded thereunder.

Therefore, as we consider that there was no breach of the right to union safeguarded by Article 51 of the Constitution, we disagree with the majority's conclusion to the contrary.

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ABDULVAHAP CAN AND OTHERS

(Application no. 2014/3793)

8 November 2017

On 8 November 2017, the Second Section of the Constitutional Court found a violation of the right to union safeguarded by Article 51 of the Constitution in the individual application lodged by *Abdulvahap Can and Others* (no. 2014/3793).

THE FACTS

[9-23] Eğitim ve Bilim Emekçileri Sendikası ("the EĞİTİM SEN"), one of the applicants, is a labour union that carries out its activities with the aim of protecting and developing the economic, social, democratic and cultural rights of the employees working in the field of education and forming a free and democratic business life. The other applicants, who are real persons, are teachers working in the public sector. They are also members and heads of the Batman Branch of the EĞİTİM SEN.

At the beginning of the 2013-2014 school year, the Batman Branch of the EĞİTİM SEN, together with an association called Kurdi Der and the Batman Provincial Organization of the Peace and Democracy Party ("the BDP"), carried out activities themed education in mother tongue. Within the scope of these activities, banners themed "education in mother language" were put on fifteen billboards located in various places in the city centre, which were operated by a company. Thereupon, following the processes initiated by the Batman Governor's Office, administrative fines were imposed on eight persons, including the applicants, in the amount of 1,500 Turkish liras (TRY).

The applicants contested the administrative fines before the – abolished– Batman 1st Magistrates' Court ("Magistrates' Court"). In their petition, the applicants argued that the administrative fine imposed with reference to a unilateral report issued by the police was unlawful. They maintained that they only hung banners and that it was not possible to hold them personally responsible for this. They added that although there had been a sole activity which could be regarded as a labour union activity, eight persons were imposed administrative fines in the amounts of higher than the minimum limit. Therefore, the punishment in question turned into a means of pressure against the labour union.

The official of the company operating the billboards submitted before the Magistrates' Court that the relevant banners had been hung with reference to a contract signed between the company and a member of the Provincial Organization of the BDP.

The Magistrates' Court dismissed the objections to the administrative fines with no right of appeal. It stated that within the scope of the event organized by the Batman Provincial Organization of the BDP, the Kurdi Der association and the EĞİTİM SEN –all had signatures on the banners–, an illegal demonstration march had been carried out without any notification to the relevant authority as stated in the banners. It therefore concluded that the administrative fines imposed in accordance with Article 42 of the Misdemeanour Law no. 5236 and Article 27 of the Law no. 2911 on Meetings and Demonstrations were lawful.

V. EXAMINATION AND GROUNDS

24. The Constitutional Court, at its session of 18 November 2017, examined the application and decided as follows.

A. The Applicants' Allegations and the Ministry's Observations

25. The applicants stated that they had been imposed administrative fines in the last two years on account of the labour union activities carried out by the members and heads of the EĞİTİM SEN union. The applicants, maintaining that they had not committed any act falling into the scope of Law no. 2911, complained that although the administration had not put forward any allegation, the reasoning of the court decision stated that they had carried out an illegal demonstration march. The applicants further stated that they had not committed the act of hanging banners without permission either, as the said banners had been put on the billboards rented from a private company. Accordingly, no permission had been required for such an activity, and therefore the misdemeanour specified in Article 42 of Law no. 5326 did not occur. The applicants also complained that although it is stipulated by the last sentence of Article

42 of Law no. 5326 that hanging banners of the same content shall be regarded as only one act, the incumbent court had disregarded this provision. According to the applicants, the exact reason relied on by the court to dismiss the applicants' appeal had been the discomfort felt due to the theme of the banner, namely education in the mother tongue, but not the act of hanging banners. The applicants, underlining that supporting the education in the mother tongue was not unlawful and that it did not constitute an offence, stated that supporting the education in the mother tongue was among the objectives specified in the Rules of the EĞİTİM SEN.

26. The applicants claimed that the report forming a basis for the administrative fine imposed on them had not been duly issued. They argued that the administrative fine imposed with reference to the unilateral report issued by the police without their knowledge was unlawful.

27. The applicants maintained that even if the act of hanging banners in the present case was considered as an offence, imposition of administrative fine on each head of the union higher than the minimum limit without any explanation demonstrated that there was an arbitrary action on the part of the incumbent authorities. The applicants maintained that imposition of an administrative fine upon the authorities' conclusion through judicial decisions that the acts actually not constituting an offence were to be considered as misdemeanours as a result of strained interpretations served the purpose of punishing the union activities and deterring the employees. The applicants, arguing that these punishments had turned into a systematic practice, pointed out that the court had dismissed their case without any justification. As a result, the applicants claimed that their right to union, their freedom of expression, their right to a fair trial and the principle of equality were violated.

28. The Ministry, in its observations, specified that the legal basis of the alleged interference was Article 42 of Law no. 5326. The Ministry, reiterating that the purpose of the interference was not to punish the applicant but to maintain the public order, stated that the impugned

interference pursued a legitimate aim. Referring to the ECHR's judgment of *Mouvement raëlien suisse v. Switzerland* ([GC], no. 16354/06, 13 July 2012), the Court underlined that a permission might be required for hanging banners for the purpose of preserving the landscape. The Court, pointing out the discretion vested in the public authorities in terms of the requirement of permission for hanging banners, also indicated that regard being had to the amount of the administrative fine imposed and its not having been entered in the criminal records, the interference had been necessary for the purposes of the democratic order of the society and it had been proportionate.

B. The Court's Assessment

1. As Regards the Applicant İdris Solmaz

29. Pursuant to Article 47 § 5 of the Code on Establishment and Rules of Procedures of the Constitutional Court no. 6216, dated 30 March 2011, and Article 64 § 1 of the Internal Regulations of the Court, the individual application should be made within thirty days starting from the exhaustion of legal remedies or from the date when the violation is known, if no remedies are envisaged.

30. In the present case, the applicant's objection to the administrative fine was dismissed by the court on 17 February 2014. The applicant maintained that the court's decision was served on him on 17 January 2014. On the other hand, according to the notice paper included in the case file, it has been understood that the decision was served on the applicant on 21 February 2014 by attaching it to the door in accordance with Article 21 of Law no. 7201. Accordingly, the applicant lodged an application on 14 April 2014, which was out of the thirty days period that started to run from the communication of the court's decision to the applicant 21 February 2014. As a result, the applicant failed to lodge an application within the legal period.

31. For the reasons explained above, İdris Solmaz's application must be declared inadmissible for being *time-barred*, without any examination in terms of the other admissibility criteria.

2. As Regards the Other Applicants

32. Article 34 of the Constitution, titled "*Right to hold meetings and demonstration marches*", provides as follows:

> *"Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*
>
> *The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others.*
>
> *The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."*

33. The relevant paragraphs of Article 51 of the Constitution, titled "*Right to union*", read as follows:

> *"Employees and employers have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations.*
>
> *No one shall be forced to become a member of a union or to withdraw from membership. The right to form a union shall be solely restricted by law on the grounds of national security, public order, prevention of commission of crime, public health, public morals and protecting the rights and freedoms of others.*
>
> *The formalities, conditions and procedures to be applied in exercising the right to form union shall be prescribed by law…"*

34. The Constitutional Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicants' complaints concerning their freedom of expression, their right to a fair trial and the

principle of equality must be examined as a whole within the scope of their right to union.

a. Admissibility

35. The alleged violation of the right to labour union membership must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

i. Existence of Interference

36. Right to union safeguarded by Article 51 of the Constitution is a part of the freedom of organization which forms the basis of a democratic society. Freedom of organization stands for the individuals' freedom to come together by forming a collective entity which represents them in order to protect their own interests. This freedom provides individuals with the opportunity of realizing their political, cultural, social and economic goals in a collective manner. The right to union brings about the employees' freedom of organization by coming together so as to protect their personal and common interests, and from this aspect, it constitutes a part of the freedom of organization (see the Court's judgment no. E.2014/177, K.2015/49, 14 May 2015).

37. Right to union is not limited to the right of the employees to form the unions they want and to become member to them. It also includes the guarantee of the existence of the legal entities they form, as well as the specific activities of these legal entities. It is also a requirement of the right to union that the labour unions and their superior institutions, which are formed to protect and develop the economic, social and cultural interests of their members, can freely carry out labour union activities, bring about labour disputes in this respect, go into collective bargaining and agreement, as well as, give and implement strike and lock-out decisions (see the Court's judgment no. E.2014/177, K.2015/49, 14 May 2015).

38. The right to union also guarantees that members of a labour union are not imposed sanctions due to their membership to the union or taking part in its activities. Accordingly, imposition of a sanction on an employee

for his membership to a labour union or for his participation in the union's activities may constitute an interference with his right to union.

39. In the present case, each applicants, who were the heads of the Batman Branch of the EĞİTİM SEN, were imposed administrative fine of TRY 1,500 in accordance with Article 42 of Law no. 5326 for hanging banners without permission. The disputed banners had been hung within the scope of the activities themed education in the mother tongue carried out by the Batman Branch of the EĞİTİM SEN, the Kurdi Der and the Batman Provincial Organization of the BDP at the beginning of the 2013-2014 school year. Accordingly, it has been understood that the banners had been hung within the scope of the labour union activities. Therefore, imposition of administrative fines on the applicants due to hanging banners, which was an activity falling into the scope of the labour union activities, constituted an interference with the applicants' right to union.

ii. Whether the Interference Constituted a Violation

40. Relevant part of Article 13 of the Constitution provides as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution ... These restrictions shall not be contrary to … the requirements of the democratic order of the society … and the principle of proportionality."*

41. The right to union is not absolute, and it may be restricted in accordance with the criteria set forth in Article 13 of the Constitution. Accordingly, in order to prevent any violation, any interference with the right to union must be prescribed by the law, it must be based on the grounds stipulated in the relevant article of the Constitution, and it must not be contrary to the requirements of the democratic order of the society and the principle of proportionality.

(1) Lawfulness

42. In the present case, the administrative fine imposed on the applicants was based on Article 42 of Law no. 5326. The Court conducted

a review relying on this article. Therefore, it has been concluded that the administrative fine in question had a legal basis.

(2) Legitimate aim

43. It is specified in Article 52 § 2 of the Constitution that the right to form a union shall be solely restricted by law on the grounds of national security, public order, prevention of commission of crime, public health, public morals and protecting the rights and freedoms of others.

44. The reasoning of Article 42 of Law no. 5326 provides that "*hanging notices or banners made of canvas, paper or etc. in public squares and parks and on the public walls and areas near the streets …*" leads to "*visual pollution*". It is therefore understood that the prohibition of hanging banners in public places without an express and written permission of the authorities aimed at preventing visual pollution. This can be considered within the scope of the aim of "protection of the public order". Accordingly, it has been concluded that the administrative fine imposed on the applicants was among the measures taken to maintain the public order and therefore pursued a legitimate aim.

(3) Conformity with the Requirements of the Democratic Order of the Society and Proportionality

(a) General Principles

45. The Constitutional Court has many times explained how the notion of "requirements of the democratic order of the society" should be interpreted. According to this, the measure restricting the fundamental rights and freedoms must serve a pressing social need and must be the last resort likely to be applied (see *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, § 56; *Adalet Mehtap Buluryer*, no. 2013/5447, 16 October 2014, §§ 103-105; and *Kristal-İş Sendikası* [Plenary], no. 2014/12166, 2 July 2015, § 70; within the scope of the freedom of expression, see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51). The inferior courts enjoy a certain margin of appreciation in

the assessment of whether there exists such a need. However, the margin of appreciation enjoyed by the inferior courts is subject to the review of the Constitutional Court (see *Eğitim ve Bilim Emekçileri Sendikası and Others*, no. 2014/620, 25 May 2017, § 73).

46. The Constitutional Court emphasized in its previous judgments that the freedom of organization, in general, and the right to union, in particular, were among the freedoms which concretized the political democracy which was one of the fundamental values enshrined in the Constitution and constituted one of the fundamental values of a democratic society. According to the Court, the manner in which the ideas are expressed in the course of the labour union activities –even if it may be considered inadmissible by the authorities– falls into the scope of the right to union. The Court expressed that the ability to discuss and settle the issues in public forms the essence of democracy and that individuals who exercise their right to union enjoy the protection of the fundamental principles of a democratic society such as pluralism, tolerance and open-mindedness (see *Tayfun Cengiz*, § 52; and *Selda Demir Taze*, §§ 48, 49).

47. In this context, freedom of expression, safeguarded by Article 26 § 1 of the Constitution, constitutes one of the basic foundations of a democratic society and is a prerequisite for the development of the democratic society and the self-realization of the individuals. Social pluralism can only be achieved in an environment of free discussion where all kinds of ideas can be freely expressed. In this context, social and political pluralism can only be achieved by peaceful and free expression of all kinds of thoughts (see *Yaman Akdeniz and Others*, no. 2014/3986, 2 April 2014, § 25).

48. The Court, in its many judgments, has made reference to the ECHR's case-law which states that the freedom of expression applies not only for "information" or ''thoughts'' which are considered to be in favour, harmless or not worthy of attention, but also for those which are against the State or a part of the society or disturbs them. The Court has confirmed that these are the requirements of pluralism, tolerance and open-mindedness which are the fundamental principles of a democratic society (see *Fatih*

Taş [Plenary], no. 2013/1461, 12 November 2014, § 94; *Bejdar Ro Amed*, no. 2013/7363, 16 April 2015, § 63; and *Abdullah Öcalan*, § 95).

49. The legislator may stipulate certain conditions for the exercise of the union rights either for the reasons specified in Article 51 § 2 of the Constitution or for the fulfilment of duties and responsibilities incumbent on the State in accordance with the other provisions of the Constitution. In addition, in order to ensure the compliance with these conditions, sanctions may be imposed in case of a violation. Stipulating certain conditions for the exercise of labour union activities and imposition of a sanction in case of any violation in this respect alone do not violate the right to union. The measure applied and the sanction envisaged to be imposed in case of a violation of the measure must not impair the essence of the right, must be necessary in a democratic society and must be proportionate.

50. The public authorities are required to demonstrate with reasonable grounds that imposition of a sanction as an interference due to expression of thoughts and ideas within the scope of labour union activities was necessary in a democratic society (for similar judgments, see *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 83).

51. In addition, as regards the complaints under Article 51 of the Constitution, in case of an interference on the part of the public authorities with the right to union, an assessment as to whether the decisions of the inferior courts included "sufficient and relevant justification" is to be made.

(b) Application of Principles to the Present Case

52. In the present application, each applicant was imposed an administrative fine of TRY 1,500 for hanging banners without permission. It is understood that the applicants hung the banners within the scope of the activities themed education in the mother tongue carried out by the EĞİTİM SEN together with other organizations. The public authorities neither established that the contents of the banners constituted an offence, nor did they submit an allegation in this respect.

53. There is no doubt that hanging a banner, themed "education in the mother tongue", which contains no criminal element is a way of expression of thoughts. In the present application, it was performed as part of labour union activities. Therefore it falls into the scope of the guarantees concerning the freedom of labour union membership and the freedom of expression, enshrined in the Constitution. However, the use of constitutional safeguards to express thoughts by hanging banners does not prevent determining certain prerequisites for hanging banners. Determining such prerequisites does not lead to a violation of the right to union, unless it makes it impossible to enjoy the right or makes it meaningless to bestow the right.

54. According to Article 42 of Law no. 5326, the legislator has required the permission of the competent authority to hang banners in public areas and of the property owner in private places and has prescribed administrative fine for hanging banners without permission. According to the justification of the Law, the requirement of a permission for hanging banners aimed at preventing visual pollution. This cannot be regarded as an unnecessary measure. It must be accepted that the legislator has discretion in this respect. Therefore, it is reasonable to expect the applicants to fulfil this requirement even if it falls into the scope of labour union activities. It cannot be considered that the applicants' right to union was violated for the sole reason that a permission had been required for hanging banners. However, in terms of the necessity in a democratic society and the proportionality, the issues as to whether a sanction was imposed due to failure to fulfil the requirement of taking permission, whether the nature and severity of the sanction was reasonable, whether the public authorities acted arbitrarily, and whether there existed judicial mechanisms whereby the allegations of unlawfulness could be raised are of importance.

55. The sole violation of the requirement of taking permission may not be considered sufficient to justify the sanction. At this point, it is important to make an assessment as to whether the public order was deteriorated or faced the risk of being deteriorated as a result of hanging banners without

permission. In other words, it must also be demonstrated that "the public order" was deteriorated or faced the risk of being deteriorated. In the event that a sanction was imposed in the absence of relevant and sufficient grounds demonstrating that the public order was deteriorated, it may be concluded that the freedom of union was violated (for the assessments in the same vein, see *Eğitim ve Bilim Emekçileri Sendikası and Others*, §§ 88, 89).

56. In the present case, the administration or the court made no assessment that the banners hung by the applicants deteriorated the public order or posed a danger in this regard.

57. In addition, although it was stated in the reports forming a basis for the administrative fines imposed on the applicants that the applicants had hung banners without permission, the applicants claimed that the said act had not occurred. The applicants maintained that the banners had been put on the billboards rented from a company named N.R.B. Ltd. Şti. by the Batman Provincial Organization of the BDP, and that therefore the said banners could not be said to have been hung without permission. Although the applicants raised these allegations before the court, no assessment was made by the court concerning these allegations.

58. In cases which are the subject matter of individual applications, it is at the discretion of the inferior courts to make an assessment as to whether the alleged misdemeanour occurred and to make an interpretation of the evidence, the facts and the legal rules. Any interference by the Constitutional Court with the discretion of the inferior courts on this matter is not compatible with the purpose of the individual application. However, the Constitutional Court has jurisdiction to review whether the allegations raised by the parties, which are of importance in terms of the determination of whether the impugned misdemeanour had occurred, were examined and whether satisfactory explanations were made in this respect.

59. Article 42 § 1 of Law no. 5326 provides that any person who hangs notices or banners made of canvas, paper or etc. in public places near the

streets and in the places belonging to private persons without their consent shall be imposed administrative fine. In addition, Article 42 § 2 of Law no. provides that the 1st Paragraph shall not be applicable to the banners hung upon the express and written permission of the relevant authorities. Accordingly, hanging banners without an express and written permission of the relevant authorities in the public places and without consent of the property owner in the places belonging to private persons constitute the misdemeanour of "hanging banners" specified in Article 42 of Law no. 5326. In the present case, the banners had been hung on the billboards operated by the N.R.B. Ltd. Şti.. The file of the individual application contains no information or documents indicating that the applicants had also hung banners on the places other than these billboards. It has been found established that the said billboards had been rented from the N.R.B. Ltd. Şti. by the Batman Provincial Organization of the BDP. Regard being had to the fact that the billboards had been rented by one of the shareholders attending the organization, it cannot be said that the private company in question had not given consent to hang banners on the said billboards. It has been understood that determination of whether a permission of the competent public authorities is also required for hanging banners on the billboards operated by private companies and determination of which company is competent are of great importance in the assessment of whether the misdemeanour of "hanging banners" occurred. The court was obliged to make an examination on this matter which was of importance in terms of the occurrence of the misdemeanour and to examine the applicants' allegations in this respect. However, it appears that the court failed to make an examination and assessment in this regard.

60. The court concluded that during the organization held by the Batman Provincial Organization of the BDP, the Kurdi Der and the EĞİTİM SEN, which had signatures on the banners, an illegal demonstration march was carried out on 16 September 2013 without informing of the competent authority; therefore, the administrative fines imposed on the heads of the institutions having signatures on the banners in accordance with Article 42 of Law no. 5236 and Article 27 of Law no. 2911 were not unlawful. The

applicants were imposed administrative fines on the ground that they had committed the misdemeanour of "hanging banners" that was regulated in Article 42 of Law no. 5236. The administration had no argument or evaluation that the administrative fine in question was imposed on account of acting in breach of "the prohibition of incitement" specified in Article 27 of Law no. 2911 or carrying out an unlawful demonstration march. Excluding this assessment which is clearly not related to the act imputed to the applicants, it is seen that the remaining reason is far from satisfying the legal grounds for the administrative fine.

61. As a result, in the absence of an assessment that the banners, which did not include any criminal element and which were hung on the billboards rented from a private company, deteriorated the public order or posed a danger in this respect, imposition of an administrative fine without relevant and sufficient reasons was not necessary in a democratic society. Moreover, the administrative fine imposed on the applicants might create a deterrent factor in terms of carrying out labour union activities.

62. Consequently, the Constitutional Court has found a violation of the right to union safeguarded by Article 51 of the Constitution.

c. Application of Article 50 of Code no. 6216

63. Article 50 §§ 1 and 2 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, 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 resolution 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."

64. The applicants sought the reimbursement of the administrative fines as pecuniary compensation.

65. It has been concluded that the right to union was violated.

66. As there is a legal interest in conducting retrial in order to redress the consequences of the violation of the applicants' right to union, a copy of the judgment must be sent to the (abolished) 1st Chamber of the Batman Magistrates' Court (E.2013/1364 and E.2013/1365) for retrial.

67. As retrial has been ordered, it has not been considered necessary to award compensation.

68. The total court expense of 2,006.10 Turkish liras (TRY) including the court fee of TRY 206.10 and the counsel fee of TRY 1,800, which is calculated over the documents in the case file, must be reimbursed to the applicants jointly.

VI. JUDGMENT

The Constitutional Court UNANIMOUSLY held on 8 November 2017 that

A. 1. As regards the applicant İdris Solmaz, the application be DECLARED INADMISSIBLE for being *time-barred*;

2. As regards the applicants Abdulvahap Can, Ender Onur Künteş and the EĞİTİM SEN, the alleged violation of the right to union be DECLARED ADMISSIBLE;

B. The right to union safeguarded by Article 51 of the Constitution was VIOLATED;

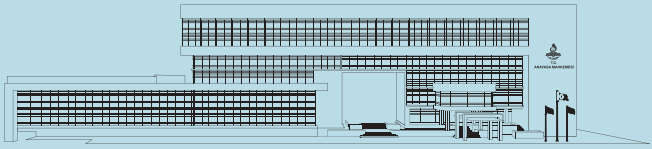
C. A copy of the judgment be SENT to the court which replaced the (abolished) 1st Chamber of the Batman Magistrates' Court (E.2013/1364 and E.2013/1365) to conduct retrial in order to redress the consequences of the violation of the right to union;

D. 1. The court expense incurred by the applicant İdris Solmaz be COVERED by him;

2. The total court expense of TRY 2,006.10 including the court fee of TRY 206.10 and the counsel fee of TRY 1,800 be JOINTLY REIMBURSED to the applicants Abdulvahap Can, Ender Onur Künteş and the EĞİTİM SEN;

E. The payment be made within four months as from the date when the applicants apply 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; and

F. A copy of the judgment be SENT to the Ministry of Justice.



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