CONSTITUTIONAL COURT OF THE REPUBLIC OF TÜRKİYE

2024

SELECTED JUDGMENTS

CONSTITUTIONAL COURT OF THE REPUBLIC OF TÜRKİYE

2024

SELECTED JUDGMENTS

(Individual Application)

Ankara, 2025

Constitutional Court Publications
ISBN: 978-625-6318-08-3

Selected Judgments 2024

Department of International Relations
Constitutional Court of the Republic of Türkiye

Translated by:
Enise YÜZÜAK
Özge ELİKALFA
Gökçen Sena KUMCU
Tuğçe KILIÇ

Edited by:
Dr. Mücahit AYDIN

Adress : Ahlatlıbel Mah. İncek Şehit Savcı
Mehmet Selim Kiraz Bulvarı No. 4
06805 Çankaya, Ankara / TÜRKİYE
Phone : +90 312 463 73 00
Fax : +90 312 463 74 00
E-mail : tcc@anayasa.gov.tr
X : @aymconstcourt
Web : www.anayasa.gov.tr/en

Designed and Printed by
EPAMAT
Basın Yayın Promosyon San. Tic. Ltd. Şti.
Phone : +90 312 394 48 63
Fax : +90 312 394 48 65
Web : www.epamat.com.tr

Print Date
September, 2025

FOREWORD

The individual application mechanism has transformed the Constitutional Court, originally a supreme court focused solely on constitutionality review, into a judicial body that directly safeguards individuals' fundamental rights and freedoms. This mechanism, regarded as one of the most significant reforms within the Turkish legal system, ensures that all individuals alleging violations of their fundamental rights and freedoms have access to the Constitutional Court. In operation since 23 September 2012, this constitutional complaint mechanism has affirmed the Constitutional Court as the guardian of fundamental rights and freedoms. This mechanism has led to an expansion in the scope of constitutional justice, turning it into a cornerstone of human rights law.

Through its judgments on individual applications, the Constitutional Court has not only identified violations through its decisions but has also established guiding principles for public authorities and judicial bodies. Accordingly, the Constitutional Court has not only fulfilled the fundamental purpose of the individual application system - protecting rights and freedoms - but has also contributed to the advancement of the law by developing jurisprudence aimed at preventing future violations.

In handling individual applications, the Constitutional Court also relies on the jurisprudence of international human rights protection mechanisms. The judgments rendered by the Court have significant consequences not only for the applicants but for the entire legal system. By defining the scope of fundamental rights and steering the law, the Constitutional Court's judgments serve as a guiding framework for both administrative and judicial practices. In this regard, the Court's jurisprudence on individual applications plays a vital role in strengthening the rule of law in Türkiye.

This book, titled *"Selected Judgments (Individual Application) - 2024"* compiles landmark judgments reiterating the well-established case-law and representing the novel jurisprudence introduced by the Court. These judgments were chosen for their significant contribution to the evolution of case-law, their relevance to public interest, and their ability to serve as precedents in similar matters.

I sincerely believe that this volume, serving as an important reference for the rule of law and the protection of human rights, will provide an insightful understanding of the Constitutional Court's jurisprudence.

Kadir ÖZKAYA
President of the Constitutional Court

INTRODUCTION

This book covers selected judgments which are capable of providing an insight into the case-law established in 2024 by the Plenary and Sections of the Turkish Constitutional Court through the individual application mechanism. In the selection of the judgments, several factors such as the development of the Court's case-law, the precedential effect, as well as the public interest are taken into consideration.

In the judgments included in the book, the Constitutional Court deals with the merits of the case following its examination on the admissibility. These judgments are primarily classified in an order that reflects the sequence of the constitutional provisions they are based on, as set forth in the Constitution.

This compilation of judgments issued throughout 2024 constitutes a valuable reference work, as it demonstrates the development of the individual application mechanism within the Turkish legal system and outlines the framework it offers for the protection of fundamental rights.

As concerns the extent of translation, it should be noted that the whole text of judgments has not been translated. First, a concise summary of facts is provided in the introductory section. The summary of the facts is followed by a full translation of the remaining text with the same paragraph numbers of the original judgment under the title of "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 the Constitutional Court's assessments in a focused and practical manner. The judgments included herein are the ones which particularly embody the pioneering jurisprudence of the Constitutional Court.

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.

Department of International Relations
Turkish Constitutional Court

CONTENTS

RIGHT TO PROPERTY (ARTICLE 35)

RIGHT TO A FAIR TRIAL (ARTICLE 36)

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

NURİYE AYHAN ALTINER

(Application no. 2020/1327)

4 October 2023

On 4 October 2023, the First Section of the Constitutional Court found a violation of the right to protect and improve one's corporeal and spiritual existence, safeguarded by Article 17 of the Constitution, in the individual application lodged by *Nuriye Ayhan Altıner* (no. 2020/1327).

(I-IV) SUMMARY OF THE FACTS

[1-25] The applicant lodged a complaint against M.K. and R.T., members of the same political party, alleging that she had been threatened in absentia by them while serving as a neighbourhood representative during the organisation of a party congress. On 25 October 2019, the İstanbul Anadolu Chief Public Prosecutor's Office (the Prosecutor's Office) requested the competent family court to issue a preventive injunction under Law no. 6284 on the Protection of the Family and the Prevention of Violence Against Women, dated 8 March 2012, (Law no. 6284).

On 28 October 2019, the 23rd Chamber of the İstanbul Anatolian Family Court ("family court") granted the Prosecutor's Office's request and issued an injunction against M.K. and R.T.. The court ordered that they refrain from acts or words involving threats of violence, insult, humiliation or degradation towards the applicant, and prohibited them from approaching her residence, school, or workplace. As noted in the injunction, it would remain in effect for three months, and a non-compliance therewith would result in coercive imprisonment.

In their objections to the injunction, M.K. and R.T. maintained that they had not threatened the applicant, and that the conditions for the issuance of such an injunction under Law no. 6284 had not been met. On 25 November 2019, the 1st Chamber of the İstanbul Anatolian Family Court ("the appellate authority") upheld their objection and revoked the injunction with final effect. In its reasoning, the court stated that the request for injunction did not concern domestic violence or stalking, thus not falling within the scope of Law no. 6284.

The final decision was served on the applicant on 4 December 2019.

Following the applicant's complaint, on 4 February 2020, the Chief Public Prosecutor's Office indicted M.K. and R.T. on the charge of making threats against the applicant. In the indictment, it was stated that the suspects had allegedly threatened the applicant in her absence by saying: *"If you refuse to remove her from her post, there will be a lot of bloodshed—either hers or ours."* Furthermore, according to the documents in the case file, there were witness statements that the suspects had threatened the applicant in her absence.

V. EXAMINATION AND GROUNDS

26. The Constitutional Court ("the Court"), at its session of 4 October 2023, examined the application and decided as follows:

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

27. The applicant maintained that the death threats she had received were confirmed by witness statements, thus there being a serious and imminent threat to her life; and that for amounting to violence against women, the impugned act infringed upon the right to protect and improve her corporeal and spiritual existence. She further argued that the lifting of the protective measure prevented her from living peacefully and safely with her family, thus being in breach of the right to respect for private and family life. In addition, she noted that the interpretation by the appellate authority that Law no. 6284 on the Protection of the Family and the Prevention of Violence against Women shall be applicable merely to family members amounted to a breach of the prohibition of discrimination.

28. In its observations, the Ministry, which referred to the decisions rendered during the proceedings and the relevant case-law, emphasised that the information provided in the observations should be taken into account in assessing whether the procedural safeguards inherent in the right to a fair trial would come into play and whether the applicant had substantiated her claims. The Ministry further noted that the impugned protective measure had remained in effect for one month until the issuance of the appellate decision, and that upon the lifting of the protective measure, the applicant reported no

act of violence against her. It accordingly maintained that the applicant cannot be considered to have victim status. The Ministry lastly stated that in assessing whether there had been violations of the applicant's right to protect and improve her corporeal and spiritual existence, as well as of the right to a fair trial, the Court should take into account the particular circumstances of the present case in the light of the constitutional provisions and the provisions of law that are specified in the Ministry's observations, as well as the respective well-established case-law of the Court.

B. The Court's Assessment

29. Paragraph 1 of Article 17 of the Constitution, titled "*Personal inviolability, corporeal and spiritual existence of the individual*", reads as follows:

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

30. Article 5 of the Constitution, titled "*Fundamental aims and duties of the State*", reads, insofar as relevant, as follows:

> *"The fundamental aims and duties of the State are to (…); 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."*

31. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16).

32. Article 17 § 1 of the Constitution provides for that everyone has the right to protect and improve her/his corporeal and spiritual existence, which corresponds to the right to protection of physical and mental integrity safeguarded within the scope of the right to respect for private life under Article 8 of the European Convention on Human Rights ("the Convention").

33. The applicant's claims concern the failure to protect her against threats to her physical integrity. Although she further alleged a violation of the equality principle, it appears that these claims are based solely on the outcome of the decision issued by the incumbent family court. In the light of its previous judgments in similar cases, the Court examined all complaints raised by the applicant under the right to protect and improve one's corporeal and spiritual existence, which is enshrined in Article 17 § 1 of the Constitution (see *Eylem Çetin Demir*, no. 2014/2302, 9 November 2017, § 28; *A.Z.Ö.*, no. 2014/546, 19 December 2017, § 60; *Ö.T.*, no. 2015/16029, 19 February 2019, § 25; and *K.Ş.*, no. 2016/14613, 17 July 2019, § 32).

1. Admissibility

34. The alleged violation of the right to protect and improve one's corporeal and spiritual existence must be declared admissible for not being manifestly ill-founded, and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

35. Article 17 of the Constitution safeguards the right to protect and improve one's corporeal and spiritual existence. This right, when read in conjunction with Article 5 thereof, imposes certain negative and positive obligations on the State (see *Serpil Kerimoğlu and Others*, no. 2012/752, 17 September 2013, §§ 50 and 51).

36. These positive obligations necessarily require the adoption of measures designed to secure respect for the specified rights even in the sphere of the relations of individuals between themselves (see *Marcus Frank Cerny* [Plenary], no. 2013/5126, 2 July 2015, §§ 36 and 40).

37. The State's positive obligation in this context includes the duty to establish effective mechanisms, to provide judicial procedures that offer the necessary procedural safeguards, and thereby to ensure that judicial and administrative authorities issue effective and fair decisions in disputes between individuals and the administration or private

parties (see *Semra Özel Üner*, no. 2014/12009, 26 October 2016, § 36; and *Ö.T.*, § 29).

b. Application of Principles to the Present Case

38. In the present case, since the preventive measure provided under Law no. 6284 was lifted by the appellate authority and no new measure was indicated, an examination must be made of the public authorities' positive obligations within the meaning of the applicant's right to protect and improve her corporeal and spiritual existence.

39. In that case, it must first be assessed, under the particular circumstances of the present case, whether the State fulfilled its positive obligation to *set up an effective judicial system* in terms of the respective basic right.

40. The legislator enacted Law no. 6284 with a view to adopting an effective and prompt method for the protection of the family and the prevention of violence against women, as well as to offering immediate protection for individuals who have been, or are at risk of being, subjected to violence. Law no. 6284 provides for principles, procedures, and sanctions in regard to measures to be taken for the protection of women, children, and family members who have been, or are at risk of being, subjected to violence and preventing violence against them. Accordingly, it appears that necessary legal infrastructure has been set up within the framework of the State's obligation to protect, and that the legal system put in place for the protection of those who are subjected to violence or facing such risk is adequate (for considerations in the same vein, see *Semra Özel Üner*, § 39; *A.Z.Ö.*, § 76; and *Ö.T.*, § 32).

41. The second issue to be examined is whether reasonable and practical measures, as required by the circumstances of the present case, were taken within the framework of the existing administrative and judicial legislation.

42. In the present case, stating that, as a woman, she was under threat and at risk of physical harm, the applicant filed a complaint with the Chief Public Prosecutor's Office, which applied to the respective court for a preventive injunction to be indicated in her favour under

Law no. 6284. The preventive injunction, which had been indicated by the respective court on the basis of certain provisions listed in Article 5 of Law no. 6284 and executed for a period of one month, was lifted upon an objection. In its decision lifting the preventive injunction, the appellate authority stated that Law no. 6284 was not applicable to the applicant's case, as the applicant's claim did not concern domestic violence or stalking.

43. Article 1 of Law no. 6284 sets forth that one of the aims pursued by this Law is to protect women being subjected to violence or facing such risk. Article 2 of the same Law defines violence against women as any act or conduct directed against or affecting women solely because they are women, involving gender-based discrimination, which leads to a violation of women's human rights, and that is categorised as violence under this Law. Besides, reports on the subject also emphasise that violence against women is a multi-dimensional issue, posing a threat to women of all ages, educational backgrounds, regions, and levels of welfare, indicating that violence against women takes many forms, including but not limited to domestic violence.

44. Moreover, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) considers discrimination against women as any distinction, exclusion, or restriction made on the basis of sex, irrespective of their marital status, which hinders gender equality. Article 2 thereof states that State Parties have the positive obligation to prevent any kind of discrimination against women inflicted by any individual or institution. In this regard, the Committee established under the CEDAW indicates in its recommendation that the gender-based violence against women also covers any form of violence inflicted by private individuals and domestic violence. In another recommendation, the Committee also states that violence against women includes threats intended to cause physical, psychological, or sexual harm to women, regardless of the place where it occurs, as well as violence taking place within the family or in interpersonal relationships, and underlines that State Parties have an obligation to exercise due diligence to prevent such violence.

45. Besides, the İstanbul Convention explicitly emphasises that one of its objectives is *"to protect women against all forms of violence, and to prevent, prosecute, and eliminate violence against women and domestic violence"*. It is further noted that *"the İstanbul Convention shall apply to all forms of violence against women, including domestic violence, which disproportionately affects women"*. Violence against women is defined therein as *"a violation of human rights and a form of discrimination against women, including all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"*. Finally, the European Court of Human Rights ("ECHR") states that the issue of domestic violence, which can take various forms, ranging from physical assault to sexual, economic, emotional or verbal abuse, transcends the circumstances of an individual case, and that it is a general problem which affects, to a varying degree, all member States.

46. In the present case, the applicant maintained in the application form that the threat to which she had been subjected was directed towards her merely because of her sex, which was in the form of violence against women. She further noted that all expressions such as *"Do it! Otherwise, there will be a bloodbath"* were used by men. It is evident that upon the applicant's criminal complaint, those concerned were indicted on charges of making threats against the applicant.

47. It is explicitly acknowledged both in Law no. 6284 and the respective international law that violence against women covers any kind of act of violence inflicted on the basis of gender. However, in the present case, the appellate authority lifted the injunction, stating that the applicant's complaint did not concern *domestic violence or stalking*. Nor did it provide any concrete explanation, assessment, or justification as to whether the threats directed against the applicant, as a woman, by male offenders was motivated by gender-based discrimination, and whether the impugned act constituted an act of violence against women. Accordingly, the appellate authority's interpretation to the effect that circumstances other than domestic violence and stalking or any form of violence against women occurring outside the domestic

sphere would fall outside Law no. 6284 falls foul of the constitutional safeguards.

48. It has been thus concluded that the final decision was not based on relevant and sufficient reasons within the meaning of the applicant's right to protect and improve her corporeal and spiritual existence. Although the applicant elucidated that the threat against her was gender-based, the appellate authority failed to comply with its positive obligations to protect the applicant as a victim of violence. Therefore, the positive obligations imposed on the State within the scope of the applicant's right to protect and improve her corporeal and spiritual existence cannot be said to have been duly fulfilled.

49. For these reasons, it must be held that there was a violation of the right to protect and improve one's corporeal and spiritual existence enshrined in Article 17 of the Constitution.

VI. REDRESS

50. The applicant requested the Court to find a violation, to order a retrial, and to award her 10,000 Turkish liras (TRY) for non-pecuniary damages.

51. There is a legal interest in conducting a retrial in order to redress the consequences of the violation found in the present case. In this regard, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3*) [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

52. On the other hand, it is clear that ordering a retrial would be insufficient for the redress of all damages sustained by the applicant. Accordingly, the applicant must be awarded a net amount of TRY 10,000 in compensation of her non-pecuniary damage, which could

not be redressed by merely finding of a violation of the right to protect and improve one's corporeal and spiritual existence, so as to redress the violation and all consequences thereof within the framework of the *restitution* procedure.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 4 October 2023 that

A. The alleged violation of the right to protect and improve one's corporeal and spiritual existence be DECLARED ADMISSIBLE;

B. The right to protect and improve one's corporeal and spiritual existence safeguarded by Article 17 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the 23rd Chamber of the İstanbul Anatolian Family Court (E.2019/758, K.2019/755) in order for its referral to the 1st Chamber of the İstanbul Anatolian Family Court (E.2019/810, K.2019/820) for a retrial to be conducted to redress the consequences of the violation of the right to protect and improve one's corporeal and spiritual existence;

D. A net amount of TRY 10,000 be PAID to the applicant in compensation for non-pecuniary damage;

E. The total litigation costs of TRY 19,246.90, including the court fee of TRY 446.90 and counsel fee of TRY 18,800, be REIMBURSED to the applicant;

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

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

RIGHT TO PERSONAL LIBERTY AND SECURITY (ARTICLE 19)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

M.S.

(Application no. 2020/15221)

5 October 2023

On 5 October 2023, the Second Section of the Constitutional Court found a violation of the right to personal liberty and security, safeguarded by Article 19 of the Constitution, in the individual application lodged by *M.S.* (no. 2020/15221).

(I-IV) SUMMARY OF THE FACTS

[1-37] On 15 July 2016, Türkiye was confronted with a military coup attempt, which gave rise to the declaration of a state of emergency throughout the country from 21 July 2016 to 19 July 2018. Based on factual findings, the public authorities and judicial bodies assessed that the organisation behind the attempt was a structure that had been active in Türkiye for many years and had, in recent years, come to be referred to as the Fethullahist Terrorist Organisation (FETÖ) and/or the Parallel State Structure (PDY).

During and after the attempted coup, investigations were launched throughout the country not only into those directly involved in the coup attempt, but also into the structuring of FETÖ/PDY within public institutions in various fields including education, health, trade, civil society and the media. At the end of these proceedings, numerous individuals were taken into custody and detained on remand (see *Aydın Yavuz and Others* [Plenary], no. 2016/22169, 20 June 2017, § 51; and *Mehmet Hasan Altan (2)* [Plenary], no. 2016/23672, 11 January 2018, § 12).

The applicant was detained on 20 August 2016 within the scope of the investigation no. 2015/45316 initiated by the İstanbul Anatolian Chief Public Prosecutor's Office for offences related to FETÖ/PDY.

On 25 August 2016, the İstanbul Magistrate Judge no. 8 ordered the applicant's detention on charges of attempting to overthrow the constitutional order, establishing or managing a terrorist organisation, propagating a terrorist organisation, infringing Law no. 6415 on the Prevention of the Financing of Terrorism, and legalisation (laundering) of criminal proceeds.

He challenged his detention, which was rejected on 7 September 2016 by the İstanbul Magistrate Judge no. 9, with no right of appeal.

The 28 Chamber of the İstanbul Assize Court ("trial court") ordered the applicant's continued detention during the first hearing on 11 April 2019, where the applicant was given the possibility to be heard in person.

On 24 March 2020, the trial court held a hearing *ex officio* and ordered his continued detention in the absence of him and his defence counsel. It subsequently conducted the applicant's detention reviews on 21 April 2020, 20 May 2020, and 2 June 2020 on the basis of the case-file. However, on 2 June 2020, the court held a hearing for the review of the applicant's detention, during which the applicant's counsel being present in person and the applicant participating the hearing through an audio-visual system for remote participation (SEGBIS) presented their submissions regarding the detention.

Accordingly, the applicant appeared before a judge 2 months and 26 days (86 days) after the last review of the applicant's detention with a hearing on 6 March 2020.

During the applicant's proceedings, measures were being applied also in the judicial affairs due to the Covid-19 pandemic.

V. EXAMINATION AND GROUNDS

38. The Constitutional Court ("the Court"), at its session of 5 October 2023, examined the application and decided as follows:

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

39. The applicant maintained that his right to personal liberty and security had been violated, stating that in dismissing his challenges to the decision on his continued detention, the incumbent court had reviewed his pre-trial detention and adjudicated the case on the basis of the case-file without hearing him and his defence counsel. The applicant noted that on 24 March 2020, the trial court opened a hearing *ex officio* and ordered his continued detention in the absence of both the applicant and his defence counsel. He further complained that his pre-trial detention was reviewed periodically on the basis of the case-file on 21 April 2020, 20 May 2020, and 2 June 2020. According

to the applicant, conducting judicial review of his pre-trial detention, without a hearing, for a period exceeding the statutory duration of 90 days indicated the lack of an effective review of his challenges to detention.

40. In its observations, the Ministry noted, referring to the Court's relevant case-law, that the applicant had the opportunity to raise his detention-related arguments by attending the hearing in person after having filed an individual application with the Court. The Ministry accordingly stated that the legal avenue for compensation provided for in Article 141 of the Code of Criminal Procedure ("Code no. 5271") was an effective legal remedy applicable to the applicant's case and capable of offering reasonable prospects of redress. It accordingly argued that the applicant's complaint must be declared inadmissible for non-exhaustion of available remedies.

41. The Ministry further stated that in the event that the Court decided to proceed with an examination on the merits of the case, it should be considered that pursuant to Provisional Article 19 of Anti-Terror Law no. 3713 (Law no. 3713), judicial reviews of continued detention may be conducted on the basis of the case-file every 30 days, and that such reviews must be conducted through a hearing at least once every 90 days. It should be also noted in regard to the present case that the trial court held a hearing on 6 March 2020 to review the applicant's pre-trial detention, and within the scope of measures taken due to the pandemic, an *ex officio* hearing was held on 24 March 2020 –prior to the previously scheduled hearing date– where his continued detention was ordered; and that the subsequent reviews of his pre-trial detention were conducted on the basis of the case-file until 2 June 2020 when the incumbent court held a hearing and the applicant had the opportunity to present his defence submissions. The Ministry accordingly noted that the applicant's complaint must be declared inadmissible for being manifestly ill-founded.

42. In his counter-statements, the applicant made allegations similar to those raised in the application form.

B. The Court's Assessment

43. Paragraph 8 of Article 19 of the Constitution, titled *"Right to personal liberty and security"*, 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".

44. 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 the present case, the applicant complained that he could not effectively challenge his continued detention, as the trial court reviewed his pre-trial detention without holding a hearing for a long period of time. In this sense, his complaint must be examined under Article 19 § 8 of the Constitution.

1. Admissibility

a. As regards the Exhaustion of Legal Remedies

45. According to provisional Article 19 added to Law no. 3713 by Article 13 of Law no. 7145, which was applicable during the period when the applicant's pre-trial detention was reviewed, pre-trial detentions shall be subject to reviews at intervals not exceeding 90 days, with the detainee or his defence counsel being heard. It was observed that, in the present case, the applicant's pre-trial detention was reviewed through a hearing no later than 86 days following the previous one.

46. Moreover, in its judgment *Tarık Korkmaz* (no. 2019/13057, 9 July 2020), the Court first cited its previous judgments *Erdal Tercan* ([Plenary], 2016/15637, 12 April 2018) and *Salih Sönmez* (no. 2016/25431, 28 November 2018), which concerned the complaints about the inability to appear before a judge/court for a prolonged period during the state of emergency, and stated that there was no maximum time-limit laid down for detention reviews to be conducted without a hearing in ordinary times. It thus found that the circumstances of the applicant's case were distinguishable from the aforementioned judgments. It

accordingly held that the avenue of compensation would be ineffective insofar as it related to reviews of pre-trial detention without a hearing, which had been in compliance with the legislation, and that there was no need to exhaust the legal remedy specified in Article 141 of Code no. 5271 (see *Tarık Korkmaz*, § 103). Therefore, in the present case where the applicant's pre-trial detention was subject to review with a hearing within the time-limit prescribed by the respective Law, there is no circumstances requiring the Court to depart from its findings in the above-cited judgment.

b. As regards the Time-Limit for Application

47. In its examination of similar complaints, the Court has noted that the interference resulting from the failure to conduct the judicial review of pre-trial detention without bringing the detainee before a judge/court would cease automatically at the moment when he will appear before a judge/court, and that therefore, the individual application must be lodged within a maximum period of 30 days following his bringing before the judge/court (see *Tarık Korkmaz*, § 95).

48. In the present case, the applicant filed an individual application with the Court on 14 May 2020 when his challenge to the court's decision of 21 April 2020, whereby his continued detention was ordered on the basis of the case-file, was dismissed with final effect, again on the basis of the case-file, on 6 May 2020 by the 29th Chamber of the İstanbul Assize Court. Therefore, it appears that the applicant filed his application while the interference was still ongoing, as he had not yet been brought before a judge. Therefore, the application must be considered to have been submitted within the prescribed time-limit.

49. For these reasons, the application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

50. Pursuant to Article 19 § 8 of the Constitution, persons who are deprived of liberty are entitled to apply to the competent judicial

authority for speedy conclusion of thr proceedings regarding their situation and for their immediate release, if the restriction imposed upon them is not lawful (see *Mehmet Haberal*, no. 2012/849, 4 December 2013, § 122).

51. As it is requisite to have recourse to the competent judicial authority for release, the exercise of this right is contingent upon a request. Accordingly, the right to apply to the competent judicial authority is a guarantee for those deprived of their liberty due to a criminal charge, which must be afforded not only in terms of the request for release but also for the judicial review of challenges to detention, continued detention, as well as to the decisions dismissing the request for release (see *Aydın Yavuz and Others*, § 328).

52. However, during an *ex officio* judicial review of detention of the suspect or the accused without a request under Article 108 of Code no. 5271, no assessment shall be made within the scope of the suspect's/detainee's 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*, no. 2012/1158, 21 November 2013, § 32; and *Faik Özgür Erol and Others*, no. 2013/6160, 2 December 2015 § 24).

53. As it is set forth in Article 19 § 8 of the Constitution that the requests for release must be lodged with a judicial authority, the review to be conducted in this regard is, by its very nature, of a judicial nature. In this judicial review, the safeguards inherent in the right to a fair trial, which come into play by virtue of the nature and conditions of detention, must be afforded. In this respect, the principles of *equality of arms* and *adversarial proceedings* must be observed in reviewing the challenges against continued detention or the request to be released (see *Hikmet Yayğın*, no. 2013/1279, 30 December 2014, §§ 29 and 30).

54. 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 entails 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).

55. 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, this is the primary legal means for a person deprived of his liberty to effectively challenge his detention, to effectively submit his allegations as to the contents and classification of the evidence underlying his detention, as well as his arguments against the opinions and assessments, favourable or unfavourable to him, 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*, § 66; *Süleyman Bağrıyanık and Others*, § 267; and *Aydın Yavuz and Others*, § 333).

56. As a reflection of this safeguard, Article 105 of Code 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 along with the public prosecutor shall be heard. Article 108 thereof also envisages that in deciding on the continued detention of the suspect at the investigation phase, the suspect or his defence counsel is to be heard. Moreover, all types of decisions on detention that is rendered either *ex officio* or upon request within the scope of Article 101 § 5 or Article 267 of the Code no. 5271 may be challenged before a court (see *Süleyman Bağrıyanık and Others*, § 269). As regards the judicial 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 or the representative may be heard. Accordingly, in cases where judicial reviews of detention or challenge to detention are conducted through a hearing, the suspect, the accused, or the defence counsel are to be heard (see *Aydın Yavuz and Others*, § 334).

57. However, holding a hearing for reviewing challenges to detention orders or assessing every request for release may lead to congestion of

the criminal justice system. Therefore, the safeguards enshrined in the Constitution as to the review procedure do not necessitate a hearing for review of every single challenge to detention unless the special circumstances require otherwise (see *Firas Aslan and Hebat Aslan*, § 73).

b. Application of Principles to the Present Case

58. The applicant maintained that he could not effectively challenge his pre-trial detention, since the judicial review of his detention and the challenges to his continued detention were conducted on the basis of the case-file, without a hearing where he and his defence counsel could be heard.

59. At this stage, the legal status of the applicant must first be determined. Pursuant to Provisional Article 19 added to Law no. 3713 by Article 13 of Law no. 7145, which was in force at the relevant time when the applicant's detention was subject to judicial review, as regards the offence of membership in a terrorist organisation, which also constitutes the basis for the applicant's detention, challenges to detention and requests for release may be decided on the basis of the case-file, and such release requests may be assessed in conjunction with the periodic review of detention, also on the basis of the case-file, at intervals not exceeding 30 days. Furthermore, as laid down in Article 108 of Code no. 5271, pre-trial detention shall be reviewed *ex officio* on the basis of the case-file at intervals not exceeding 30 days, and in the presence of the person or his defence counsel at intervals not exceeding 90 days. Thus, by introducing this provision, the legislature set a maximum period of 90 days during which detention reviews may be conducted without a hearing, thereby safeguarding the principles of *equality of arms* and *adversarial proceedings* in detention reviews.

60. Accordingly, detention reviews conducted *ex officio* under Article 108 of Code no. 5271 in relation to the offences listed in the provisional Article 19 of Law no. 3713 also fall within the scope of Article 19 § 8 of the Constitution. Moreover, the applicant also complained that his challenges to the decisions ordering his continued detention were examined without a hearing. There is no doubt that the examination of such challenges is also safeguarded by Article 19 § 8 of the Constitution.

61. Besides, it appears that Law no. 7226, which contains provisions regarding the measures adopted due to the pandemic, excludes the time-limits related to protective measures regulated under Code no. 5271. Furthermore, the authority to determine all other necessary measures including the postponement of hearings and deliberations, as well as the related procedures and principles is granted to the respective Board of Presidents for the Court of Cassation and the Council of State, to the Council of Judges and Prosecutors in respect of first instance courts as well as regional courts of appeal and regional administrative courts, and to the Ministry of Justice in terms of judicial services. Nevertheless, the aforementioned legislation does not introduce any explicit provision concerning cases involving detained persons. Therefore, the legal amendments introduced during this period did not result in any change to the time-limits for reviewing the applicant's detention. In other words, the applicant's detention had to be reviewed through a hearing at intervals not exceeding 90 days, pursuant to the provisional Article 19 added to Law no. 3713 by Article 13 of Law no. 7145.

62. In the present case, it appears that on 24 March 2020, the trial court held a hearing *ex officio* and ordered his continued detention in the absence of him and his defence counsel. It subsequently conducted the applicant's detention reviews on 21 April 2020, 20 May 2020, and 2 June 2020 on the basis of the case-file. However, on 2 June 2020, the court held a hearing for the review of the applicant's detention, during which the applicant's counsel being present in person and the applicant participating the hearing through an audio-visual system for remote participation (SEGBIS) presented their submissions regarding the detention. Accordingly, the applicant appeared before a judge 2 months and 26 days (86 days) after the last review of the applicant's detention with a hearing on 6 March 2020. It is therefore explicit that the applicant's detention was reviewed through a hearing within the ninety-day time-limit prescribed by law. In this respect, there appears to be no manifest breach of the law.

63. However, in examining complaints concerning time-limits related to preventive measures, the Court both considers the time-

limits set forth in the applicable legislation and makes a constitutional assessment as to whether the statutory time-limits or the length of period in a given case are reasonable. Indeed, in its below-mentioned judgments, the Court assessed whether the periods in the given cases were reasonable.

64. Accordingly, it is necessary to assess whether the applicant's appearance before the court within 2 months and 26 days, which was in compliance with the legislation, was reasonable under the particular circumstances of the present case.

65. In this sense, in its judgment *Aydın Yavuz and Others* (§§ 326-359), the Court has held -in consideration of the circumstances arising from the coup attempt of 15 July 2016 and the subsequent state of emergency declared thereafter- that ordering the continued detention of the persons, detained on remand for offences related to coup attempt, FETÖ/PDY, and terrorism, through judicial reviews without holding a hearing, for a certain period of time (8 months and 18 days) may be found justified by Article 15 of the Constitution governing the exercise of fundamental rights and freedoms when extraordinary administration procedures are applied, albeit being in breach of Article 19 § 8 of the Constitution. However, in the case of *Erdal Tercan*, the Court has found, as a result of its assessment under the same scope, that conducting detention reviews for individuals arrested in connection with the coup attempt -particularly for those accused of being affiliated with the organisation behind the coup (FETÖ/PDY) or terrorism-related offences- without bringing them before a judge/court for a period exceeding 18 months constituted a violation of the right to personal liberty and security, even during the state of emergency (see *Erdal Tercan,* §§ 229-251).

66. On the other hand, the Court has concluded that the applicants' continued detention for 7 months and 2 days in the cases of *Mehmet Halim Oral* (no. 2012/1221, 16 October 2014, § 53) and *Ferit Çelik* (no. 2012/1220, 10 December 2014, § 53), for 3 months and 17 days in the case of *Ulaş Kaya and Adnan Ataman* (no. 2013/4128, 18 November 2015, § 61), and for 13 months in the case of *İbrahim Soylu* (no. 2015/14648,

23 January 2019, § 36), which were ordered on the basis of the case-file without holding a hearing, was in breach of Article 19 § 8 of the Constitution in ordinary times.

67. In its recent judgment *Tarık Korkmaz*, the Court has noted that in ordinary times, there is no maximum time-limit prescribed for detention reviews to be conducted without a hearing. Accordingly, it has concluded that conducting detention reviews in compliance with the legislation for 1 month and 26 days without bringing the applicant before a judge/court did not constitute a violation of the right to personal liberty and security under Article 19 § 8 of the Constitution (see *Tarık Korkmaz*, § 107).

68. In its constitutionality review of the request for annulment of the provision underlying the interference, the Court has found that, pursuant to the provision in question, a suspect or an accused could be deprived of liberty for a period of up to 90 days without being able to present their submissions and evidence regarding detention before a court. The Court has held that depriving the suspect or accused of the opportunity to orally submit a request for release before a court for such an unreasonable period was incompatible with the safeguard enshrined in Article 19 § 8 of the Constitution, which guarantees that arguments and defence submissions regarding detention be brought before a court within a reasonable time. It accordingly found the interference disproportionate and annulled the provision for being in breach of Articles 13 and 19 of the Constitution (see the Court's decision no. E.2018/137, K.2022/86, 30 June 2022, §§ 316-338).

69. In the case of *Erişen and Others v. Türkiye,* the European Court of Human Rights found that the dismissal of challenges to detention without hearing the suspect over a period of 2 months and 13 days constituted a violation of Article 5 § 4 of the Convention (see *Erişen and Others v. Türkiye*, §§ 51-54).

70. In the present case, the applicant was tried together with 83 co-accused persons for various offences related to the FETÖ/PDY. The applicant's case was undoubtedly of a complex nature due to the structure of the organisation and the large number

of co-accused. However, although the Court takes into account factors such as the complexity of the case and the high number of defendants and complainants in assessing complaints related to the length of detention or proceedings, it has carried out a separate and independent assessment of complaints concerning the inability to appear before a judge or court for a prolonged period, as is clearly seen in the afore-mentioned judgments. However, this does not mean that the particular circumstances of the case would be disregarded in any way, and nor does it require the participation of all defendants or parties in a hearing held for the purpose of reviewing detention. The court may conduct such a hearing by ensuring the attendance of only the detained individuals. Indeed, in the present case, the hearings for detention review were held with the participation of merely the detained defendants and their defence counsel.

71. Although, due to the pandemic, holding hearings with physical presence may carry certain risks for the participants and public health, it cannot be said that conducting hearings via SEGBIS entails the same level of risk. Indeed, under the applicable regulations, no restrictions have been imposed on holding hearings for detention-related issues through audio-visual system for remote participation. Furthermore, nor did the applicant raise any challenge to the conduct of the hearing via this system.

72. Consequently, the applicant did not have the opportunity to orally present, before a judge/court, the challenges to his pre-trial detention, allegations as to the content or qualification of the evidence underlying his detention, his counter-statements to the views and assessments in favour of or against him, as well as his requests for release. Therefore, the judicial review of the applicant's detention without a hearing for a period exceeding two months fell foul of the principles of *equality of arms* and *adversarial proceedings* in ordinary times.

73. For these reasons, it must be held that the applicant's right to personal liberty and security enshrined in Article 19 § 8 of the Constitution was violated.

C. REDRESS

74. Article 50 of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011 ("Code no. 6216"), reads, insofar as relevant, as follows:

"(1) At the end of the examination on the merits, it shall be decided whether or not the right of the applicant has been violated. In cases where a decision on violation is rendered, the steps required to be taken for the redress of the violation and the consequences thereof shall be indicated...

(2) If the determined violation originates from a court ruling, the file shall be sent to the relevant court for retrial to be held to eliminate the violation and its consequences. In cases where there is no legal interest in conducting retrial, the compensation may be adjudged in favour of the applicant or the remedy of filing a case before the ordinary courts may be indicated. The court, responsible for conducting the retrial shall, if possible, issue a decision on the case in such a way to redress the violation and its consequences as determined by the Constitutional Court in its decision on the violation."

75. In its judgment in the case of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court has indicated the general principles as to how a violation of any fundamental right, which has been found established by the Court, and its consequences will be redressed. In another judgment, the Court has explained the relevant principles as well as the consequences of the failure to comply with its judgment finding a violation and pointed out that this would amount to the continuation of the violation and might also result in a violation for the second time (see *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019).

76. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for the redress of the violation and the consequences thereof is to ensure restitution to the extent possible, that is to say, to ensure restoration of the original state prior to the violation. To that end, it is primarily required to identify the cause of the violation and then to end the continuing violation, to revoke the decision or act giving rise to the violation, to redress the

consequences thereof, to compensate -if any- the pecuniary and non-pecuniary damages resulting from the violation, and to take other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55 and 57).

77. The applicant did not claim any compensation.

78. In the present case, the Court found a violation of Article 19 § 8 of the Constitution due to the applicant's continued detention for a period exceeding 2 months, which was ordered on the basis of the case-file without his being brought before a judge/court. It is however clear that the applicant was brought before a judge/court for the judicial review of his pre-trial detention by the date of this decision. Therefore, it appears that there is no step required to be taken for the elimination of the consequences of the violation.

79. The litigation costs of 19, 246.90 Turkish liras (TRY), including the court fee of TRY 446.90 and counsel's fee of TRY 18,800, as established on the basis of the documents in the case file, must be reimbursed to the applicant.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 5 October 2023 that

A. The applicant's request for confidentiality of his identity in the documents accessible to the public be GRANTED;

B. The alleged failure to conduct the judicial review of the applicant's detention at reasonable intervals before a judge/court be DECLARED ADMISSIBLE;

C. Article 19 § 8 of the Constitution was VIOLATED due to the failure to conduct the judicial review of the applicant's detention at reasonable intervals before a judge/court;

D. The total litigation costs of TRY 19,246.90, including the court fee of TRY 446.90 and counsel fee of TRY 18,800, be REIMBURSED to the applicant;

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

F. A copy of the judgment be SENT to the 28th Chamber of the İstanbul Assize Court (E. 2019/3) for information; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

YAKUP GÜNEŞ

(Application no. 2019/15907)

19 March 2024

On 19 March 2024, the Second Section of the Constitutional Court found a violation of the right to personal liberty and security, safeguarded by Article 19 of the Constitution, in the individual application lodged by *Yakup Güneş* (no. 2019/15907).

(I-IV) SUMMARY OF THE FACTS

[1-34] The İstanbul Chief Public Prosecutor's Office filed a criminal action against the applicant, who had previously served as a prison officer, on charges of membership of the Fetullahist Terrorist Organization / Parallel State Structure (FETÖ/PDY).

On 21 December 2017, the 24th Chamber of the İstanbul Assize Court (the assize court), which conducted the proceedings, sentenced the applicant to eight years and nine months' imprisonment for the offence with which he had been charged, and ordered the continuation of his pre-trial detention. In the reasoning of the decision, it was stated that the applicant, among other acts, invited members of the organisation to organisational meetings held under the guise of religious talks and collected money from them for the organisation under names such as "sacrifice donations". The applicant denied the charges against him throughout the proceedings.

On an unspecified date, the Adıyaman Chief Public Prosecutor's Office launched a criminal investigation against M.Ş., who had worked as a prison officer at Silivri Closed Penitentiary Institution between 2009 and 2015, on suspicion of membership of FETÖ/PDY. In his statement given to the law enforcement authorities on 17 May 2018 within the scope of this investigation, M.Ş. alleged that the applicant had attended religious talks organised by H.K., who was working as a teacher at a private tutoring centre. He also identified the applicant and Mu.Ş. from photographs as persons who had participated in those talks conducted by H.K.

The applicant's appeal on facts and law against his conviction was dismissed by the 3rd Criminal Chamber of the İstanbul Regional Court of Appeal on 30 August 2018. The criminal chamber also ordered the applicant's continued detention.

On 19 March 2019, the Şanlıurfa Chief Public Prosecutor's Office (the Chief Prosecutor's Office), which was conducting a criminal investigation against Mu.Ş. for membership of FETÖ/PDY, sought to hear the applicant as a witness via the Audio and Visual Information System (SEGBİS), based on the statements and identifications made by M.Ş., in relation to Mu.Ş. and H.K. Among other matters, the applicant was reminded of his right to refuse to make any statements likely to expose himself or the persons listed in Article 45 § 1 of the Code of Criminal Procedure no. 5271 to criminal prosecution; however, he was not informed of the consequences of unjustified refusal to testify. Despite having taken the witness oath, the applicant declared that he did not wish to give any statement in his capacity as a witness.

On the same date, the Chief Public Prosecutor's Office requested the magistrate judge to impose disciplinary detention on the applicant for failing to testify, although he was not among those entitled to refuse to testify.

The Şanlıurfa Magistrate Judge no. 3 ("the magistrate judge") took the applicant's statement via the Audio and Visual Information System on 22 March 2019. In his statement, the applicant stated that he did not accept the content of the report prepared by the Chief Public Prosecutor's Office and, invoking his legal right, refused to testify on the grounds that giving evidence could have adverse consequences for him. The magistrate judge sentenced him to thirty days of disciplinary detention in the absence of a justified ground for his refusal to testify and ordered his immediate release upon testifying.

The applicant's appeal against the said decision was dismissed by the Şanlıurfa Magistrate Judge no. 4 on 3 April 2019.

The disciplinary detention imposed on the applicant was served between 2 April 2019 and 2 May 2019, while the application was lodged on 2 May 2019.

Following the dismissal of the applicant's appeal against the decision of the criminal chamber on 25 January 2021, the applicant's conviction became final.

V. EXAMINATION AND GROUNDS

35. The Constitutional Court ("the Court"), at its session of 19 March 2024, examined the application and decided as follows:

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

36. The applicant maintained that there had been violations of his rights to protect and improve one's corporeal and spiritual existence, to a fair trial, and to personal liberty and security, as well as of the principles of *nullum crimen, nulla poena sine lege* and equality. In this regard, he alleged that the incumbent Chief Public Prosecutor's Office attempted to obtain his statement through unlawful means, that the official record prepared by the Chief Public Prosecutor's Office did not reflect the truth, and that he was subjected to treatment affecting his psychological well-being, partly due to being held in a penitentiary institution. He further submitted that he was denied the right to be exempted from testifying, although the testimony in question could have led to new criminal charges being brought against him. The applicant further maintained that he was subjected to a disciplinary sanction without sufficient reasoning, and that the sanction had been enforced before it became final.

37. In its observations, the Ministry noted that the applicant was lawfully detained pursuant to a court decision for the legitimate aim of securing evidence in connection with a criminal investigation. It also stated that, in making an assessment as to proportionality, the Court should take into account that the applicant had already been convicted in relation to the incident in which his testimony was sought, that he was already being held in a penitentiary institution, and that his disciplinary detention had not been extended.

38. In his counter-statement, the applicant reiterated his allegations and claimed that the magistrate judge failed to inform him of his legal rights.

B. The Court's Assessment

39. Article 19 §§ 1 and 2 of the Constitution, titled *"Right to personal liberty and security"*, reads as follows:

"Everyone has the right to personal liberty and security.

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

… arrest or detention of an individual in line with a court ruling or an obligation upon him designated by law…"

40. The applicant alleged that the Chief Public Prosecutor's Office sought to obtain his statement through unlawful methods and that the treatment he was subjected to in the penitentiary institution adversely affected his psychological state. He raised these allegations in the context of being required to testify as a witness despite having the right to refuse to do so. Accordingly, the only issue to be examined in the present case is whether the disciplinary detention of the applicant for allegedly refusing to testify without any justified ground was lawful. Therefore, the application must be examined under the right to personal liberty and security within the framework of Article 19 § 2 of the Constitution.

1. Admissibility

41. The alleged violation of the right to personal liberty and security must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of an Interference and Scope of the Respective Right

42. The right to personal liberty and security is a fundamental right that precludes the State from interfering with the individuals' freedom in an arbitrary fashion (see *Erdem Gül and Can Dündar* [Plenary], no. 2015/18567, 25 February 2016, § 62).

43. 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 be deprived of liberty in accordance with due process of law are laid down 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 down in this provision prevails (see *Murat Narman*, no. 2012/1137, 2 July 2013, § 42).

44. One of the circumstances under which an individual may be deprived of liberty as set forth in Article 19 of the Constitution is the detention of an individual for the purposes of *executing a court decision* or *fulfilling an obligation prescribed in the law*, which is laid down in the second paragraph thereof.

45. There may be differences between these two forms of detention by the very nature of detention. Detention by virtue of a court decision may also serve the disciplinary purpose, whereas the detention to secure fulfilment of an obligation prescribed by law cannot be of such nature. Detention to secure fulfilment of an obligation prescribed by law may be effected merely for, and until, the fulfilment of the said obligation (see *Mustafa Karaca* [Plenary], no. 2020/15967, 20 May 2021, §§ 44 and 45). Therefore, in order for a deprivation of liberty to be *justified under an obligation prescribed by law*, the person must have failed to fulfil such an obligation (see *Muhammed Neşet Girasun*, no. 2017/22254, 2 June 2020, § 46).

46. On the other hand, if the norm forming the basis of the legal obligation prescribed by law requires a decision by a judge or a court, then the deprivation of liberty does not arise from the *fulfilment of a legal obligation prescribed by law*, but rather from the *execution of a court decision* (see *Kübra Çankaya*, no. 2021/7876, 13 April 2022, § 37).

47. The phrase "*detention of a person pursuant to an obligation prescribed by law*", included in Article 19 § 2 of the Constitution, allows for detention of individuals who are not under suspicion of having committed an offence, for the purpose of securing the fulfilment of obligations prescribed by law. The term "detention" as used in this context has an autonomous meaning and refers not to detention as defined under criminal procedure law, but rather to the deprivation of a person's physical liberty by public authorities (see the Court's decision no. E.2020/59, K.2023/53, 22 March 2023, § 116).

48. According to the provisions on witness testimony in Code no. 5271, witnesses who are duly summoned by public prosecutor's offices, magistrate judges, or courts are, unless they have a valid excuse, under an obligation to appear before the summoning judicial authority; to take an oath unless they are among those who are to be heard without oath or may refrain from taking the oath, and -unless they have the right to refrain from testifying or have such a right but do not exercise it- they are obliged, in line with Articles 272 and 273 of Turkish Criminal Code no. 5237, to give truthful testimony on the matters in question and to answer the questions posed to them accurately, except where such answers may expose themselves or persons listed in Article 45(1) of Code no. 5271 to criminal prosecution.

49. The norms underlying the obligation to testify as a witness do not stipulate any necessity for obtaining a decision from a judge or a court in order for the obligation to be enforced. Therefore, the question whether depriving a person of his liberty -on the mere grounds that he has refused to testify or to take an oath before public prosecutor's offices, magistrate judges, or courts, in the absence of a justified excuse- must be assessed within the scope of detention "*to secure the fulfilment of a legal obligation prescribed by law*" under Article 19 § 2 of the Constitution.

50. "In the present case, the applicant was held in a penitentiary institution between 2 April 2019 and 2 May 2019 on the grounds that he had refused to testify without a justified excuse, despite being under a legal obligation to do so, and with the aim of securing his testimony. Accordingly, it is evident that in the present case, the applicant's right to personal liberty and security was interfered with, as he had been held in a penitentiary institution for a certain period of time.

b. Whether the Interference Constituted a Violation

51. 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 on the grounds specified in the relevant articles of the Constitution without

infringing upon their essence. Such restrictions shall not be contrary to the letter and spirit of the Constitution, to the requirements of a democratic social order and a secular republic, and to the principle of proportionality."

52. The impugned interference would amount to a violation of Article 19 of the Constitution unless it complies with the conditions prescribed in Article 13 of the Constitution.

53. Therefore, it must be determined whether the impugned interference complies with the conditions of *being prescribed by law*, *pursuing the legitimate aims prescribed* in the relevant provisions of the Constitution, and not being contrary to the principle of *proportionality*, which are stipulated in Article 13 of the Constitution.

54. 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 stipulates that the procedure and conditions of the circumstances under which the right to personal liberty and security may be restricted must be prescribed by law. Pursuant to the general rule laid down in Article 19 § 2 of the Constitution, which provides for that the procedure and conditions of the circumstances under which the right to personal liberty and security may be restricted must be prescribed by law, the detention ordered to "*to secure the fulfilment of a legal obligation prescribed by law*" must be regulated by law. In this context, the phrase "law" requires the formal existence of a law. A law in the formal sense refers to a legislative act adopted by the Grand National Assembly of Türkiye in accordance with the procedure set out in the Constitution and enacted under the title of a law (see *Muhammed Neşet Girasun*, § 45).

55. In addition, the obligation prescribed by law must be concrete and definite, rather than being of a general nature. For a deprivation of liberty to fall within the scope of this provision, the individual must have failed to fulfil an obligation that is clearly required by law (see *Muhammed Neşet Girasun*, § 46). Moreover, given the importance of the right to personal liberty and security in democratic societies and its aim of preventing arbitrary deprivation of liberty, any measure based on law must be foreseeable, and the law must provide sufficient

safeguards against arbitrariness (for partially similar considerations, see *Mustafa Karaca*, § 46).

56. Accordingly, for a deprivation of liberty to be justified on the grounds of *fulfilling an obligation prescribed by law*, it is essential that the interference with the right to personal liberty and security has a legal basis.

57. The applicant argued that he had refrained from testifying because his testimony could lead to new criminal accusations against him. Therefore, it must first be determined whether the applicant was under a legal obligation to testify as a witness before the Chief Public Prosecutor's Office, taking into account the *right to remain silent* and the *privilege against self-incrimination*.

58. In Article 38 of the Constitution, titled *"Principles relating to offences and penalties"*, it is set forth that *"No one shall be compelled to make a statement that would incriminate himself/herself or his/her legal next of kin, or to present such incriminating evidence"*, thus enshrining *the right to remain silent and the privilege against self-incrimination*. This right also constitutes one of the safeguards inherent in the right to a fair trial under Article 36 of the Constitution (see the Court's decision no. E.2022/75, K.2022/128, 26 October 2022, § 14). According to its legislative intent, the aim of Article 38 § 5 of the Constitution is to prohibit any treatment that is contrary to human nature and to prevent inhuman treatment that could amount to torture.

59. In light of its legislative intent, there is no doubt that Article 38 § 5 of the Constitution provides safeguards for individuals who are under a criminal charge, specifically in relation to the proceedings conducted against them on the basis of such charges (for the constitutional meaning of the concept of *criminal charge*, see, *inter alia*, *Cevdet Genç*, no. 2012/142, 9 January 2014, § 36; and B.Y.Ç., no. 2013/4554, 15 December 2015, § 31). However, the said paragraph does not specify the status of the person who may be exempted from testifying, nor does it make reference to any specific judicial proceedings. This indicates that the safeguard is not limited solely to individuals formally charged with a criminal offence or to proceedings against such individuals. Accordingly, the

provision prohibits the use of coercion both against individuals who are not yet charged but may face criminal accusations as a result of their statements, and against individuals who are already facing charges, for the purpose of obtaining self-incriminating statements or evidence. Therefore, even a person who is called to testify as a witness should not be compelled to make a statement, pursuant to Article 38 § 5 of the Constitution, if such statement may lead to a new criminal charge against him, contribute to the extension of existing charges, or be used as evidence to support the existing ones.

60. In the present case, M.Ş., who is under investigation by the Adıyaman Chief Public Prosecutor's Office for the offence of membership of an armed terrorist organisation (FETÖ/PDY), stated in his statement taken by the law enforcement authorities that the applicant, with whom he had worked for a period in the same penitentiary institution, attended the religious talks held by H.K., who had worked as a teacher at a private tutoring centre, identifying the applicant and Mu.Ş. from photographs as persons who participated in those talks organised by H.K. In light of these statements and identifications, the Chief Public Prosecutor's Office sought to hear the applicant as a witness within the scope of the investigation conducted against H.K. and Mu.Ş.; however, the applicant stated that he did not wish to testify in the capacity of a witness. The Chief Public Prosecutor's Office, considering that the applicant could not refuse to testify due to the existence of a conviction against him, sought the applicant's disciplinary detention, which was granted by the incumbent magistrate judge.

61. The applicant was convicted by the criminal court and sentenced to imprisonment for membership of an armed terrorist organisation. Although his appeal against this conviction was dismissed by the Regional Court of Appeal, the conviction had not yet become final at the time when the applicant was called to testify as a witness. One of the grounds for the conviction was that the applicant allegedly invited members of the organisation to organisational meetings held under the guise of *religious talks* and collected money for the organisation from the participants under names such as "sacrifice donations". Considering that the applicant denied the charges throughout the

proceedings and that the incident about which he was expected to testify concerned those meetings he was accused of attending, it is clear that any statement he would have given as a witness could have been used against him in the ongoing criminal proceedings. Moreover, his statement could be relied on for raising a new criminal charge against him. This is because the Turkish legal system does not provide any judicial immunity for witnesses that would prevent their statements from being used against them either in ongoing proceedings related to existing charges or in the initiation of new criminal accusations.

62. In this respect, forcing a witness to choose between the risk of being subjected to new criminal charges or the upholding of a conviction that might otherwise have been overturned, and the imposition of disciplinary detention, are incompatible with the requirements of the right to remain silent and the privilege against self-incrimination. Therefore, it must be accepted that, in the present case, the applicant was not under a legal obligation to testify as a witness before the Chief Public Prosecutor's Office. Accordingly, it has been concluded that the interference with the applicant's right to personal liberty and security lacked a legal basis.

63. Since the interference did not satisfy the requirement of lawfulness, the Court has found it unnecessary to examine whether it pursued a *legitimate aim* or complied with the requirement of *proportionality*.

64. For these reasons, the applicant's placement in disciplinary detention to *secure the fulfilment of an obligation prescribed by law* was found unlawful. Accordingly, it must be held that there was a violation of the right to personal liberty and security under Article 19 § 2 of the Constitution.

VI. REDRESS

65. The applicant requested the Court to find a violation and to order a re-trial, as well as to award him 10,000 Turkish liras (TRY) in compensation for pecuniary damage and TRY 90,000 in compensation for non-pecuniary damage.

66. In the present case, the Court found a violation of the applicant's right to personal liberty and security under Article 19 § 2 of the Constitution, due to the unlawful nature of his disciplinary detention to *secure fulfilment of an obligation prescribed by law*. The disciplinary detention imposed on the applicant had been already executed before he lodged this application with the Court. Therefore, the only appropriate measure to redress the consequences of the violation was the award of compensation.

67. The Court has accordingly awarded – in consideration of the amount the applicant claimed– a net amount of TRY 90,000 in compensation of his non-pecuniary damage, which could not be redressed by merely finding of a violation of the right to personal liberty and security. The applicant did not submit any information or documents in support of his claim for pecuniary damage. Therefore, his claim for pecuniary compensation must be dismissed.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 19 March 2024 that

A. The alleged violation of the right to personal liberty and security be DECLARED ADMISSIBLE;

B. The right to personal liberty and security was VIOLATED insofar as it related to Article 19 § 2 of the Constitution;

C. A net amount of TRY 90,000 be PAID to the applicant in compensation for non-pecuniary damage, and the remaining claims for compensation be REJECTED;

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

E. A copy of the judgment be SENT to the Şanlıurfa Magistrate Judge

no. 3 (miscellaneous no. 2019/1237) and Şanlıurfa Magistrate Judge no. 4 (miscellaneous no. 2019/1787) for information; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

BURHAN YAZ (3)

(Application no. 2021/7919)

29 May 2024

On 29 May 2024, 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 *Burhan Yaz (3)* (no. 2021/7919).

(I-IV) SUMMARY OF THE FACTS

[1-35] On 28 August 2018, following the fourth hearing held before the 26th Chamber of the Ankara Assize Court, the applicant was subjected to a preventive measure of house arrest, pursuant to Article 109 § 3 (j) of the Code of Criminal Procedure no. 5271 (Code no. 5271). He remained under house arrest until the last hearing of 27 November 2018.

At the end of the proceedings, the applicant was convicted of membership of the Fetullahist Terrorist Organisation / Parallel State Structure (FETÖ/PDY) and sentenced to 8 years, 1 month and 15 days' imprisonment. The court also ordered the continuation of his pre-trial detention.

His appeal on points of facts and law was dismissed. Upon his subsequent appeal on points of law before the Court of Cassation, his conviction was upheld and became final on 21 September 2020.

According to the writ of execution (*müddetname*) issued by the Kayseri Chief Public Prosecutor's Office on 18 January 2021, the applicant's final sentence, as upheld by the Assize Court, was 8 years, 1 month and 15 days' imprisonment. His conditional release date was indicated as 4 December 2022, and his full release date was indicated as 15 December 2024.

On 22 January 2021, the applicant submitted a petition to the Kayseri Chief Public Prosecutor's Office requesting correction of the date of offence in the writ of execution issued on 18 January 2021, adjustment of the date when he placed in the penitentiary institution, application of a two-thirds rate instead of three-quarters – for a deduction from the total length of his imprisonment – pursuant to the amendment introduced by Law no. 7242, dated 14 April 2020, which was more

favourable to him, and deduction of the time spent under house arrest from his imprisonment. However, his request was dismissed. His challenge to the dismissal decision was also rejected, with no right of appeal, by the 1st Chamber of the Kayseri Assize Court on 8 February 2021.

On 26 February 2021, the applicant lodged an individual application with the Court.

On 11 August 2021, the applicant submitted a petition to the Kayseri Sentence-Execution Judge no. 1, stating that his sentence had been miscalculated and requesting correction of the deduction.

The Sentence-Execution Judge accepted the applicant's request for deduction of 45 days, corresponding to half of the 90-day period he spent under house arrest between 28 August 2018 and 26 November 2018, pursuant to the amendment made to Article 109 § 6 of the Code of Criminal Procedure by Law no. 7331.

On 18 August 2021, the Kayseri Chief Public Prosecutor's Office issued a revised writ of execution in respect of the applicant. In this document, 45 days, corresponding to half of the 90-day period during which the applicant had been subject to preventive measure of house arrest, were deducted from his sentence. His final sentence was confirmed as 8 years, 1 month and 15 days; his conditional release date was set for 20 October 2022, and his full release date for 31 October 2024.

The applicant was released on probation on 10 December 2021.

V. EXAMINATION AND GROUNDS

36. The Constitutional Court ("the Court"), at its session of 29 May 2024, examined the application and decided as follows:

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

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

37. The applicant maintained that his right to personal liberty and

security had been violated on the grounds that the period he spent under house arrest as a preventive measure had not been deducted from his imprisonment sentence.

38. In its observations, the Ministry submitted that the writ of execution had been revised in respect of the applicant and that, in this new calculation, forty-five days, corresponding to half of the ninety-day period during which he was placed under house arrest, had been deducted from his sentence. The Ministry considered that this matter should be taken into account in the assessment of the applicant's victim status.

39. The applicant argued that, since the preventive measure of house arrest was similar in nature to detention, the entire period spent under this measure should have been deducted from his sentence.

2. The Court's Assessment

a. Admissibility

40. The alleged violation of the right to personal liberty and security must be declared admissible for not being manifestly ill-founded, and there being no other grounds for its inadmissibility.

b. Merits

41. Deduction refers to the reduction of imprisonment sentence by taking into account any period spent in situations which restricted an individual's liberty prior to the final conviction. The purpose of this mechanism is to remedy the unfairness arising from the deprivation of liberty of a person who, although suspected of an offence, has not yet been convicted. The deduction of periods of deprivation of liberty from imprisonment serves to remedy this unfairness. Deduction fulfils a compensatory function for a person whose liberty has been restricted, as required by considerations of justice and equity. Indeed, the European Court of Human Rights ("ECHR") has held that a deduction may constitute redress within the meaning of Article 5 of the European Convention on Human Rights ("Convention"), where it was expressly

intended to compensate for a violation of the right to personal liberty and had a measurable impact on the sentence served by the individual concerned (see *Porchet v. Switzerland*, no. 36391/16, 8 October 2019, §§ 18-25).

42. Accordingly, the deduction mechanism may be regarded as an instrument designed to give effect, in the field of criminal law, to the right to personal liberty and security guaranteed by the Constitution. Under Turkish law, Article 63 of the Turkish Criminal Code (Code no. 5237) provides: *"any period spent as a result of measures restricting personal liberty prior to the final conviction shall be deducted from the imposed prison sentence"*. This establishes a system of mandatory deduction, under which the time spent in pre-trial detention must be credited towards the sentence, even if the detention resulted, in whole or in part, from the convicted person's own actions.

43. Moreover, the Court has held that situations directly or indirectly affecting the duration of an individual's stay in a penitentiary institution must be assessed within the scope of the right to personal liberty and security enshrined in Article 19 of the Constitution (see *İbrahim Uysal*, no. 2014/1711, 23 July 2014, § 26; and *Günay Okan*, § 13). Decisions concerning the deduction of periods spent as a result of measures restricting personal liberty serve to determine the scope of a prison sentence and, accordingly, has an essential bearing on the right to personal liberty and security. This is because the deduction mechanism is directly related to the duration that an individual is required to spend in a penitentiary institution.

44. For these reasons, it has been concluded that the deduction mechanism should be regarded as a safeguard under Article 19 of the Constitution. Accordingly, a complete prohibition on the deduction from a sentence of periods spent as a result of measures restricting personal liberty falls foul of the right to personal liberty and security. However, the recognition of the deduction mechanism as a safeguard under Article 19 of the Constitution does not preclude the determination of the period to be deducted, taking into account various factors such as the effects of the measures restricting personal

liberty on the individual's physical freedom and the manner in which they are implemented.

45. Pursuant to the amendment introduced by Law no. 7331 to Article 109 § 6 of the Code of Criminal Procedure (Code no. 5271), each two days spent under house arrest as a preventive measure shall be counted as one day for the purposes of sentence deduction. In the present case, in accordance with the aforementioned legislative amendment, forty-five days -corresponding to half of the ninety-day period during which the applicant was under house arrest- were deducted from his sentence. The applicant maintained that the entire period spent under the measure should have been deducted.

46. In this sense, it must be examined whether counting two days spent under house arrest as one day for the purposes of deduction amounts to a violation of the right to personal liberty and security.

47. In one of its previous judgments, the Court has concluded that, given its nature, manner of application, and characteristics, the house arrest imposes a restrictive effect on the applicant's freedom of movement that is considerably more severe than ordinary travel restrictions, thus constituting an interference with the right to personal liberty and security (see *Esra Özkan Özakça* [Plenary], no. 2017/32052, 8 October 2020, §§ 68-76). Accordingly, the period spent under this measure, which restricts the right to personal liberty and security, should be deducted from the overall period of imprisonment. However, this requirement does not imply that the entire period must necessarily be deducted. A different deduction rate may be applied, having regard to the nature of the measure in question.

48. In this regard, it should be acknowledged that the preventive measure of house arrest imposes a less severe restriction on fundamental rights and freedoms than detention. While individuals are required to constantly remain at home, this does not hinder them from engaging in social interactions with other residents or visitors, nor from utilizing any means of personal or collective communication. Moreover, in certain cases, individuals may be allowed to leave their residence with permission (see *M.S.*, no. 2018/25505, 25 February 2021,

§ 82). Taking into account that the preventive measure of house arrest has a less severe impact on fundamental rights and freedoms compared to detention, the Court has concluded that counting two days spent under house arrest as one day for the purposes of sentence deduction is proportionate.

49. For these reasons, it must be held that there was no violation of the personal liberty and security enshrined in Article 19 of the Constitution.

Mr. Hasan Tahsin GÖKCAN and Mr. Selahaddin MENTEŞ concurred with the conclusion, but on different grounds.

B. Alleged Violation of the Right to Respect for Private Life

1. The Applicant's Allegations

50. The applicant alleged a violation of his right to respect for private life on the grounds that the measure of house arrest imposed on him was enforced through the use of an electronic ankle bracelet. He submitted that the use of the electronic monitoring device led to social stigma within his community, that his social life was severely restricted as a result of being unable to leave his home, and that his mental health deteriorated during the period in which the measure was in effect.

2. The Court's Assessment

51. Pursuant to Article 47 § 5 of Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court, dated 30 March 2011, and Article 64 § 1 of the International Regulations of the Court, individual applications must be lodged within 30 days upon the exhaustion of the available legal remedies or, in cases where no available legal remedy exists, by the date when the violation is become known. Applications may be submitted directly to the Court or through other courts or foreign representations (see *Yasin Yaman*, no. 2012/1075, 12 February 2013, §§ 18, 19).

52. Compliance with the time-limit for lodging an individual application, which is one of the admissibility requirements, is a

condition that must be sought *ex officio* at every stage of the individual application proceedings (see *Taner Kurban*, no. 2013/1582, 7 November 2013, § 19).

53. The preventive measure imposed on the applicant was lifted on 27 November 2018. However, the applicant lodged the individual application on 26 February 2021, although it should have been submitted within thirty days from the date on which the measure ceased to apply.

54. For these reasons, this part of the application must be declared inadmissible for being *time-barred*, as the applicant failed to lodge his application within thirty days after the cessation of the alleged interference.

C. Alleged Violation of the *Nullum Crimen, Nulla Poena Sine Lege* Principle

1. The Applicant's Allegations

55. The applicant alleged that, pursuant to Law no. 7242, the proportion for conditional release had been reduced from three-quarters to two-thirds, and that as this amendment was more favourable (*lex mitior*), it should have been applied to him. However, he argued that the date of conditional release indicated in the writ of execution (*müddetname*) had been calculated based on the former three-quarters ratio, which was in breach of the law. He claimed that his objections in this regard had not been taken into account by the domestic courts. He accordingly alleged violations of the right to personal liberty and security, the right to be tried by an independent and impartial tribunal, as well as the prohibition of discrimination.

2. The Court's Assessment

56. Article 38 § 1 of the Constitution, titled *"Principles relating to offences and penalties"*, reads as follows:

"No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a

heavier penalty for an offence other than the penalty applicable at the time when the offence was committed."

57. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself. The applicant's complaint concerns in essence the non-application of the more lenient law in the context of conditional release. Therefore, the Court has assessed the applicant's case under the *nullum crimen, nulla poena sine lege* principle.

58. In this context, it must first be ascertained whether the principles set forth in Article 38 of the Constitution are applicable to the execution of the sentence following a conviction.

59. The notion of *penalty* set out in Article 38 § 1 of the Constitution is an autonomous concept. Accordingly, in order to ensure the effective protection of the principle safeguarded by this provision, an assessment may be made as to whether a measure amounts, in substance, to a penalty, regardless of the domestic courts' classification or the terminology used in the legislation (see *Yunis Karataş* [Plenary], no. 2021/34231, 26 January 2023, § 43).

60. On the other hand, a distinction must be made between a measure that qualifies as a *penalty* and one that relates to the execution or enforcement of a sentence. In this regard, where the nature and purpose of the measure concern a modification related to sentence reduction or early release, such a measure may not, as a rule, be regarded as a *penalty* within the meaning of Article 38 of the Constitution. Article 38 of the Constitution is concerned not with the manner in which a sentence is executed, but with the sentence itself, in other words, whether the essence of the penalty is affected. However, in practice, the distinction between a measure that constitutes a *penalty* and one that merely concerns the *execution of a sentence* may not always be clear-cut. As a result, it should be taken into account that the steps to be taken by administrative authorities or courts after the imposition, or during the execution, of a sentence may, in effect, redefine or alter the nature and scope of the penalty originally imposed by the trial court. Otherwise, it would amount to the acknowledgement that administrative authorities

or courts may adopt measures which retrospectively redefine the scope of the sentence in a manner that could not have been foreseen by the convicted person at the time of the offence or sentencing and that would be to his detriment (see *Yunis Karataş*, § 44).

61. In determining whether a measure falls within the scope of substantive criminal law or the law of execution of sentences, the assessment should be based not merely on its formal classification, but rather on its nature. In this context, where a measure concerns a matter directly related to the penalty to be imposed on the accused and is adopted with punitive intent, it must be regarded as falling within the realm of substantive criminal law. Accordingly, in order to determine whether a measure applied to a convicted person falls within the protection afforded by Article 38 of the Constitution, it is necessary to assess whether the measure constitutes a consequence of a criminal conviction. This assessment should take into account the nature and purpose of the measure, how it is characterised by the courts and competent administrative authorities, the procedures governing its adoption and implementation, and the degree of its severity. In order to determine whether a measure adopted during the execution of a sentence concerns merely the manner of execution, or whether it affects the substance and scope of the sentence itself, it is essential to examine what the imposed penalty actually entailed under the law in force at the relevant time, in other words, to identify the true nature of the sentence. In this context, the Criminal General Assembly of the Court of Cassation, stated the followings in its judgment no. E.1985/268, K.1985/361 and dated 18 November 1985: *"…Although laws amending the regime governing the execution of sentences must be applied immediately, such amendments must not alter the nature of the sentence. If a legislative amendment concerning the execution of a sentence results in the extension of the term of imprisonment or imposes an additional burden on the convicted person, it alters the nature of the sentence and therefore cannot be applied with immediate effect."* (see also a similar judgment by the 6th Criminal Chamber of the Court of Cassation no. E.1973/6567, K.1973/6535 and dated 5 July 1973). It has been thus concluded that the mere fact that a measure falls under the law of execution does not in itself justify its immediate application, and instead, it must be assessed whether the

measure extends the term of imprisonment or increases the burden on the convicted person (see *Yunis Karataş*, § 45).

62. In this context, for the purpose of determining the constitutional protection, it is necessary to establish whether the institution of conditional release falls within substantive criminal law or the law of execution of sentences. A careful analysis of the applicable laws is thus necessary. Pursuant to Article 38 of the Constitution, and in light of the *nullum crimen, nulla poena sine lege* principle, the main issue regarding execution law concerns the temporal applicability of provisions governing theexecution of sentences. With regard to the temporal application of laws, there are three principles: retroactivity, prospectivity, and immediate application. The manner in which these principles apply in criminal law is set out in Article 38 of the Constitution and Article 7 of Turkish Criminal Code no. 5237. However, the guarantees enshrined in Article 38 of the Constitution would come into play in determining whether these principles also extend to the rules governing the execution of sentences (see *Yunis Karataş*, § 46).

63. In principle, the provisions of the law of the execution of sentences are applied immediately. Accordingly, the underlying purpose is not to ensure whether a given provision produces a beneficial or adverse effect for the convicted person, but rather to implement more effective methods aimed at rehabilitation of the convicted person and his reintegration into society, to improve security and discipline within the penal institution, and to make the prison environment more humane and tolerable for inmates. However, Article 7 § 3 of Code no. 5237 introduces an exemption in this sense, according to which provisions relating to the execution regime, such as the suspension of imprisonment, conditional release, and recidivism, cannot be to the detriment of the convicted persons. In other words, the institution of conditional release is subject to the temporal application rules under substantive criminal law (see *Yunis Karataş*, § 47).

64. On the other hand, when a court orders imprisonment, it is, in principle, deemed to be a sentence that may be subject to conditional release -even if not expressly stated in the judgment-, unless such release is explicitly excluded by law. In other words, the imprisonment

sentence imposed by the court may turn into a sentence for which the option of conditional release is applicable. In this respect, the period that must be served in a penitentiary institution in order to qualify for conditional release effectively determines the actual length of time the convicted person will spend in the penitentiary institution, thus concerning the scope of the sentence in terms of the convicted person. Accordingly, this matter must be assessed within the framework of the *nullum crimen, nulla poena sine lege* principle enshrined in Article 38 of the Constitution (see *Yunis Karataş* [Plenary], no. 2021/34231, 26 January 2023, § 48; *Efendi Yaldız*, no. 2013/1202, 25 March 2015, § 42; and *Metin Durmaz*, no. 2013/7764, 25 March 2015, § 60).

65. After it is established that conditional release falls within the scope of Article 38 of the Constitution, another issue to be addressed is whether a more lenient law may be applied retrospectively. As stated above, as a rule, the provisions of execution law are applied with immediate effect. However, an exception to this rule has been recognized in relation to conditional release, which is considered part of the execution regime, under Article 7 § 3 of Code no. 5237, insofar as the provisions concerning conditional release must not result in a less favourable outcome for the convicted person. Therefore, the principles set out in Article 7 § 2 of Code no. 5237 are applicable also to conditional release. This paragraph provides for that *"if the provisions of the law in force at the time the offence was committed and those of a subsequently enacted law differ, the law more favourable to the offender shall apply and be executed."* As previously stated by the Court, this principle, referred to as the retrospective application of the more lenient law, is a constitutional requirement under Article 38 (see the Court's decision no. E.2019/9, K.2019/27, 11 April 2019, §§ 13-20).

66. When this principle is applied to conditional release, it follows that a person who was entitled to conditional release under the law in force at the time of the offence cannot be deprived of this right in case where he is no longer entitled to conditional release under a law enacted after the offence, as he cannot be subjected to the more disadvantageous provision, and that however, provisions enacted following the commission of the offence must be applied with immediate effect

insofar as they are more favourable to the convicted person (see *Yunis Karataş*, § 50). The principle of the retrospective application of the more lenient law applies separately to both conditions of conditional release. In this regard, any legislative amendment that reduces the period to be served in a penitentiary institution would be favourable to the convicted person.

67. In the present case, the applicant was sentenced to a term of imprisonment for membership of an armed terrorist organisation under Law no. 3713. Prior to the legislative amendments introduced in 2020 by Law no. 7242, the length of the period -during which the person convicted for membership of an armed terrorist organisation under Law no. 3713 is to stay in the penitentiary institution before becoming eligible for conditional release- was not directly specified in Law no. 3713. Instead, reference was made to Article 107 § 4 of Law no. 5275 on the Execution of Sentences and Security Measures, which provided that such persons must serve three-quarters of their sentence before being eligible for conditional release. There was no dispute that this three-quarters rule applied to those sentenced to imprisonment for offences falling within the scope of Law no. 3713. However, in 2020, certain amendments concerning conditional release were introduced by Law no. 7242.

68. In this context, Article 48 of Law no. 7242 replaced the phrase "*three-quarters*" in Article 107 § 4 of Law no. 5275 with "*two-thirds*". Furthermore, the following sentence was added to the same paragraph: *"In respect of offences for which the conditional release ratio exceeds two-thirds, the applicable conditional release ratio shall continue to apply"*. In addition, Article 65 of Law no. 7242 introduced an amendment to of Article 17 § 1 of Law no. 3713, titled *"Conditional Release"*, adding the following sentence at the end of the paragraph: *"However, in respect of fixed-term imprisonment, the conditional release ratio shall be applied as three-quarters"*.

69. As a result of these amendments, although the ratio specified in Article 107 § 4 of Law no. 5275 was changed to two-thirds, it appears that there has been no change in the conditional release ratio applicable

to those sentenced to a fixed-term of imprisonment under Law no. 3713, by virtue of the subsequently-added sentences: *"However, in respect of fixed-term imprisonment, the conditional release ratio shall be applied as three-quarters"* in Law no. 3713, and *"In respect of offences for which the conditional release ratio exceeds two-thirds, the applicable conditional release ratio shall continue to apply"* in Law no. 5275. For these convicted persons, the applicable conditional release ratio has been all the time three-quarters both before and after the entry into force of Law no. 7242. In other words, no more lenient law that would cover these individuals has entered into force.

70. Therefore, in the present case, the alleged violation of the *nullum crimen, nulla poena sine lege* principle must be declared inadmissible for being manifestly ill-founded.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 29 May 2024 that

A. 1. The alleged violation of the right to personal liberty and security be DECLARED ADMISSIBLE;

2. The alleged violation of the right to respect for private life be DECLARED INADMISSIBLE for *being time-barred*;

3. The alleged violation of the *nullum crimen, nulla poena sine lege* principle be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

B. The right to right to personal liberty and security safeguarded by Article 19 of the Constitution WAS NOT VIOLATED;

C. The applicant, whose request for legal aid was granted, be EXEMPTED FROM the litigation costs pursuant to Article 339 § 2 of the Code of Civil Procedure no. 6100 of 12 January 2011, which would otherwise cause him financial hardship; and

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

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE (ARTICLE 20)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

FATİH ÖZALTIN AND İBRAHİM ESİNLER

(Application no. 2019/17374)

29 November 2023

On 29 November 2023, the Plenary of the Constitutional Court found a violation of the right to respect for private life, safeguarded by Article 20 of the Constitution, in the individual application lodged by *Fatih Özaltın and İbrahim Esinler* (no. 2019/17374).

(I-IV) SUMMARY OF THE FACTS

[1-20] Following their appointments as associate professors of medicine at Hacettepe University ("the University"), the applicants set up private medical clinics to pursue their professional activities outside university hours.

The Law no. 2547 on Higher Education was amended to include a provisional article requiring medical academics engaged in private practice to cease such activities within three months from the introduction of this article. The Constitutional Court ("the Court") found this provision to be inconsistent with Article 2 of the Constitution and subsequently annulled it (see the Court's decision no. E.2014/61, K.2014/166, 7 November 2014). Following the annulment, the applicants continued their professions as associate professors at the University and maintained their private practices.

However, their applications for promotion to professor were not processed due to their failure to fulfil an additional requirement according to which those who will be appointed shall submit a written declaration stating that, for a period of 5 years (excluding education, training, and research activities conducted outside the institution), they will not engage in any income-generating professional activity, and shall attach to their written declaration official documents confirming that they are not currently engaged in any income-generating professional activity.

Thereupon, the applicants individually sought the annulment of this requirement before the administrative courts, which found the additional requirement to be unlawful and thus annulled it. In the reasoning of the courts' decisions, it was noted that Article 26 of Law no. 2547 lays down the minimum requirements for promotion

and appointment to the position of professor, and that, in addition to these, universities may impose additional requirements solely for the purpose of enhancing scientific quality. However, it was stated that the additional requirement at issue could not be said to serve that purpose. The decisions further indicated that academic staff engaged in private professional practice are obliged, during working hours, to perform all forms of patient care and treatment under the same conditions as other members of the academic staff; that the applicants were, at the material time, serving as associate professors engaged in private professional practice; and that such a difference between academic staff holding the title of associate professor and those holding the title of professor, when working in the same unit, could not be justified.

Following the relevant annulment decisions, both applicants were appointed as professors by the University.

Nevertheless, the University's appeal against the annulment decisions was successful, resulting in the quashing of these decisions and the dismissal of the actions with final effect.

V. EXAMINATION AND GROUNDS

21. The Court, at its session of 29 November 2023, examined the application and decided as follows:

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

22. The applicants asserted that they were serving in the capacity of faculty members holding the title of associate professor, practicing their profession independently without receiving revolving fund payments from the university. They further stated that they were appointed as professors following the annulment by the first-instance courts of the additional requirement included in the call for applications for the position. However, they expressed their concern that the appellate courts' subsequent rejection could result in the annulment of their appointments. In this sense, the applicants argued that, as the appellate decisions were final and not subject to further appeal, they had no access to a legal remedy. They claimed that if the additional requirement were enforced, their professional reputation would be

harmed, noting that many faculty members currently hold positions as professors and practice their professions independently. On these grounds, they maintained that their right to respect for private life, the right to a fair trial, and the principle of equality had been violated.

23. The Ministry, in its observations, noted that the applicants had lodged individual applications on the grounds of the risk of annulment of their appointments as professors, which had been made pursuant to the annulment decisions of administrative courts, due to the subsequent final rejection decisions of the appellate courts. The Ministry emphasised that it is for the relevant administrative authority to interpret and execute court decisions. Accordingly, the said applications concern a hypothetical event that has not occurred yet, and thus whether the applicants have victim status should be considered in the review of admissibility.

24. In their counter-statements, the applicants reiterated their opinions and requests set out in their petitions, asserting that they have the status of potential victims. They argued that following the final rejection decisions of the appellate court, the additional requirement in the call for applications for the position of professor had once again become applicable and that the University might initiate proceedings to annul their appointments.

2. The Court's Assessment

25. Article 20 § 1 of the Constitution, titled "*Privacy of private life*", reads, insofar as relevant, as follows:

"*Everyone has the right to demand respect for his/her private … life. Privacy of private … life shall not be violated.*"

26. Article 130 of the Constitution, titled "*Institutions of higher education*", reads, insofar as relevant, as follows:

"*… The establishment of institutions of higher education, their organs, their functioning and elections, their duties, authorities and responsibilities, the procedures to be followed by the state in the exercise of the right to supervise and inspect the universities, the duties of the teaching staff, their titles,*

appointments, promotions and retirement, the training of the teaching staff, the relations of the universities and the teaching staff with public institutions and other organizations, the level and duration of education, admission of students into institutions of higher education, attendance requirements and fees, principles relating to assistance to be provided by the State, disciplinary and penalty matters, financial affairs, personnel rights, rules to be abided by the teaching staff, the assignment of the teaching staff in accordance with inter-university requirements, the pursuance of training and education in freedom and under guarantee and in accordance with the requirements of contemporary science and technology, and the use of financial resources provided by the State to the Council of Higher Education and the universities, shall be regulated by law…"

27. The Court is not bound by the legal qualification of the facts by the applicants and it makes such an assessment itself.

28. It has been observed that the applicants' allegations concern the introduction of an additional requirement for appointment as professors, namely the condition of not engaging in income-generating professional activities, and the risk that their appointments may be annulled due to their ongoing freelance professional practice. It is evident that individuals' professional lives are closely linked to their private lives, and that legal proceedings involving measures or interferences affecting one's professional life may fall within the scope of the right to respect for private life. However, it is first necessary to establish criteria as to the circumstances under which such measures or interferences in professional life may be regarded as falling within the scope of private life, and to determine which types of disputes brought before the Court may be considered applicable in this context. Assessments must be carried out in light of these criteria (see *Tamer Mahmutoğlu* [Plenary], no. 2017/38953, 23 July 2020, § 82).

29. In the event that the present application is dealt with under this aspect and after it is determined that the right to respect for private life is applicable to the present case, it is considered that all the applicants' allegations should be examined within the framework of the right to respect for private life.

a. Applicability

30. In its several previous judgments, the Court has frequently stressed that the right to respect for private life also embodies the right to be in contact with those in the relevant person's circle and assures the right to maintain a private social life; and that individuals' professional life is closely interrelated with their private life (see *K.Ş.*, no. 2013/1614, 3 April 2014, § 36; *Serap Tortuk*, no. 2013/9660, 21 January 2015, § 37; *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 62; *Ata Türkeri*, no. 2013/6057, 16 December 2015, § 31; *Ö.Ç.*; no. 2014/8203, 21 September 2016, § 50; *Haluk Öktem* [Plenary], no. 2014/13433, 13 October 2016, § 27; and *E.G.* [Plenary], no. 2014/12428, 13 October 2016, § 34).

31. In its recent *Tamer Mahmutoğlu* judgment, the Court ruled that the *right to respect for private life* is applicable in cases where private life concerns an individual's actions in his/her professional life. In the same judgment, the Court also defined the circumstances required to assess, in the context of the right to respect for private life, interferences with professional life imposed without reference to a ground relating to private life (see *Tamer Mahmutoğlu*, §§ 84-90).

32. In the specific circumstances of the present case, it has been understood that, pursuant to the additional requirement, the applicants were expected to terminate their ongoing freelance professional activities; otherwise, their appointments as professors—despite fulfilling the academic criteria—could be annulled. In this regard, it may be stated that the impugned additional requirement had a serious impact on the applicants' professional and academic activities, and, consequently, on *their private lives*, attaining a certain level of severity. Considering the content of the additional requirement, it is inevitable that the related measures would have serious implications for the applicants' ability to maintain their professional and academic standing and to continue practicing their profession. Accordingly, it has been concluded that, given the consequences involved, the application is to be examined within the scope of the right to respect for private life, and the applicants' claims concerning their ability to engage in freelance

professional activities have been assessed as a whole under this right.

b. Admissibility

33. Those who are entitled to lodge an individual application are listed in Article 46, titled "*Persons entitled to lodge an individual application*", of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court, dated 30 March 2011. Pursuant to the first paragraph thereof, three fundamental conditions must be met concurrently for a person to be able to file an individual application with the Court. These conditions are that the applicant must have a *current right which has been violated* as a result of an act, action, or omission of public power; that the applicant must be *personally and directly* affected by this violation and that the applicant must claim to be a *victim* of the alleged violation (see *Onur Doğanay*, no. 2013/1977, 9 January 2014, § 42).

34. The concept of "*victim*" in individual applications is interpreted independently of procedural rules such as legal interest or capacity to sue. Moreover, the interpretation of the victim status is subject to change in light of contemporary social conditions and must be applied in a manner free from excessive formalism (see *Tezcan Karakuş Candan and Others*, no. 2013/1977, 9 January 2014, § 20).

35. In the present case, the applicants, who are associate professors working as academic staff, have been practicing their profession independently by operating private clinics. The applicants filed an administrative case on the grounds that the additional requirement included in the announcement for the vacant position of professor—stipulating that candidates must not have engaged in income-generating professional activities for five years—constituted an obstacle to their appointment. Following the annulment of the additional requirement, they were appointed as professors by the University. However, upon the University's appeal, the decisions of the lower courts were revoked, and the applicants' case was dismissed. As a result, the additional requirement forming the basis for the appointment became applicable again.

36. Given that the additional requirement—at the core of the applicants' claims—has become applicable again, and that their current rights are directly affected, it must be concluded that the applicants hold victim status.

37. The alleged violation of the right to respect for private life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

c. Merits

38. It is not in every case possible to make an exact definition of, and a distinction between, negative and positive obligations inherent in the right to respect for private life. Negative obligations incumbent on the State require to refrain from any arbitrary interference with right to respect for private life. Positive obligations on the other hand necessitate the protection of this right and taking of specific measures so as to afford the safeguards inherent in the respect for private life even in the sphere of relations among individuals (see, in the same vein, *Adnan Oktar (3)*, no. 2013/1123, 2 October 2013, § 32; *Ömür Kara and Onursal Özbek*, no. 2013/4825, 24 March 2016, § 46; and *Tamer Mahmutoğlu*, § 98).

39. Considering that an administrative act was issued preventing the applicants from applying for the position of professor due to their ongoing independent professional activities, and that this act was upheld by the lower courts, thereby constituting an interference with the applicants' professional lives and reputations, it has been concluded that the application should be examined within the scope of the State's negative obligations.

i. Existence of an Interference

40. It has been concluded that the administrative act requiring the applicants, who met the other criteria for appointment as professors, to terminate their ongoing independent professional activities constitutes an interference by a public authority with the applicants' right to respect for private life.

ii. Whether the Interference Constituted a Violation

41. 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 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.*"

42. The aforementioned interference amounts to a violation of Article 20 of the Constitution unless it complies with the conditions set out in Article 13 thereof. Therefore, it must be determined whether the interference complied with the requirements of being prescribed by law, pursuing a legitimate aim and not being contrary to the principle of proportionality and to the requirements of a democratic social order, which are relevant for the present application and laid down in Article 13 of the Constitution (see *R.G.* [Plenary], no. 2017/31619, 23 July 2020, § 82; *Halil Berk*, no. 2017/8758, 21 March 2018, § 49; *Süveyda Yarkın*, no. 2017/39967, 11 December 2019, § 32; and *Şennur Acar*, no. 2017/9370, 27 February 2020, § 34).

(1) General Principles

43. The Constitution envisages that any form of restriction may be imposed absolutely by law. According to the well-established case-law of the Constitutional Court, the interference should rely on a law to fulfil the requirement of lawfulness prescribed in Article 13 of the Constitution (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 31; *Bülent Polat* [Plenary], no. 2013/7666, 10 December 2015, § 75; *Fatih Saraman* [Plenary], no. 2014/7256, 27 February 2019, § 65; *Turgut Duman*, no. 2014/15365, 29 May 2019, § 66; and *Tamer Mahmutoğlu*, § 103).

44. However, the statutory arrangements concerning the restriction of fundamental rights and freedoms must not be available merely in theory. The lawfulness requirement also entails the existence of an

effective content. At this point, what is of importance is the quality of the given law. The requirement of being restricted by law points to the accessible, foreseeable and precise nature of the restriction. It is thereby aimed at precluding any arbitrary acts of the practitioner and also enabling individuals to know the law, thereby ensuring legal certainty (see *Halime Sare Aysal* [Plenary], no. 2013/1789, 11 November 2015, § 62; *Fatih Saraman*, § 66; *Turgut Duman*, § 67; and *Tamer Mahmutoğlu*, § 104).

45. A given law may be considered to comply with these requirements only when it is sufficiently accessible; when the citizens have adequate knowledge of the existence of the provisions of law which are applicable to a given case; when the relevant law affords appropriate protection against arbitrariness; and when it precisely defines the extent of the power afforded to the competent authorities and the way how such power may be exercised (see *Halime Sare Aysal*, § 63; *Fatih Saraman*, § 67; *Turgut Duman*, § 68; and *Tamer Mahmutoğlu*, § 105).

46. The law itself, except for any administrative practice it would involve, explicitly defines the scope of the discretionary power afforded to the competent authorities to protect the individuals against arbitrary interferences also in consideration of the legitimate aim pursued by the impugned act. The legal system should demonstrate to the citizens, with sufficiently explicit expressions, under which circumstances and within which limits the public authorities are empowered to interfere. In this sense, the legal system should enable the parties of an impugned interference to foresee the conditions underlying the interference and its possible outcomes (see *Halime Sare Aysal*, § 64; *Fatih Saraman*, § 68; *Turgut Duman*, § 69; and *Tamer Mahmutoğlu*, § 106).

47. However, the extent of protection afforded by the legislation, which could not offer a solution for every opportunity, is mainly associated with its field and content, as well as the quality and quantity of its addressees. Therefore, the complex nature of a given provision of law, or its abstract nature to a certain degree, and thereby, its gaining clarity and precision through legal advice cannot be per se considered to fall foul of the principle of legal foreseeability. In this sense, the

provision of law, allowing for interference with any right or freedom, may, of course, grant discretionary power, to a certain degree, to the executive; however, it is necessary that the limits of such discretionary power be set in a sufficiently clear manner, and the provision of law ensure a sufficient degree of certainty (see *Halime Sare Aysal*, § 65; *Fatih Saraman*, § 69; *Turgut Duman*, § 70; and *Tamer Mahmutoğlu*, § 107).

48. In conclusion, the judicial bodies that have the authority to examine the fulfilment of the impugned criteria assess whether the legal provisions relied on by the authorities for interferences are accessible, foreseeable, and certain, and are obliged to implement the legal provisions to the case before them within the scope of the aforementioned framework (see *Tamer Mahmutoğlu*, § 108).

(2) Application of Principles to the Present Case

49. Article 130 of the Constitution stipulates that the duties, titles, appointments, and promotions of faculty members shall be regulated by law.

50. The procedures and principles regarding promotion and appointment to the position of professor are set forth in Article 26 of Law no. 2547. Paragraph (a) thereof stipulates that, in order to be promoted and appointed as a professor, one must have held the title of associate professor for at least five years and must have conducted studies in the relevant academic field in which the vacant position of professor is announced, and must have produced original publications or studies in that field. The same paragraph further provides that, in addition to these minimum requirements, universities may impose additional conditions that are objective and subject to review, exclusively for the purpose of enhancing academic quality and taking into account differences between academic disciplines, provided that they obtain the approval of the Council of Higher Education.

51. In the present case, the University issued a call for applications for the position of lecturer and imposed an additional requirement on the basis of the aforementioned Article. This additional condition requires that candidates are not currently engaged in any income-

generating professional activity and that they undertake to refrain from such activities for a period of five years.

52. Article 26 (a) of Law no. 2547 grants universities very limited discretion, stating that any additional requirements for professorial appointments must be "*exclusively aimed at enhancing academic quality, taking into account the differences between academic disciplines, and must be objective and subject to review.*" In this regard, the additional conditions for professorial appointments should focus on enhancing academic quality through scientific and scholarly publications, research, or other academic endeavours. Given the limited discretion allowed by the law, the requirement to refrain from income-generating professional activities has not been found to sufficiently and appropriately enhance academic quality. Consequently, the interpretation that this additional requirement is consistent with the limited scope and purpose defined by the law is considered to be overly broad and unforeseeable. As a result, it has been concluded that there is no legal basis for the additional condition requiring the cessation of independent professional activities and abstention from such activities for five years as a prerequisite for a professorial appointment.

53. Moreover, following the Court's annulment of Provisional Article 64 of Law no. 2547, which mandated medical academics to cease their private professional activities, no subsequent legal provision has been enacted to regulate the cessation of such activities.

54. In order for any interference with the right to respect for private life to be considered applicable under the constitutional guarantees, the first and essential criterion is that the interference must have a legal basis. In the present case, the administrative act included as an additional requirement in the vacancy announcement imposed a restriction on the private professional activities of the applicants. In the absence of a specific legislative provision on the matter, it has been concluded that an administrative act constituted an interference with the applicants' private lives.

55. In light of the findings above, since the impugned interference did not meet the requirement of legality as stipulated in the Constitution, it

has been deemed unnecessary to further assess whether the remaining safeguards have been observed with respect to the said interference.

56. In light of the foregoing, it must be held that there was a violation of the right to respect for private life safeguarded by Article 20 of the Constitution.

VI. REDRESS

57. The applicants requested the Court to find a violation and to order a retrial.

58. In the present case, it has been concluded that there was a violation of the right to respect for private life, which was apparently caused by a court decision. Thus, there is a legal interest in conducting a retrial in order to redress the consequences of the violation found. The retrial to be conducted will serve the purpose of redressing the violation and its consequences in accordance with Article 50 § 2 of the Code no. 6216 regulating the individual application mechanism. In this regard, the procedure to be followed by the judicial authorities is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 29 November 2023 that

A. The alleged violation of the right to respect for private life be declared ADMISSIBLE;

B. The right to respect for private life safeguarded by Article 20 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the 17th Chamber of the Ankara Administrative Court (E.2018/23, K.2018/1643) and to

the 11th Chamber of the Ankara Administrative Court (E.2018/39, K.2018/1503) in order to be referred to the 4th Administrative Chamber of the Ankara Regional Administrative Court (E.2018/2819, K.2019/503 and E.2018/3459, K.2019/512) for retrial to be conducted to redress the consequences of the violation of the right to respect for private life;

D. The litigation costs, including the court fee of 364.60 Turkish liras (TRY), be REIMBURSED to the applicants RESPECTIVELY, and counsel fee of TRY 18,800 be REIMBURSED to the applicant İbrahim ESİNLER;

E. The payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

AHMET KARDAM AND OTHERS

(Application no. 2019/29604)

13 December 2023

On 13 December 2023, the First Section of the Constitutional Court found a violation of the right to respect for private life, safeguarded by Article 20 of the Constitution, in the individual application lodged by *Ahmet Kardam and Others* (no. 2019/29604).

(I) SUMMARY OF THE FACTS

[1-10] The 2nd Chamber of the Administrative Court annulled the environmental impact assessment (EIA) decision in favour of the power plant project to be built by a private company. Subsequently, an appeal was filed against this decision.

During the appellate proceedings, another EIA decision in favour of the project was rendered, and the applicants brought an action for annulment against the latest EIA decision before the 5th Chamber of Administrative Court ("the trial court").

As the action for annulment had been ongoing, the relevant annulment decision against the first EIA decision was upheld by the Council of State. Therewith, the trial court ruled that an additional report be drafted for the re-assessment of the EIA decision in favour of the project in light of the matters indicated in the reasoning of the upholding judgment of the Council of State. Accordingly, an additional expert report was prepared. Having assessed the expert reports and the upholding judgment of the Council of State as a whole, the trial court annulled the EIA decision.

While the appellate proceedings were pending, the third EIA decision in favour of the project was issued. The municipality and the applicants brought separate actions for annulment against the latest EIA decision in favour of the project. As the proceedings in question had been ongoing, the trial court's decision of annulment was quashed and the applicant's action was dismissed with final effect by the Council of State.

Thereon, the trial court dismissed the applicants' action for annulment against the EIA decision in favour of the project, in consideration of the expert report issued within the scope of the action

brought by the municipality concerning the same dispute and the impugned judgment of the Council of State.

The Council of State upheld the trial court's decision of dismissal with no prospects of rectification.

II. THE COURT'S ASSESSMENT

A. Alleged Violation of the Right to Respect for Private Life

11. The applicants asserted that the project in question resulted in environment and air pollution, negatively affected agricultural life in the region—particularly olive cultivation—led to the destruction of forests and contributed to climate change. They also contended that there were olive groves in close proximity to the project site, and therefore the implementation of the project was not permissible under the applicable legislation. On these grounds, they claimed that there had been violations of the right to a fair trial, the right to an effective remedy, the right to life, the right to protect and improve corporeal and spiritual existence, the right to live in a healthy environment, and the right to respect for private life. In its observations, the Ministry of Justice emphasised that it must be assessed whether the applicants were directly, personally, and currently affected by the electricity generation activity, and thus whether they had victim status. The Ministry also stated that, in the admissibility examination, consideration should be given to whether the applicants' claims amounted to a request for an appellate review.

12. The present application has been examined under separate headings based on the applicants' respective status within the scope of the right to respect for private life.

1. As regards the Applicants Arif Ali Cangı, Ali Osman Karababa, Erhan İçöz, Erol Engel, Ertuğrul Barka, Mehmet Şahin, Senih Özay, Süleyman Eryılmaz, and Zehra Vezan Karabulut

13. The applicants claimed that the power plant project would have a negative impact on global climate change and, therefore, that they

had legal standing to bring an action for the protection of the right to the environment.

14. The first issue to be assessed regarding the present application is whether the impugned environmental impact has attained the minimum threshold required to trigger the safeguards enshrined in Article 20 of the Constitution. In this regard, it is sufficient that there exists a sufficiently close link between the environmental impact caused by the relevant facility, enterprise, or other activity and the applicant's right to respect for his or her private and family life or the right to enjoy his or her home (see *Mehmet Kurt* [Plenary], no. 2013/2552, 25 February 2016, § 69; *Hüseyin Tunç Karlık and Zahide Şadan Karluk*, no. 2013/6587, 24 March 2016, § 68; and *Ahmet İsmail Onat*, no. 2013/6714, 21 April 2016, § 84).

15. It has been observed that, as of the date the action was brought, the applicants neither resided within the project site or its area of impact (the districts of Aliağa and Foça) nor owned any immovable property within these areas. Moreover, the applicants did not submit any information or documents attached to their individual application form demonstrating how they were affected or likely to be affected by the particular circumstances of the case.

16. In the present case, the applicants failed to submit sufficient information or document to establish that the environmental impact of the project has reached the minimum threshold required to trigger the safeguards enshrined in Article 20 of the Constitution. Therefore, although the applicants claimed that there was a violation of the right to respect for private life within the meaning of the right to live in a healthy environment, it has been concluded that they were not directly affected by the impugned EIA decision in favour of the project they claimed to have caused the violation and, as a result, they did not have victim status.

17. For the reasons explained above, this part of the application must be declared inadmissible for incompatibility *ratione personae*, and there being no need to examine other admissibility criteria.

2. As regards the Applicants Egeçep Derneği, Ekoloji Kolektifi Derneği, Menemen Sanatkarlar ve Esnaf Odası, Menemen Esnaflar Odası, Menemen Şoförler ve Otomobilciler Odası, Menemen Ticaret Odası, Menemen Ziraat Odası, and S.S. Menemen Esnaf ve Sanatkârlar Kredi ve Kefalet Kooperatifi

18. In the present case, although the applicants claimed a violation of their right to respect for private life in terms of living in a healthy environment, it has been concluded that the relevant EIA decision in favour of the project, which they claimed to have caused the alleged violation, did not directly affect the legal entities of the applicants, nor did it infringe any rights belonging to such legal entities. Accordingly, the applicants cannot be considered to have victim status (see, in the same vein, *Egeçep Association*, no. 2015/17415, 17 April 2019, §§ 33-38). In addition, there is no impediment for natural persons whose current and personal rights might have been directly affected by the said EIA decision to lodge an individual application.

19. For the reasons explained above, this part of the application must be declared inadmissible for incompatibility *ratione persona*e, and there being no need for further examination on the other admissibility criteria.

3. As regards the Other Applicants

20. The applicants argued that the impugned project adversely affected agricultural life in the region, particularly olive cultivation, and that the relevant EIA decision was unlawful due to the close proximity of olive groves to the project site. They further asserted that, although the initial EIA decision had been annulled by a court order, subsequent EIA reports were unscientific and repetitive of the former. They claimed that, in the following judicial proceedings, the Council of State overturned the administrative court's decision and dismissed the case without conducting any inquiry. Additionally, they stated that in the final EIA-related proceedings, an expert report from another case file was communicated to the applicants who could not participate in the on-site examination, but their objections and considerations regarding the said report were not taken into account.

21. The present application must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

22. In the present case, the applicants' allegations have been examined under the State's positive obligation to effectively protect and observe the right to respect for private life. The Court has previously outlined the procedural obligations incumbent on the State in terms of environmental issues. Accordingly, in order to prevent or minimise potential negative environmental impacts, the interests of the parties involved in the process must be carefully assessed, and effective participation of these parties must be ensured (see *Mehmet Kurt*, §§ 61-66; *Hüseyin Tunç Karlık and Zahide Şadan Karluk*, §§ 64, 65; *Ahmet İsmail Onat*, §§ 79-81; *Fevzi Kayacan (2)*, no. 2013/2513, 21 April 2016, §§ 56-61; and *Ahmet Bilgin and Others*, no. 2015/11709, 12 December 2018, § 56). In this regard, the judicial proceedings must be conducted in accordance with the constitutional guarantees, and the final decision must be announced with relevant and sufficient reasoning.

23. It is clear that the authorisation granted for the project pursued a legitimate aim of public interest based on the economic benefit of the country. The core of the applicants' allegations was that the project was harmful to the environment and human health; that the subsequent EIA decisions, which were issued after the initial one had been annulled, were unlawful; and that given the presence of olive groves near the proposed waste storage area, the operation of the facility was not feasible.

24. In view of the circumstances of the present case, with particular regard to the reasoning of the decision of the trial court dated 26 October 2018, it has been observed that there was no information or document in the case file indicating that there was a new plan, or an alternative area had been designated for waste storage outside the area defined in the previously suspended plans. Referring to the applicable provisions of Law no. 3573 on Olive Improvement and Grafting of Wild Species, the trial court concluded that since olive groves were located less than three kilometres away from the existing waste storage area, the EIA decision was unlawful.

25. In its judgment dismissing the case, the Council of State stated that according to the relevant expert report, the waste storage area had not been used since the facility became operational in 2015, and that the scientific basis for any negative effect of the unused storage area on the nearby olive groves, whose distance was not precisely indicated, had not been demonstrated. The Council of State also emphasised that the existing waste was intended to be reprocessed in the market place, and that unsold waste would be stored, for which contracts had already been signed. Thus, it concluded that the EIA decision met the criteria set out in the EIA Regulation.

26. Similarly, the trial court's decision of 14 November 2019 included assessments in line with the aforementioned Council of State judgment. It concluded that the unused waste storage area would not have a negative impact on the surrounding agricultural areas, that there were no areas within or around the facility that could be classified as olive groves forming an economic unity under Law no. 3573, and that therefore, the relevant EIA decision was not unlawful.

27. Having assessed the judicial proceedings in the present case as a whole, the Court has observed that the subject matter of the dispute was related to the waste storage area of the power plant and the surrounding olive groves. The Court has found that the case file did not include any information or document on whether a new plan for the location and boundaries of a waste storage area had been formulated or whether any other area had been allocated for this purpose. Additionally, in the final judgment dismissing the case, the Council of State confined itself with indicating that "*the contract had provided for the sale of the existing waste to be reprocessed in the market place and the storage of the unsold waste*". Nevertheless, no assessment was included in this judgment as to whether there was a need for a new waste storage area for storage purposes. Although it was found that the plant had not utilised the waste storage area during its operation since 2015, the judgment did not put forward any assessment whether the plant that delivered a solution for the existing waste that was intended to be stored, nor whether such a solution had been examined by the EIA decision in favour of the project.

28. Furthermore, the inferior courts merely found that the waste storage area of the power plant had not been used and that the contracts had been concluded for the sale or the storage of the existing waste, but did not inquire into alternative ways of re-purposing waste and the environmental impact of manners of waste storage and whether measures and obligations had been regulated in this regard. There has been no assessment of whether the above-mentioned matters were examined in the said EIA report and, if so, whether these matters were addressed in line with the relevant regulations. Therefore, the decisions dismissing the applicant's requests for annulment on the grounds that the favourable EIA decisions were lawful lacked relevant and sufficient reasoning.

29. In addition, the decision issued by the trial court on 26 October 2018 established that olive groves were found less than three kilometres away from the centre of the existing waste storage area of the plant. However, the trial court indicated in its subsequent decision of 14 November 2019 that there were no areas in and around the power plant which could be qualified as olive groves of economic value under Law no. 3573. The trial court failed to present explanations as to why its considerations contradicted the conclusion set out in its previous decision, nor did it provide any grounds to eliminate this contradiction.

30. Accordingly, the Court concluded that the incumbent public authorities had failed to act with due diligence, to assess public and individual interests as required, and to fulfil their positive obligations under the right to respect for private life.

31. Consequently, it must be held that there was a violation of the right to respect for private life safeguarded by Article 20 of the Constitution.

B. Alleged Violation of the Right of Access to a Court due to the Awarding of Counsel Fee

32. The applicants argued that, in addition to the dismissal of their cases, the awarding of counsel fee in favour of the respondent administration constituted a violation of their right to a fair trial.

33. In its judgment in the case of *K.V.* ([Plenary], no. 2014/2293, 1 December 2016), the Court held that the low amount of the damages awarded did not cause serious harm to the applicant's financial situation, and thus concluded that the sum in question did not amount to significant damage for the applicant (*K.V.*, § 78).

34. In the present case, considering that the counsel fee awarded in favour of the defendant administration in the two proceedings—amounting to 1,660 Turkish liras (TRY) and TRY 2,075—did not cause serious harm to the applicants' financial standing, there is no reason to depart from the aforementioned judgment.

35. Consequently, this part of the application must be declared inadmissible for *lacking constitutional and personal significance*, there being no need for further examination regarding the other admissibility criteria.

III. REDRESS

36. The applicants requested the Court to find a violation, to order a retrial, and to award pecuniary and non-pecuniary compensation in varying amounts.

37. There is a legal interest in conducting a retrial in order to redress the consequences of the violation found. In this regard, the procedure to be followed by the judicial authorities is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

38. As it has been concluded that a retrial to be conducted in order to eliminate the violation and its consequences would constitute sufficient redress, the claims for compensation must be dismissed.

IV. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 13 December 2023 that

A. 1. The application be declared INADMISSIBLE as being incompatible *ratione personae* in respect of the applicants Arif Ali Cangı, Ali Osman Karababa, Erhan İçöz, Erol Engel, Ertuğrul Barka, Mehmet Şahin, Senih Özay, Süleyman Eryılmaz, Zehra Vezan Karabulut, Egeçep Derneği, Ekoloji Kolektifi Derneği, Menemen Sanatkarlar ve Esnaf Odası, Menemen Esnaflar Odası, Menemen Şoförler ve Otomobilciler Odası, Menemen Ticaret Odası, Menemen Ziraat Odası, and S.S. Menemen Esnaf ve Sanatkarlar Kredi ve Kefalet Kooperatifi;

2. The alleged violation of the right to respect for private life be declared ADMISSIBLE in respect of the remaining applicants;

3. The alleged violation of the right of access to a court be declared INADMISSIBLE as *lacking constitutional and personal significance* in respect of all applicants;

B. The right to respect for private life safeguarded by Article 20 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the 5th Chamber of the İzmir Administrative Court (E.2017/1072, K.2018/1382; E.2019/378, K.2019/1236) for retrial to be conducted to redress the consequences of the violation of the right to respect for private life;

D. The litigation costs incurred by the applicants Arif Ali Cangı, Ali Osman Karababa, Erhan İçöz, Erol Engel, Ertuğrul Barka, Mehmet Şahin, Senih Özay, Süleyman Eryılmaz, Zehra Vezan Karabulut, Egeçep Derneği, Ekoloji Kolektifi Derneği, Menemen Sanatkarlar ve Esnaf Odası, Menemen Esnaflar Odası, Menemen Şoförler ve Otomobilciler Odası, Menemen Ticaret Odası, Menemen Ziraat Odası, and S.S. Menemen Esnaf ve Sanatkarlar Kredi ve Kefalet Kooperatifi be COVERED by them; the total litigation costs of TRY 19,164.60, including the court fee of TRY 364.60 and counsel fee of TRY 18,800, be REIMBURSED JOINTLY to the applicants Orhan Bahadır Doğutürk,

Recep Hisar, Ömer Turgut Erlat, Oya Otyıldız, Fırat Korkmaz, Nevrize Çivril, Canan Gedik, Eren Tunga, Fatma Başyiğit, Bahattin Bilgin, Işıl Dirim Kavitaş, Hasan Aytekin, Cafer Tayyar Başyiğit, Nurten Baltacıhisar, Celal Demirkıran, Ayşe Nazan Bilgin, Sadiye Kızılöz, Hasan Öztoprak, Ahmet Bülent Akyöndem, Nabi Yağcı, Ahmet Kardam, Sadık Başyiğit, Mustafa Kemal Dinçer, Ufuk Dişli, Emine Dişli, Tülay Karacaörenli, Cemile Bulut, Necdet Özkesen, Hatice Solmaz Doğutürk, Ali Tuğrul Çölmekçi, Ahmet Nihat Dirim, and İsmail Hakkı Mete; and the total litigation costs of TRY 19,249.90, including the court fee of TRY 446.90 and counsel fee of 18,800 be REIMBURSED JOINTLY to the applicants Orhan Bahadır Doğutürk, Oya Otyıldız, Recep Hisar, and Ömer Turgut Erlat;

E. The payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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 6th Chamber of the Council of State (E.2019/2365, K.2019/2065; E.2020/415, K.2020/3855) and to the Ministry of Justice.

FREEDOMS OF EXPRESSION AND THE PRESS (ARTICLES 26 AND 28)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

SERDAR GÜZELÇAY AND OTHERS

(Application no. 2022/66987)

21 December 2023

On 21 December 2023, the Plenary of the Constitutional Court found a violation of the freedom of expression, safeguarded by Article 26 of the Constitution, in the individual application lodged by *Serdar Güzelçay and Others* (no. 2022/66987).

(I-IV) SUMMARY OF THE FACTS

[1-18] The applicants were held in pre-trial detention or were serving their sentences on terrorism-related charges in various penitentiary institutions.

Certain books sent to the applicants by post were not delivered to them pursuant to decisions rendered by the education boards of the respective penitentiary institutions.

No allegation has been made that, as of the dates of the applications, any of the undelivered books were subject to a sales ban, confiscation order, or seizure order issued by the competent courts.

In some of the decisions issued by the relevant education boards regarding the non-delivery of the publications, it was found that the said publications contained statements making propaganda of terrorist organisations, expressions insulting or denigrating public institutions, and writings, reports, and commentaries intended to discredit statesmen and institutions working for the country's security.

The education boards also stated that the publications contained obscene material; included visual information and descriptions of the prison layout and other sections; praised hunger strikes, death fasts, crime, and criminals; and contained excerpts from prohibited publications. Based on these findings, the education boards concluded that the delivery of the publications in question to the applicants would undermine the security of the penitentiary institutions and the rehabilitation of the inmates, and thus decided not to deliver them. The decisions in question did not provide specific explanations as to which particular content in the publications was of such nature. In some other decisions, the pages of the relevant publication deemed objectionable

were explicitly identified; however, it was not discussed whether it would be possible to remove the objectionable parts and deliver the remainder to the applicants.

The applicants lodged complaints with the enforcement judges against the said decisions. However, their complaints were dismissed by the relevant enforcement judges on similar grounds. The applicants' subsequent appeals were also dismissed by the assize courts on similar grounds.

Consequently, the impugned decisions of the education boards were found lawful. Thereupon, the applicants lodged an individual application with the Court.

V. EXAMINATION AND GROUNDS

19. The Court, at its session of 21 December 2023, examined the application and decided as follows:

A. Request for Legal Aid

20. The applicants applied for legal aid. In accordance with the principles set out by the Court in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the Court should accept the applicants' request for legal aid, on the ground that it is not manifestly ill-founded, since it has been established that the applicants, who applied for legal aid are unable to afford the litigation costs without suffering a significant burden.

B. Alleged Violation of the Freedom of Expression

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

21. The applicants asserted that their constitutional rights had been violated due to the arbitrary and unjustified refusal to deliver books sent to them from outside the penitentiary institutions.

22. The Ministry, in its observations, first referred to the relevant decisions of the Constitutional Court and the European Court of Human Rights (ECHR) concerning similar cases, and then outlined

the reasoning of the administration and the inferior courts. It further stated that, in assessing whether there had been a violation of the freedom of expression, the relevant constitutional and legal provisions, the judgments rendered by the Court and the ECHR, as well as the particular circumstances of the case, should be taken into consideration.

2. The Court's Assessment

23. The Court has previously held in numerous judgments that the refusal to admit periodicals or non-periodicals delivered to prisoners by courier, brought by visitors, or purchased by the prisoners themselves, should be examined within the scope of the freedom of expression (see, for example, *İbrahim Kaptan (2)*, no. 2017/30723, 12 September 2018, § 23; *Recep Bekik and Others* [Plenary], no. 2016/12936, 27 March 2019, § 24; and *Ahmet Sil and Taner Yay*, no. 2017/35227, 30 September 2020, § 31). Accordingly, the applicants' allegations have been considered to fall within the scope of the freedom of expression.

24. Article 26 of the Constitution reads, insofar 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, public safety, … preventing crime, … as prescribed by law…

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

25. The alleged violation of the freedom of expression must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of an Interference

26. As a rule, detainees and convicts retain all fundamental rights and freedoms that fall within the common protection realm of the Constitution and the European Convention on Human Rights ("the Convention") (see *Mehmet Reşit Arslan and Others*, no. 2013/583, 10 December 2014, § 65). In this context, the freedom of expression of detainees and convicts is also protected under the Constitution and the Convention (see *Murat Karayel (5)*, no. 2013/6223, 7 January 2016, § 27).

27. The access of detainees and convicts to periodicals or non-periodicals is a manifestation of the freedom to receive information and ideas and thus falls within the scope of the freedom of expression (see *İbrahim Bilmez*, no. 2013/434, 26 February 2015, § 74; *Kamuran Reşit Bekir* [Plenary], no. 2013/3614, 8 April 2015, § 43; *Hüseyin Sürensoy*, no. 2013/749, 6 October 2015, § 44; and *Ahmet Temiz (6)*, no. 2014/10213, 1 February 2017, § 34).

28. In this regard, the refusal to deliver books sent to the applicants, who were held in penitentiary institutions as detainees or convicts, has been considered an interference with their freedom to receive news or ideas, and therefore a restriction on their freedom of expression.

ii Whether the Interference Constituted a Violation

29. The aforementioned interference would constitute a violation of Article 26 of the Constitution, unless it meets the conditions specified in Article 13 of the Constitution, which reads, insofar 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.*"

30. It must be determined whether the impugned restriction complies with the requirements set out in Article 13 of the Constitution,

which are applicable to the present case: whether it is prescribed by law, whether it is based on at least one of the reasonable grounds listed in Article 26 § 2 of the Constitution, and whether it is compatible with the requirements of a democratic society.

(1) Legality

31. Article 62 § 3 of the Law no. 5275 on the Execution of Penalties and Security Measures (Law no. 5275) stipulates that no publication which disrupts or endangers institutional discipline, order or security, which hampers the rehabilitation of prisoners, or which includes obscene news, writings, photographs or comments shall be delivered to the convicts. Pursuant to Article 116 thereof, the aforementioned provision also applies to detainees. Therefore, it has been observed that the impugned interference had a legal basis.

(2) Legitimate Aim

32. The said publications were not delivered to the applicants for the purpose of maintaining order and security in penitentiary institutions, preventing crime, and ensuring the rehabilitation of prisoners. Accordingly, it has been concluded that the said interference pursued a legitimate aim within the scope of maintaining public order, as prescribed in Article 26 § 2 of the Constitution.

(3) Compliance with the Requirements of a Democratic Society

(a) General Principles

33. The Constitutional Court has previously clarified on numerous occasions what should be understood from the expression "*requirements of a democratic society*" within the context of freedom of expression. Freedom of expression refers to a person's ability to have free access to the news and information, other people's opinions, not to be condemned for the opinions and convictions they have acquired and to freely express, explain, defend, transmit to others and disseminate these either alone or with others. Expressing the ideas including those opposed to the majority by any means, gaining stakeholders for the ideas expressed, the efforts to materialise the ideas and to convince

others in this sense, as well as the tolerance of these efforts are among the requirements of a pluralist democratic order. Therefore, ensuring social and political pluralism depends on the peaceful and free expression of thoughts. Thus, the freedom of expression and dissemination of thought is of vital importance for the functioning of democracy (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 33-35; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 42, 43; and *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, §§ 35-38).

34. In order for an interference with the freedom of expression to be *compatible* with the requirements of a democratic society, it must be proportionate and correspond to a pressing social need (see *Bekir Coşkun*, §§ 53-55; *Mehmet Ali Aydın*, §§ 70-72; and the Court's decision no. E.2017/162, K.2018/100, 17 October 2018, §96). The measure giving rise to the impugned interference may be considered to meet a pressing social need only when it is convenient for attaining the aim pursued and appears to be the last remedy to be resorted to and the most lenient measure available (see, *mutatis mutandis, Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, § 51). Proportionality refers to a fair balance struck between the rights of individuals and the public interests, or if the interference pursues the aim to protect the rights of others, the rights and interests of other individuals (see, *mutatis mutandis*, *Bekir Coşkun*, § 57; *Tansel Çölaşan*, §§ 46, 49, 50; and *Hakan Yiğit*, no. 2015/3378, 5 July 2017, §§ 59, 68).

(b) Constitutional Court's Case-Law on Access to Publications in Penitentiary Institutions

(i) Publications Accessible to Detainees and Convicts

35. The Court has established the principles governing detainees' and convicts' access to publications in penitentiary institutions, taking into account the relevant provisions of Law no. 5275, as follows:

i. Prisoners may request the institution to purchase and provide them with any publication, on the condition that the cost is covered by the money deposited in their prison account.

ii. Newspapers, books, and printed materials published by public institutions, universities, professional organizations with public institution status, foundations granted tax exemption by the President, and associations serving in the public interest shall be provided to prisoners free of charge and without restriction, provided that such materials have not been banned by the courts.

iii. Prisoners shall be entitled to have access to the library of penitentiary institution.

iv. Prisoners shall have the right to receive books sent via cargo or brought as gifts by visitors on religious holidays, New Year's Day, and birthdays as recorded in official civil registers.

v. Prisoners who are continuing their education shall be provided with their textbooks without any obstruction (see *İbrahim Kaptan (2)*, § 31).

36. Explaining the methods of accessing publications in this way, the Court, in its judgments in the cases of *İbrahim Kaptan (2)* and *H.Y.* (no. 2018/22011, 27 July 2022), has examined in detail the lack of regulation under Law no. 5275 on the acceptance into penitentiary institutions of periodicals and non-periodicals (excluding textbooks) sent via cargo or brought by visitors. The Court has initially accepted that Law no. 5275 does not provide for the delivery of such materials to detainees and convicts and, therefore, such publications cannot be accessed in this manner. Moreover, the Court has concluded that the categorical non-acceptance of all such publications delivered via cargo or brought by visitors does not constitute a violation of the freedom of expression (see *İbrahim Kaptan (2)*, §§ 33–37; and *H.Y.*, § 20).

37. Following this determination by the Court, Article 69 of Law no. 5275, which regulates the right of prisoners to receive gifts, was amended by Law no. 7242, dated 14 April 2020. This amendment introduced a new opportunity by allowing prisoners to receive gifts once every two months. As a result of this legislative amendment, prisoners have acquired the right to receive books sent via cargo or brought by visitors every two months, thereby incorporating these methods into the means by which they can access publications.

(ii) Principles and Criteria for the Required Review

38. The administrations of penitentiary institutions are required to review whether the publications available to prisoners meet the conditions stipulated in Articles 3 and 62 of Law no. 5275. Such a review must be conducted in accordance with the principles established in the Constitutional Court's case-law, and the outcome must determine whether the publication in question should be accepted into the institution (see *Ahmet Sil and Taner Yay*, § 43).

39. The principles relating to the review to be carried out concerning periodicals and non-periodicals are set out in the Court's judgment in the case of *Halil Bayık* ([Plenary], no. 2014/20002, 30 November 2017). Any interference made with a motivation that does not meet the criteria established in the judgment of *Halil Bayık* will constitute a violation. The relevant principles set forth in the relevant judgment are as follows:

i. Consideration must be given to what type of penitentiary institution the applicant has been placed in and for what offence, as well as, to whether the said penitentiary institution and the offence he has committed have any bearing on the adoption of the disputed measure.

ii. If the restriction consisting in the refusal to hand over to a prisoner all or part of a publication relates to his rehabilitation, the link between the content of the publication and the prisoner's rehabilitation must be explicitly demonstrated.

iii. The social background, criminal record, intellectual capacity and abilities, personal temperament, length of prison sentence and post-release expectations of each prisoner must be taken into account.

iv. In this context, it should be evaluated whether the publications have caused the persons imprisoned for terrorism offenses to resort to increased violence against the state or individuals, whom they perceive as responsible for their alleged victimisation.

v. The type, content, publisher and objectionable parts of the

periodical or non-periodical that is not given to the prisoner should be identified, and a detailed analysis must be carried out regarding the sections considered objectionable.

vi. If such an analysis reveals any connection to terrorist organisations or content that legitimises terrorist activities, a balance must be struck between the prisoner's freedom of expression and the legitimate right of a democratic society to protect itself against terrorist activities.

vii. To strike this balance, the following factors must be considered:

- Whether the publication, in its entirety, targets a specific person, public official, segment of society, or the state, and whether it incites violence against them;

- Whether it exposes individuals to the risk of physical violence or incites hatred against them;

- Whether the message conveyed suggests that recourse to violence is a necessary and justified measure;

- Whether the publication glorifies violence, incites people to hatred, revenge and armed resistance;

- Whether the content poses a threat to the safety, discipline, or order of the penitentiary institution;

- Whether it enables intra-organisational communication between members of criminal organizations

- Whether it contains false or misleading information or expressions constituting a threat or an insult so as to lead people or institutions to panic;

- Whether the level of conflict taking place in part or whole of the country and the level of tension within the penitentiary institution and the country on the date of publication or delivery had an effect on the delivery of the publication to the convict; and

- Whether the restrictive measure met a pressing social need in a democratic society and whether it was the last resort.

viii. When making these assessments, the trial courts and public authorities may always have recourse to expert opinions as needed. Reports and expert evaluations may also be sought from social scientists, researchers, or academics depending on the particular circumstances of the case. In this way, the compatibility of a restriction, on providing periodicals or non-periodicals to prisoners, with the law and the criteria established by the Constitutional Court can be reviewed in a more effective manner (see *Halil Bayık*, § 45).

40. In addition, in its judgment in the case of *Sinan İyit* ([Plenary], no. 2013/1495, 30 November 2017), the Court concluded that the refusal to provide detainees or convicts with publications subject to a confiscation order or documents quoting from such publications constituted an interference necessary in a democratic society within the meaning of Articles 3 and 62 of Law no. 5275. In the relevant judgment, the Court emphasized that when an individual's freedom of expression is restricted through confiscation or seizure orders, the pressing social need underlying such restrictions — especially in the context of combating terrorism — also applies in respect of detainees and convicts. Accordingly, it found no basis to conclude that denying access to publications subject to a confiscation order, or to documents quoting from them, was unnecessary for the purposes of maintaining security, order, and discipline in penitentiary institutions and ensuring the rehabilitation of the prisoner (see *Sinan İyit*, §§ 51, 52).

41. Lastly, in cases where a publication is withheld from a prisoner either because it contains direct quotations from a publication subject to a confiscation order or as a result of the review conducted based on the principles set out in the judgment of *Halil Bayık*, it must always be assessed whether the objectionable sections of the publication can be separated and whether the remaining parts can be delivered to the prisoner. If it is not possible to separate the objectionable content or if the remainder loses its significance once the said parts are removed, withholding the entire publication may be justified — but such an exceptional situation must be explicitly reasoned in the relevant decision (see *Sinan İyit*, § 56).

(iii) Court's Case-law on Access to Non-Periodicals in Penitentiary Institutions

42. Within the framework of its case-law on access to publications in penitentiary institutions, the Court has found violations of the freedom of expression in numerous applications concerning the refusal to deliver non-periodicals to detainees and convicts. In these judgments, the Court held that a retrial was necessary. In several of these violation judgments, the Court noted that the interference made with a motivation that did not meet the criteria established in the judgment of *Halil Bayık*. It also found that there was no sufficiently concrete link between the allegedly objectionable content and the justification for the interference, and that the authorities had failed to consider whether the objectionable sections could be removed so that the remainder of the publication could be delivered to the applicants (see *Ahmet Temiz and Musa Şanak*, no. 2015/13923, 7 March 2018; *Ahmet Temiz and Musa Şanak (2)*, no. 2015/14850, 7 March 2018; *Ahmet Temiz (11)*, no. 2015/16566, 7 March 2018; *Küçük Hasan Çoban*, no. 2015/17776, 7 March 2018; *Ozan Alpkaya*, no. 2015/15980, 22 March 2018; *Cengiz Nergiz*, no. 2015/2866, 18 April 2018; and *Halil Bayık (2)*, no. 2015/19539, 10 May 2018).

43. In some of these violation judgments, it has been observed that the authorities attempted to substantiate their assessment of the publication's objectionable content by referring to the specific page numbers of the allegedly objectionable sections. Nevertheless, the Court found that the review procedure had not followed the standards set out in the judgment of *Halil Bayık*. Moreover, despite the objectionable parts having been clearly identified in those cases, the entire publication was withheld from the applicants without any reasoning provided as to why the remaining convenient sections could not be delivered (see *Abdulhamit Babat and Zeki Bayhan*, no. 2015/13046, 22 March 2018; and *Mehmet Çelebi Çalan (5)*, no. 2015/5195, 23 May 2018).

(c) The Court's Assessment

44. In the present case, the books sent by post were not delivered to the applicants. It has been considered that pursuant to Article 69 of

Law no. 5275, the acceptance of books sent as gifts by post once every two months is permissible. Accordingly, the books in question should be considered to have been received by the institution in accordance with one of the recognised methods of accessing publications. In this regard, since the books sent by post were not subject to a confiscation order, the public authorities are expected to conduct an assessment under Articles 3 and 62 of Law no. 5275 in the light of the principles and criteria set out in the Court's case-law.

45. It has been observed that the assessments made by prison administrations and first-instance courts in decisions refusing the delivery of the publications to the applicants failed to meet the standards laid down in the *Halil Bayık* judgment. These decisions did not specify the allegedly objectionable content in the publications and relied on abstract assessments rather than making a concrete evaluation.

46. In some other decisions, the prison administrations and trial courts indicated the page numbers of the parts deemed objectionable. However, even in those cases, the reasoning was found to be insufficient and not in conformity with the Constitutional Court's established principles. Moreover, none of these decisions considered whether the objectionable sections could be removed and the remaining parts be delivered to the applicants. A holistic assessment of the administrative and judicial decisions in the present applications leads to the conclusion that the impugned decisions lacked relevant and sufficient reasoning.

47. It is evident that examining a large number of books received daily by hundreds of thousands of prisoners in penitentiary institutions imposes a significant burden on public authorities. Furthermore, the legislature, by amending Article 69 of Law no. 5275 through Law no. 7242, granted prisoners the right to receive gifts, including books, once every two months. As a result of this amendment, books sent by cargo or brought by visitors—within the two-month limitation—have become one of the permissible methods of accessing publications.

48. In some cases, additional materials may be inserted into publications sent by cargo or brought by visitors, and such publications may be used as a means of covert communication. In other cases,

they may serve as a method of smuggling prohibited items into the penitentiary institution. Therefore, it is clear that books delivered via such means must be subject to more thorough scrutiny compared to those purchased through institutional channels, which in turn requires more effort and time from public authorities. It must be acknowledged that reviewing the vast number of books sent to hundreds of thousands of prisoners poses a considerable challenge for institutions and courts.

49. However, no safeguards have been established under the current system to ensure uniformity, reduce the workload of institutions and judges, prevent the accumulation of individual applications, or avert new violations of the freedom of expression.

50. Under the current system established by Article 62 of Law no. 5275, each institution is responsible for conducting its own review of books received. This results in varying assessments as to whether the same book should be delivered to detainees and convicts in identical legal circumstances across different penitentiary institutions throughout the country. It has even been observed that the same institution may take different decisions regarding the acceptance of the same book at different times. In particular, it has been noted that certain bestselling publications are delivered to some prisoners without any restrictions, while others in similar conditions are either partially or entirely denied access to the same books in other institutions. In fact, in the present case, it has been established that a book denied to one of the applicants was sent to him from another penitentiary institution.

51. In a state governed by the rule of law, the acts and decisions of the administration must be foreseeable by individuals. Discrepancies in the administrative practice regarding the delivery of a non-periodical to prisoners are incompatible with the *principle of legal certainty (certainty of administrative acts)*, which is a key element of the rule of law (see, in the same vein, *Recep Bekik and Others*, § 56).

52. In view of the assessments above, the Court has concluded that there is no mechanism in place that would prevent arbitrariness, ensure consistent treatment for individuals in the same legal situation, and guarantee a clear, instructive, and stable administrative practice

regarding the delivery of non-periodicals to detainees and convicts in penitentiary institutions.

53. Accordingly, there is no reason to depart from the Court's established case-law concerning access to non-periodicals by prisoners. In the joined applications, the administrative and judicial authorities failed to conduct an assessment that met the criteria set forth by the Court with respect to the acceptance of non-periodicals in penitentiary institutions. The adverse effects arising from practises of the administration in the current system are addressed only through court decisions within the scope of judicial review.

54. When the difficulties faced by the administration and enforcement judges in ensuring fairness in practice are considered together, it has been concluded that there is a structural problem inherent in the current practice concerning the acceptance of non-periodicals in penitentiary institutions. Therefore, it is necessary to establish a mechanism that would ensure a more effective assessment of such publications and prevent inconsistent practices among prisoners.

55. Indeed, it has been observed that a mechanism to prevent arbitrariness has been introduced in cases concerning prisoners' access to foreign-language magazines, and an effort has been made to regulate this area. The law-maker, through an amendment made on 14 April 2020 to Article 62 of Law no. 5275, stipulated that, due to the challenges faced by local authorities in evaluating the admissibility of such magazines, the authority to make this determination would lie with the Ministry, which has broader power.

56. It is undeniable that prisoners do not enjoy an unlimited right to access non-periodicals. The inherent difficulties and restrictions in penitentiary institutions naturally impose certain limitations on prisoners' access to such publications. Moreover, considering that prisoners can access non-periodicals via libraries of penitentiary institutions or public libraries in addition to other means stipulated by law, it is beyond any doubt that the access to such publications—especially when delivered as gifts by cargo, post, or through visitors whose identity cannot be verified—can be subject to limitations based

on a lawful, foreseeable, and uniform policy. It is also evident that any new system introduced in this regard would ultimately be subject to the Constitutional Court's review through the individual application mechanism.

57. In conclusion, an effective system should be established through administrative and legal measures to ensure that the delivery of non-periodicals to prisoners is carried out in a uniform, fair manner and in compliance with the standards set by the Court. Otherwise, it is obvious that this structural problem will persist and that the resulting situation—which is contrary to the requirements of a democratic society—will lead to continued or repeated violations of freedom of expression safeguarded by Article 26 of the Constitution.

58. Consequently, it must be held that the applicants' freedom of expression was violated due to a structural problem stemming from the practice.

59. However, it must be noted that this finding of a violation should not be interpreted as requiring that the books in question be automatically delivered to the applicants. The relevant courts must conduct a retrial in line with the Court's findings and discuss whether the said books should be delivered to the applicants, providing a relevant and sufficient justification in their decisions.

VI. REDRESS

60. The applicant Burhan Güneş did not claim compensation. Some of the other applicants sought both pecuniary and non-pecuniary damages, while others requested only non-pecuniary damages.

61. The Court has concluded that there exists a structural problem arising from the current practice concerning the acceptance of non-periodicals sent to detainees and convicts in penitentiary institutions, thus finding that the applicants' freedom of expression was violated. This finding demonstrates the existence of a persistently inadequate system in terms of preventing violations of fundamental rights and freedoms and redressing their consequences. Therefore, it has been

considered that certain measures should be taken by the relevant authorities, such as a review of the applicable legislation, in order to avoid rendering separate violation judgments in individual applications concerning restrictions on detainees' and convicts' access to non-periodicals. Accordingly, a copy of the judgment must also be sent to the Ministry of Justice for its information.

62. In addition, there is a legal interest in conducting a retrial in order to redress the consequences of the violation found. In this regard, the procedure to be followed by the judicial authorities is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (for exhaustive explanations regarding retrial in terms of individual application, as specified in Article 50 § 2 of the Code no 6216 on the Establishment and the Rules of Procedure of the Constitutional Court, dated 30 March 2011, see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

63. The applicants, except for Burhan Güneş who did not claim any compensation, must be awarded 5,000 Turkish liras (TRY), respectively, for the non-pecuniary damages sustained due to the violation of the freedom of expression stemming from a structural problem.

64. Since the applicants failed to provide any information or document to substantiate their claims for pecuniary damages, their claims in this regard must be rejected.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 21 December 2023 that

A. The requests for legal aid be GRANTED;

B. The alleged violation of the freedom of expression be declared ADMISSIBLE;

C. The freedom of expression safeguarded by Article 26 of the Constitution was VIOLATED;

D. A copy of the judgment be REMITTED to the respective first instance courts listed in the annex for retrial to be conducted to redress the consequences of the violation of the freedom of expression;

E. A net amount of TRY 5,000 be REIMBURSED RESPECTIVELY to the applicants, except for Burhan Güneş, in respect of non-pecuniary damages;

F. The total litigation costs of TRY 20,128.10, including the court fee of TRY 1,328.10 and counsel fee of TRY 18,800, be REIMBURSED to the applicant Sebahat Tuncel; and the litigation cost of TRY 18,800, including the counsel fee, be REIMBURSED RESPECTIVELY to the applicants Burhan Güneş and Süleyman Göksel Yerdut;

G. The payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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.

FREEDOM OF ASSOCIATION (ARTICLE 33)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

HALKIN KURTULUŞ PARTİSİ (3)

(Application no. 2019/30833)

27 September 2023

On 27 September 2023, the Plenary of the Constitutional Court found a violation of the freedom of political organisation, safeguarded by Article 68 of the Constitution, in the individual application lodged by *Halkın Kurtuluş Partisi (3)* (no. 2019/30833).

(I-IV) SUMMARY OF THE FACTS

[1-22] Upon the letter of the Chief Public Prosecutor's Office at the Court of Cassation, the relevant district governorships and provincial governorships brought an action before magistrate's courts (in civil matters), requesting the declaration of the *ipso facto* dissolution of the branches of the applicant party, on the grounds that the different provincial and district branches had failed to hold their congresses twice in a row within the prescribed period.

Having accepted the actions, the incumbent magistrate's courts ruled that the relevant provincial or district organisations of the political party in question had been *ipso facto* dissolved.

The applicant's subsequent appeals against the impugned decisions were dismissed by the regional courts of appeal with final effect.

V. EXAMINATION AND GROUNDS

23. The Court, at its session of 27 September 2023, examined the application and decided as follows:

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

24. The applicant argued that, due to the failure of a political party to hold its provincial and district congresses within the prescribed timeframe, the only applicable sanction should be a warning, and that the exclusive authority to impose such a sanction lies with the Constitutional Court. Therefore, it maintained that district governorships and provincial governorships lack the authority to initiate declaratory proceedings, and that magistrate's courts (in civil matters) are not competent to render decisions in this regard. According to the applicant, party congresses pertain to the internal functioning of political parties, and any intervention in such internal

affairs is inappropriate. Furthermore, the applicant contended that the procedural rules of adjudication were not followed, and that therefore, the freedom of political association and right to a fair trial were breached.

25. The Ministry, in its observations, stated that it must first be determined whether there was an interference with the applicant's freedom of association. If such an interference is found, it must then be assessed whether the interference pursued a legitimate aim, whether it met the requirement of legality, and whether the judicial decisions provided relevant and sufficient reasoning.

26. In its counter-statement, the applicant reiterated the arguments put forward in its individual application form.

B. The Court's Assessment

27. The Court is not bound by the legal qualification of the facts by the applicants and it makes such an assessment itself. The allegations raised by the applicant concern the *ipso facto* dissolution of provincial or district branches of a political party, therefore they must be examined, as a whole, under the freedom of political association.

28. Article 68 of the Constitution, titled "*Forming parties, membership and withdrawal from membership in a party*" reads, insofar as relevant, as follows:

"*Citizens have the right to form political parties and duly join and withdraw from them…*

Political parties are indispensable elements of democratic political life.

Political parties shall be formed without prior permission, and shall pursue their activities in accordance with the provisions set forth in the Constitution and laws.

The statutes and programs, as well as the activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular

republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime."

1. Admissibility

29. The alleged violation of the freedom of political association must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of an Interference

30. It has been understood that the decision to declare the *ipso facto* dissolution of the provincial and district branches of the applicant political party, on the grounds that the party failed to fulfil its obligation to hold provincial and district congresses within the prescribed time, constitutes an interference with the freedom of political association.

b. Whether the Interference Constituted a Violation

31. The aforementioned interference would constitute a violation of Article 68 of the Constitution, unless it meets the conditions specified in Article 13 of the Constitution, which reads, insofar 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.*"

32. Therefore, it must be determined whether the impugned interference complies with the requirements set out in Article 13 of the Constitution, which are applicable to the present case: whether it is prescribed by law, whether it is based on the reasonable grounds listed in the applicable constitutional provision, and whether it is compatible with the requirements of a democratic society. Accordingly, the first issue to be examined in the present case is whether the interference had a legal basis.

(i) General Principles

33. In Article 13 of the Constitution setting out the regime concerning the restriction of fundamental rights and freedoms, it is laid down as a basic principle that the rights and freedoms may be restricted "*only by law*". In order for an interference with any right safeguarded under Article 68 of the Constitution to be considered to meet the lawfulness requirement, the impugned interference must necessarily have a legal basis (for other outstanding judgments concerning the other aspects of the lawfulness requirement, see *Sevim Akat Eşki*, no. 2013/2187, 19 December 2013, § 36; *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 82; *Hayriye Özdemir*, no. 2013/3434, 25 June 2015, §§ 56-61; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.* [Plenary], no. 2014/19270, 11 July 2019, § 35).

34. The Court has on many occasions stated that as regards the restrictions on fundamental rights and freedoms, the lawfulness requirement primarily necessitates the formal existence of a law (see *Tuğba Arslan*, § 96; and *Fikriye Aytin and Others*, no. 2013/6154, 11 December 2014, § 34). Law, as a legislative act, is a product of the will of the Grand National Assembly of Türkiye ("GNAT") and is enacted by the GNAT in compliance with the law-making procedures enshrined in the Constitution. Such an understanding affords a significant safeguard for fundamental rights and freedoms (see *Eğitim ve Bilim Emekçileri Sendikası and Others* [Plenary], no. 2014/920, 25 May 2017, § 54; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 36).

35. The regulation by law of rights and freedoms, as well as of the interferences and restrictions to be imposed thereon, is one of the most important elements of a democratic state governed by the rule of law that prevent arbitrary interference with these rights and freedoms and ensure legal security (see *Tahsin Erdoğan,* no. 2012/1246, 6 February 2014, § 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, § 55). For an interference to be based on law, there must be sufficiently accessible and foreseeable provisions regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44).

36. 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 regarding restrictions as well as its "*clarity*" which refers to its certainty (see, in the same vein, *Metin Bayyar and People's Liberation Party* [Plenary], no. 2014/15220, 4 June 2015, § 56; *Eğitim ve Bilim Emekçileri Sendikası and Others*, § 55; and *Halk Radyo ve Televizyon Yayıncılık A.Ş.*, § 37).

37. The interpretation of the applicable legal provisions in a given dispute, and in particular those that constitute the legal basis for interference, falls within the discretion of the inferior courts. It is not incumbent upon the Constitutional Court to ascertain the correctness of the interpretations by the inferior courts of the statutory provisions underlying the impugned interference. However, in cases where the interpretations of the inferior courts are incompatible with the explicit wording of the law, or where it is evident that the provision is not foreseeable by individuals, it may be concluded that the interference with the freedom of political association lacks a legal basis (see, in the same vein, *Ziya Özden*, no. 2016/67737, 19 November 2019, § 59; and *Hüseyin Ercan*, no. 2018/11352, 8 September 2021, § 40).

ii. Application of Principles to the Present Case

38. The Constitutional Court has previously examined a request for the declaration of the *ipso facto* dissolution of a political party and for the consequent termination of its legal personality. In that decision, the Constitutional Court indicated that the Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court had vested the Constitution Court with the jurisdiction to rule on the requests for the declaration of the dissolution of political parties and that the parties concerned are required to lodge an application to the

Constitutional Court for the execution of this request. Article 87 of the Turkish Civil Code no. 4721 stipulates that the relevant parties referred to in the text are the legal representatives of political parties bearing legal and financial responsibility and the Chief Public Prosecutor's Office at the Court of Cassation, which has the authority to initiate proceedings for the dissolution of political parties and maintaining their registration files (see the Court's decision no. E.2015/2 (Miscellaneous), K.2016/4, §10).

39. Additionally, having assessed the applications, filed by certain district governorships with the Constitutional Court, requesting the declaration of the *ipso facto* dissolution of provincial and district branches of political parties, the Constitutional Court held (decisions of 15 November 2017, E.2017/7 (Misc.), K.2017/6; 15 November 2017, E.2017/8 (Misc.), K.2017/7; 15 November 2017, E.2017/9 (Misc.), K.2017/8; and 31 May 2018, E.2018/6 (Misc.), K.2018/5) that pursuant to Article 87 of Law no. 4721, district governorships are not authorised to request the declaration of the dissolution of the provincial and district branches of political parties and, accordingly, the termination of their legal personality.

40. Furthermore, in its decision no. E.2018/13 (Misc.), the Constitutional Court stated: "*Pursuant to Article 3 of Law no. 2820, political parties are defined as legal entities established nationwide with the aim of contributing to the formation of the national will through their activities and public campaigns in accordance with their statutes and programs, and by participating in presidential, parliamentary, and local elections in compliance with the Constitution and laws. As this definition makes clear, political parties are unified legal entities encompassing the headquarters as well as provincial and district branches. Accordingly, the Constitutional Court's jurisdiction to determine the dissolution of political parties applies to the entire legal entity — including all branches — and does not extend to the determination of the dissolution of provincial or district branches in isolation.*" (see the Court's decision no. K.2018/13, 27 December 2018, § 3). As explicitly stated in the aforementioned assessment, political parties are unified legal entities encompassing their provincial and district branches. In other words, the Court does not have the authority to determine the termination of

the legal existence of provincial or district branches separately from the political party's overall legal personality, merely on the grounds that they failed to hold their congresses within the prescribed period.

41. The relevant parties referred to in Article 87 of Law no. 4721 are the legal representatives of political parties with legal and financial responsibility, as well as the Chief Public Prosecutor's Office at the Court of Cassation. The Constitutional Court is exclusively entrusted with the authority to declare the dissolution of the entire legal entity of a political party upon the requests of these parties.

42. In the present application, it has been observed that upon the letter of the Chief Public Prosecutor's Office at the Court of Cassation, the district governorships and provincial governorships applied to the magistrate's courts (in civil matters) to declare *ipso facto* dissolution of the provincial and district branches of the applicant party and that accordingly the incumbent magistrate's courts (in civil matters) adjudicated on these requests. It has been understood that the public authorities delivered a judgment without taking into account of Article 3 of Law no. 2820, which stipulates that the legal entities of political parties shall be considered as a whole together with their organisations, and the phrase "*any concerned person*" in Article 87 of Law no. 4721, which does not include district governorships and governorships. In this respect, it has been concluded that the aforementioned provisions were interpreted in a broad and unforeseeable manner, exceeding their purpose.

43. In the light of the foregoing, it must be held that the decisions to declare *ipso facto* dissolution in the present application failed to meet the criteria of *lawfulness*, and there was a violation of the applicant's freedom of political association.

VI. REDRESS

44. The applicant requested the Court to find a violation and to order a retrial.

45. There is a legal interest in conducting a retrial in order to redress the consequences of the violation found. In this regard, the

procedure to be followed by the judicial authorities is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (for exhaustive explanations regarding retrial in terms of individual application, as specified in Article 50 § 2 of the Code no 6216 on the Establishment and the Rules of Procedure of the Constitutional Court, dated 30 March 2011, see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 27 September 2023 that

A. The alleged violation of the freedom of political association be declared ADMISSIBLE;

B. The freedom of political association safeguarded by Article 68 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the Yeşilova Magistrate's Court (in Civil Matters) (E.2017/95, K.2018/159), the 1st Chamber of the Ankara Magistrate's Court (in Civil Matters) (E.2018/937, K.2018/1866), the 14th Chamber of the Ankara Magistrate's Court (in Civil Matters) (E.2020/55, K.2020/450), and the 6th Chamber of the Ankara Magistrate's Court (in Civil Matters) (E.2019/1424, K.2019/2521);

D. A copy of the judgment be REMITTED to the Chief Public Prosecutor's Office at the Court of Cassation;

E. The total litigation costs of 20,546.00 Turkish liras (TRY), including the court fee of TRY 1,746.00 and counsel fee of TRY 18,800,00, be REIMBURSED to the applicant;

F. The payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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 PROPERTY
(ARTICLE 35)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ALİ KÖMÜRCÜ AND OTHERS

(Application no. 2019/2890)

25 October 2023

On 25 October 2023, the Plenary of the Constitutional Court found a violation of the right to property, safeguarded by Article 35 of the Constitution, in the application lodged by *Ali Kömürcü and Others* (no. 2019/2890).

(I-IV) SUMMARY OF THE FACTS

[1-53] By the decision of the Energy Market Regulatory Authority (EMRA) dated 21 July 2011, it was decided to construct the K. Wind Power Plant (WPP) Project, based on wind energy, in the districts of Kiraz and Beydağı in İzmir. Within this scope, an electricity generation licence was granted in favour of K. Elektrik Yatırım Üretim ve Ticaret Anonim Şirketi (the Company), valid for a period of 49 years from the date of the decision, for the purpose of carrying out electricity generation activities.

The EMRA rendered a decision, on public-interest grounds, as to the expropriation of the immovable properties owned by the applicants. Accordingly, the Ministry of Finance decided to expropriate the determined immovable properties, and the Council of Ministers also decided on the application of the urgent expropriation procedure.

In the judicial proceedings initiated by the State Treasury ("the Treasury"), the impugned immovable properties were decided to be confiscated. The applicants filed an administrative action requesting the annulment of the decision on public-interest grounds, the decision on expropriation and the urgent expropriation decision taken to register the immovable properties under the name of the Treasury for the construction of a wind power plant.

During the subsequent proceedings, the applicants' request for a stay of execution was dismissed. Pending the administrative proceedings, the applicants requested, in the action for determination of the expropriation price and registration filed by the Treasury against them, that the administrative action for annulment should

be considered as a preliminary issue. Nevertheless, this request was dismissed on the grounds that the decision on the stay of execution had not been submitted.

Following the acceptance of the action for determination of the expropriation price and registration, the Plenary Assembly of Administrative Chambers of the Council of State ("Plenary Assembly") found unlawful the urgent expropriation procedure and annulled the said procedure. However, the Plenary Assembly upheld the Chamber's decision insofar as it concerned the decision on public-interest grounds and the expropriation decision.

V. EXAMINATION AND GROUNDS

54. The Court, at its session of 25 October 2023, examined the application and decided as follows:

A. As regards the Allegations Raised by the Applicant İsmail Çetin

55. It is laid down in Article 51 of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court, dated 30 March 2011, and Article 83 of the Internal Regulations of the Court that in cases where the applicant is found to have clearly abused the right to individual application through his behaviour which is abusive, misleading or of a similar nature, the application shall be dismissed, and the person concerned shall be sentenced to a disciplinary fine up to a maximum of two thousand Turkish liras, plus the litigation costs.

56. It is evident that the relevant provisions explicitly address the abuse of rights within the scope of individual applications, stating that a given right exercised in a manner contrary to its intended purpose and in a way that harms others shall not be protected within the legal order. In this regard, actions that are manifestly contrary to the purpose of the individual application procedure and that hinder the

Constitutional Court from properly examining the application may be considered an abuse of the right to individual application (see *S.Ö.*, no. 2013/7087, 18 September 2014, § 28; and *Mehmet Güven Ulusoy* [Plenary], no. 2013/1013, 2 July 2015, § 31).

57. In this context, the right to individual application may be deemed to have been abused in cases where, in particular, the applicant relies on false factual allegations or submits misleading information or documents in order to deceive the Court; fails to disclose information on a material element relevant to the assessment of the application; refrains from informing the Court of new and significant developments that occurred during the examination process and are likely to affect the outcome of the proceedings; uses a language that constitutes insult, threat or provocation beyond the limits of civil and legitimate criticism; or lodges an application that is devoid of substance and incompatible with the objective of identifying a violation and eliminating its consequences under the individual application mechanism (see *S.Ö.*, § 29; *Mehmet Güven Ulusoy*, § 32; *Osman Sandıkçı*, no. 2013/6297, 10 March 2016; and *Selman Kapan and Others*, no. 2013/7302, 20 April 2016).

58. The applicant, İsmail Çetin, passed away on 1 March 2017. Nevertheless, on 3 August 2017, lawyer Hatice Hande Atay lodged an individual application alleging a violation of İsmail Çetin's constitutional rights, without mentioning his death in the application form.

59. In cases where an individual whose rights have allegedly been violated by public power dies before lodging an individual application, it is not possible for another person to submit an application on behalf of the deceased (see *Abdurrehman Uray*, no. 2013/6140, 5 November 2014, § 30).

60. In view of the foregoing reasons, the application submitted by a lawyer whose power of attorney had lapsed due to the applicant's death prior to the application date must be dismissed on the ground of abuse of the right to individual application.

61. In this regard, it is necessary to impose a disciplinary fine of 2,000 Turkish liras (TRY) on lawyer Hatice Hande Atay, pursuant to Article 51 of Code no. 6216 and Article 83 of the Internal Regulations of the Court, for having submitted an application containing misleading information to the Court.

A. As regards the Allegations Raised by the Applicant Mehmet Çetin

62. In its judgment in the case of *Elberan Vural and Others* ([Plenary], no. 2018/30235, 17 January 2023), the Court held that, in order to prevent potential loss of rights on the part of the heirs who were unaware of the individual application lodged by the deceased while still alive, it would be a fairer approach—also in line with the nature of individual application—for the Court to notify the heirs of the deceased applicant in accordance with the relevant provisions of the Code of Civil Procedure no. 6100 of 12 January 201 and to inquire whether they wish to pursue the application.

63. In this regard, the Court contacted the applicant's legal representative and heirs to be informed of whether they wished to pursue the application. However, it has been observed that the heirs did not make any declaration for more than six months. Furthermore, it has been concluded that none of the grounds stipulated in Article 80 § 2 of the Internal Regulations, which would necessitate the continuation of the examination of the application, were present.

64. For the reasons explained above, the application must be *struck out*.

C. Alleged Violation of the Right to Property of the Other Applicants

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

65. The applicants maintained that the areas in which their immovable properties—used for agricultural activities and constituting

their sole means of subsistence—were located, had been designated as forest and agricultural zones under respective zoning plans. They claimed that the expropriation procedures conducted within the scope of the WPP project failed to ensure a cost-benefit balance, and that the public interest objective had not been demonstrated in allocating forest and fertile agricultural lands exclusively to the Company as an energy zone. The applicants stated that their requests for a stay of execution had not been decided for a period of ten months, but the civil court proceedings became final. They further alleged that no Environmental Impact Assessment (EIA) report had been obtained, and that the general statement "*There is public interest in energy investments*" used during the conversion of agricultural lands into non-agricultural areas was insufficient to justify public interest. The applicants asserted that the decisions on public interest, expropriation, and urgent expropriation constituted interconnected administrative acts; thus, any unlawfulness affecting one of these steps would render the others unlawful as well. However, the failure of the Plenary Assembly to annul the public interest and expropriation decisions rendered the State's interference arbitrary and disproportionate. The applicants also claimed that, despite the annulment of the urgent expropriation decision, which undermined the legality of the process, the registration of their immovable properties in the name of the administration was unlawful. They argued that such a situation constituted violations of the rights to respect for private life and communication, the right to life, the inviolability of the person, the right to live in a healthy and balanced environment, the protection of corporeal and spiritual existence, the right to a fair trial, and the right to property.

66. The Ministry, in its observations, contended that, since the expropriation procedures had been completed, the applicants' victim status had to be assessed. Although the urgent expropriation decision had been annulled, the actions seeking the annulment of the public interest and expropriation decisions had been dismissed and had

become final. It was indicated that there was no information suggesting that individual applications had been lodged with the Constitutional Court against those final decisions within the prescribed time limit. The Ministry further stated that, according to the reasoning in the Plenary Assembly's decision, the expropriation had been annulled on formal grounds, and no unlawfulness had been found as to the merits of the expropriation, such as whether the expropriation of the immovable property was necessary or served a legitimate public interest. It was asserted that the expropriation decision had a legal basis and that there was no judgment pointing out unlawfulness as to the merits of the expropriation procedure.

67. In their counter-statements, the applicants reiterated their previous allegations.

2. The Court's Assessment

68. Article 35 of the Constitution, titled "*Right to property*", 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."

69. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). Although the applicants also alleged violations of the right to respect for private life and freedom of communication, the right to life, the inviolability of the person, the right to live in a healthy and balanced environment, and the protection of corporeal and spiritual existence alongside the right to property, it has been assessed that the essence of their complaints pertains to the right to property. Therefore, these allegations should be examined within the scope of the right to property.

a. Admissibility

70. 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.

b. Merits

i. Existence of a Property

71. Any individual alleging a violation of the right to property must first demonstrate that such a right exists (see *Mustafa Ateşoğlu and Others*, no. 2013/1178, 5 November 2015, §§ 49-54). It appears that the applicants' immovable properties were subjected to urgent expropriation procedure. Therefore, there is no dispute as to the existence of a property.

ii. Existence and Type of Interference

72. In view of Article 35 of the Constitution, read in conjunction 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, Article 35 § 1 of the Constitution provides that everyone has the right to property, setting out the *right to peaceful enjoyment of possessions*, and the second paragraph thereof draws the framework of interference with this right. 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 forbids any exercise of the right to property in contravention to the public interest; 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).

73. The urgent confiscation of the immovable properties and their registry in the name of the Treasury due to expropriation resulted in the applicants being deprived of their possessions. Therefore, the interference in the present case must be examined within the framework of the second paragraph concerning deprivation of property.

iii. Whether the Interference Constituted a Violation

74. 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.*"

75. Article 35 of the Constitution does not envisage the right to property as an unlimited right; and 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. In order for the interference with the right to property to be constitutional, the interference must have a legal basis, pursue the aim of public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62). Thus, the first criterion required to be examined is whether the interference had a basis in law.

(1) General Principles

76. 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*. Accordingly, the primary criterion to be considered in interferences with the right to property is whether the interference is prescribed by the law. Otherwise, it will be concluded that the right to property was violated, without any examination under other criteria (see *Ford Motor Company*, no. 2014/13518, 26 October 2017, § 49).

77. 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). For an interference to be based on law, there must be sufficiently accessible and foreseeable provisions regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44).

78. In accordance with Article 46 of the Constitution, which regulates expropriation procedure, expropriation by the State and public legal entities must be based on public interest, carried out in accordance with the principles and procedures prescribed by law, and the actual compensation must, as a rule, be paid in cash and in advance. Expropriation, which is accepted as an interference, by the State, with the sphere of private property and whose essential element is the public interest, is deemed lawful only when it is carried out as the last resort, under the conditions where the public interest is considered to outweigh the right to private property, and provided that the procedural safeguards set out in the Constitution are followed (see the Court's decision no. E.2017/110, K.2017/133, 26 July 2017, § 11).

79. Expropriation as envisaged in Article 46 of the Constitution constitutes a constitutional limitation on the right to property, which is safeguarded under Article 35 thereof. Therefore, a regulation that complies with the constitutional elements of expropriation set forth in

Article 46 does not violate Article 35. Expropriation is constitutionally recognised as a method to transfer private property to the public, whereby owner's rights over an immovable property may be terminated by the State without the former's consent, provided that it serves the public interest and that compensation is awarded (see the Court's decision no. E.2017/110, K.2017/133, 26 July 2017, §§ 12, 15).

(2) Application of Principles to the Present Case

80. In the present case, based on the electricity generation license issued by the EMRA within the scope of the WPP project, a public interest decision was adopted to ensure the implementation of the project. In this regard, the Ministry of Finance decided on the expropriation of the designated immovable properties, and the Council of Ministers resolved to apply the urgent expropriation procedure regarding these properties.

81. In 2014, in accordance with the actions filed by the Treasury, confiscation of the relevant immovable properties was decided. The applicants brought administrative actions seeking the annulment of the decisions on public interest, expropriation, and urgent expropriation procedure adopted for the registration of their properties in the name of the Treasury for the purposes of the construction of a WPP. During the proceedings, the applicants' request for a stay of execution was dismissed. While these actions were still pending, in the proceedings initiated by the Treasury for the determination of compensation and registration, the applicants requested that the administrative action for annulment be treated as a preliminary issue; however, their request was dismissed on the grounds that a decision on a stay of execution had not been submitted. Following the decisions rendered in favour of the Treasury in these proceedings, the Plenary Assembly annulled the decision on urgent expropriation procedure, finding it unlawful, yet upheld the Chamber's decision dismissing the action for annulment concerning the public interest and expropriation decisions.

82. The applicants lodged an individual application following the Plenary Assembly's judgment. The essence of their complaint concerns the registration of their immovable properties in the name of the Treasury despite the annulment of the decision on urgent expropriation procedure.

83. The Court addressed a similar complaint in the case of *Ali Ekber Akyol and Others*. In the relevant judgment, the Court observed that there was a divergence of opinion between two different branches of the judiciary as to whether the process following the confiscation of the immovable property constituted a continuation of the urgent expropriation procedure or a separate expropriation process. Emphasising that in expropriation, the actual interference with the right to property is triggered not by the registration decision but by the expropriation decision itself, the Court held that the dispute over whether the registration decision delivered in the actions for compensation and registration formed part of the urgent expropriation process, and whether it had a legal basis, did not affect the legality of the expropriation decision. Concluding that the interference with the right to property did not satisfy the legality requirement, the Court found a violation of the applicants' right to property.

84. However, in the case of *Ali Hıdır Akyol and Others* concerning a similar complaint, the Court reached a different conclusion. It noted therein that on the date when the civil court issued its registration decision, the expropriation decision was still legally in effect, and that the Plenary Assembly's annulment decisions were rendered only after the registration. The Court observed that these annulments were based on formal grounds—namely, the view that the annulment of the Council of Ministers' urgency decision, which constituted the basis of the expropriation, would automatically render the expropriation decision unlawful—however, no unlawfulness had been found as to the merits of the expropriation process. The Court held that indication of the fact that such a legal assessment, which only affected the

confiscation process, could, in itself, render the registration decision unlawful was related to the interpretation of legal provisions and was outside the Court's jurisdiction. The Court concluded that since there was no final court decision finding the merits of the expropriation process unlawful and the registration had a legal basis, the interference with the applicants' property rights met the legality requirement. Accordingly, it found no violation of the right to property.

85. One of the individual applications lodged with the Constitutional Court regarding similar complaints was declared inadmissible on the grounds that it was manifestly ill-founded, with reference to the *Ali Hıdır Akyol and Others* judgment. Subsequently, this complaint was brought before the ECHR. In the case of *Yel and Others v. Türkiye*, the ECHR emphasised that the importance attached by domestic courts to the case-law regarding the decisions rendered by the Council of State in the context of urgent expropriation procedures, given their meaning and scope —and particularly their impact on the proceedings before the civil courts— did not bear decisive significance in terms of the assessment of the present complaint. Regardless of the answers to these questions, the ECHR noted that the judicial decisions annulling the Council of Ministers' decrees and the EMRA's expropriation decisions, which formed the legal basis for deprivation of property in domestic law, had undeniably failed to produce any tangible effect. It found that the applicants' right of access to a legal remedy to challenge the lawfulness of the measures depriving them of their property had become meaningless, theoretical, illusory, and thus ineffective. Considering the lack of any concrete effect of the domestic court decisions, the ECHR concluded that the applicants' deprivation of property did not meet the requirement of lawfulness and held that there had been a violation of the applicants' right to property.

86. Following the *Yel and Others v. Türkiye* judgment, the Constitutional Court considered that its previous case-law established in the judgment of *Ali Hıdır Akyol and Others* should be reviewed.

87. The procedures and principles of expropriation are regulated under Law no. 2942. According to this Law, in order for an expropriation to be carried out, the processes such as the allocation of funds, the issuance of a public interest decision, and the identification of the immovable property to be expropriated must be completed, and then, the competent authority must issue a decision on expropriation. The expropriation decision constitutes a constituent element of the expropriation process, which results in the transfer of ownership from private persons to the public. Without a legally valid expropriation decision made by the competent authority, it is not possible to proceed to the subsequent stages of the expropriation process (see the Court's decision no. E.2020/47, K.2023/36, 22 February 2023, § 111).

88. Article 27 of Law no. 2947 regulates the urgent expropriation procedure. Accordingly, in cases where, under the implementation of Law no. 3634, the need for or urgency of national defence is determined by the President, or in extraordinary circumstances stipulated by specific laws, the immovable properties required may be expropriated urgently. In such cases, except for the valuation process, all other procedures may be completed at a later stage. Upon the request of the relevant administration, and within seven days, the court, as per Article 10, may appoint experts in accordance with Article 15 to determine the value of the immovable property. The value determined shall be deposited by the administration to the bank indicated in the summons and notice to be issued in accordance with Article 10, on behalf of the property owner, and the property may be confiscated accordingly. The court's decision on the confiscation of the immovable property shall be notified to the land registry office. An annotation shall be placed in the land register stating that the immovable property cannot be transferred or assigned to someone else. Following the confiscation order, the property shall be vacated pursuant to Article 20. In cases referred to in Article 3 § 2 of this Law, the amount to be deposited shall be considered the first instalment of the compensation to be paid (see

the Court's decision no. E.2020/47, K.2023/36, 22 February 2023, § 112).

89. Article 46 of the Constitution provides that the State and public legal entities may expropriate privately owned immovable properties only for the purposes of public interest, through the payment of fair compensation in advance, and in accordance with the principles and procedures prescribed by law. This provision also includes certain guarantees regarding the payment method. Similarly, Article 1 of Law no. 2942 contains comparable provisions and regulates the procedures to be followed during expropriation process by the State and public legal entities, the calculation of the expropriation price, the registration of the immovable property and easements in the name of the administration, the return of unused property, the transfer of immovable properties between administrations, and the methods to be employed for resolving related disputes. According to these regulations, the legislature, on one hand, allows for the expropriation of immovable properties owned by natural and legal persons in line with the public interest, and on the other hand, regards expropriation—which entails deprivation of property—as a severe interference with the right to property, thus affording those affected by such measures certain constitutional and statutory safeguards. Pursuant to Law no. 2942, following the issuance of a public interest decision and an expropriation decision, the first step to be taken is to initiate negotiations with the property owners. If a settlement is reached, the process is completed. However, if no agreement is reached, the administration will bring an action before the civil courts for the determination of the compensation and the registration of the property. Upon the deposit of the compensation amount determined by the court in accordance with the relevant provisions of Law no. 2942, the court will issue a registration order in favour of the administration. In accordance with Article 25 of Law no. 2942, the ownership of the immovable property is transferred to the administration with the registration order. Therefore, the administration is not allowed to take actions with regard to the

property for the purpose of expropriation before the issuance of the registration order.

90. In the ordinary expropriation procedure, the period until the registration of the immovable property in the name of the administration may, in certain exceptional cases, give rise to significant problems and considerable damages. Therefore, Article 27 of Law no. 2942 provides for an urgent expropriation procedure. Accordingly, in cases where the implementation of Law no. 3634 on National Defence Obligations requires urgent action as determined by the President of the Republic, or in extraordinary circumstances provided for by special laws, this special procedure may be applied to the expropriation of necessary immovable properties. Under the urgent expropriation procedure, the administrations shall apply to the civil courts to request the determination of the value of the immovable property and the issuance of a confiscation order before initiating any negotiations with the owners. The value of the immovable property, as determined by the experts, shall be deposited in a bank account opened in the name of the owner within seven days by the administration, and the court shall order the confiscation of the property. The confiscation order shall then be notified to the land registry office, and an annotation shall be placed in the land registry indicating that the property cannot be transferred or assigned to someone else. Furthermore, following the confiscation order, the property shall be vacated through enforcement officers. As is evident, in this procedure, the administration obtains the right to use the immovable property in line with the purpose of expropriation long before a registration decision is issued in the price determination and registration proceedings. Consequently, the owner's ability to use, benefit from, and dispose of the property is eliminated.

91. The urgent expropriation procedure is an exceptional expropriation method that may only be applied under extraordinary circumstances. In principle, immovable properties should be acquired through negotiation, and if no agreement can be reached, an action for

the determination of the expropriation price and registration should be brought. Expropriation constitutes a severe interference with the right to property, as it deprives individuals of their property. Therefore, except in the presence of exceptional circumstances, adhering to the standard expropriation procedure is more in line with the principles enshrined in Article 2 of the Constitution—namely, the principle of the rule of law—as well as the requirements of Articles 35 and 46 of the Constitution (see, *mutatis mutandis*, *Ali Gönültaş*, no. 2018/24998, 18 January 2022, § 49).

92. The legislative intent of Article 27 of Law no. 2942, whereby the urgent expropriation procedure is regulated, also states that adherence to the ordinary procedure may, in urgent and exceptional cases, pose certain risks and potentially cause serious harm to the public. Consequently, public authorities opting for the urgent expropriation procedure, which is intended for exceptional and extraordinary situations, must substantiate in their decisions why the ordinary procedure would be insufficient and what kind of damages would result from using the ordinary procedure. In addition, decisions declaring the need for urgency must be subject to prompt and effective judicial review in accordance with the rule of law and the requirement to protect the right to property. Otherwise, if such urgent decisions are not reviewed in a timely manner, the urgent expropriation procedure may in practice replace the ordinary procedure in contravention of the purpose of Law no. 2942.

93. Pursuant to Law no. 2942, the authority to review the legality of expropriation procedures—whether conducted through the ordinary or urgent method—rests with the administrative judiciary. Property owners may file annulment actions before the administrative courts, in accordance with the procedures set out in Law no. 2942, to challenge decisions taken by public authorities regarding public interest, ordinary expropriation, and urgent expropriation. However, actions brought for the determination of expropriation price and

registration, which are filed by the administration against the owners, are heard before the judicial courts. In practice, these cases are often heard around the same time, and it has been observed that price determination and registration proceedings may be concluded before the annulment actions pending before the administrative courts. Since the judgments regarding registration in the price determination and registration cases are final, the immovable properties are registered in the name of the administration, and any subsequent decisions by the administrative courts in favour of the owners may lead to various legal complications. In such cases, the owners not only suffer from the severe interference with their property rights through expropriation, but are also burdened with the obligation to file a separate case to have the property re-registered in their name. Moreover, the Plenary Assembly had previously taken the view that decisions regarding ordinary expropriation procedure could not be evaluated independently of those concerning urgent expropriation procedure; that judicial review should be conducted by considering both the urgent and ordinary expropriation decisions as a whole, and that if the Council of Minister's decision on urgent expropriation procedure was found unlawful and annulled by a court, then the subsequent expropriation and public interest decisions, as a continuation and consequence of the former, should also be annulled. However, in later years, the Plenary Assembly changed this approach. In its new case-law, the Plenary Assembly treated the urgent expropriation decision as independent from the ordinary expropriation process, and while it found the urgent expropriation procedure unlawful and annulled the relevant decision, it upheld the legality of the expropriation and public interest decisions and dismissed the case accordingly. Therefore, it is evident that the case-law of the Plenary Assembly —viewing the various stages of the expropriation procedure as independent from one another—reduces the prospect of success in actions brought by owners concerning unlawful registration.

94. In order to prevent conflicting judgments arising from the annulment actions and price determination and registration cases pending before two separate branches of the judiciary, the legislator introduced Article 10 § 4 of Law no. 2942. According to this provision, where right holders bring an annulment action before the administrative courts against the expropriation process and an order for a stay of execution is issued by the administrative court, the judicial court must treat the annulment action as a preliminary issue and proceed in accordance with the outcome of the administrative proceedings. However, since the judicial court's treating the action before the administrative court as a preliminary issue is contingent upon the issuance of a stay of execution order by the administrative court, this provision does not offer sufficient safeguards with respect to the effectiveness of judicial review in the administrative jurisdiction. In cases where requests for a stay of execution are not swiftly decided or are dismissed despite the subsequent annulment of the expropriation decision on the merits, this provision fails to eliminate the risk of the price determination case becoming final before the expropriation decision is annulled (see *Tarık Yüksel*, § 70).

95. Another fundamental issue regarding the implementation of the provision on the stay of execution stems from the interpretation adopted by the courts. Judicial courts hold that stay of execution orders issued with respect to only the expropriation decisions before the administrative courts should be treated as a preliminary issue. In other words, judicial courts consider that where an annulment action is filed against an urgent expropriation decision before an administrative court, a stay of execution order issued in that context does not require the judicial case to be treated as a preliminary issue. Even if a joint lawsuit is filed against expropriation proceedings, a stay of execution order concerning the urgent expropriation procedure or public interest decision does not necessitate suspension of the proceedings (see *Ali Ekber Akyol and Others*, §§ 60, 61; and *Ali Hıdır Akyol and Others*, § 71).

As a result, judicial courts conclude that stay of execution orders issued by administrative courts in urgent expropriation procedures do not constitute a ground for treating the case as a preliminary issue. Therefore, such orders have no tangible effect on the ongoing proceedings for determination of price and registration. In conclusion, the statutory regulations on stay of execution—enacted by the legislator to prevent inconsistencies between decisions rendered by separate judicial branches— does not have sufficient capacity to offer an effective solution.

96. In other words, it has been observed that the scope of the stay of execution mechanism set out in Law no. 2942 was narrowly interpreted by the judicial courts in practice and failed to provide sufficient protection. Moreover, it is clear that the outcome of the proceedings pending before the administrative court—where the lawfulness of the expropriation process is examined—would directly affect the judgment to be delivered in the proceedings regarding price determination and registration. In urgent expropriation procedures, upon the request of the administration, judicial courts may issue confiscation orders for the immovables within a very short period, and following such orders, the administration will begin using the immovable properties for the intended purpose of the expropriation. Therefore, by its very nature, the judicial review of the decisions of urgent expropriation procedure must be conducted much more swiftly than that of ordinary expropriation procedures. Otherwise, decisions of urgent expropriation procedure cannot be said to be subject to a real judicial scrutiny.

97. In the present case, decisions concerning urgent expropriation procedure, public interest, and expropriation were issued by the EMRA and the Council of Ministers in 2013 and 2014 for the region where the applicants' immovable properties were located. Upon the Treasury's request, judicial courts ordered the urgent confiscation of the immovable properties in December 2014 and January 2015, after which the properties began to be used by the administration. In

January 2015, the applicants challenged the lawfulness of the urgent expropriation, public interest, and expropriation decisions, and brought an annulment action before the administrative courts. The applicants' request for a stay of execution was dismissed. On 9 March 2017, the administrative court dismissed the request for annulment of the public interest and expropriation decisions, but annulled the urgent expropriation decision on the grounds of unlawfulness. Consequently, the legality of the expropriation process was not reviewed for more than two years—from December 2014 and January 2015, when the administration began to use the immovable properties—during which the applicants were deprived of the safeguards afforded by their right to property. Furthermore, although the urgent expropriation procedure was found unlawful by the administrative court, the properties were nonetheless registered in the name of the administration. As a result of the prolonged administrative proceedings, the annulment decision rendered in favour of the applicants lost its effectiveness, had no tangible impact, and failed to constitute an effective remedy. Accordingly, it has been concluded that the interference with the right to property resulting from the urgent expropriation procedure, which led to a deprivation of property, did not meet the lawfulness requirement under Articles 13, 35, and 46 of the Constitution.

98. For the reasons set out above, it must be concluded that the right to property safeguarded by Article 35 of the Constitution was violated.

VI. REDRESS

99. The applicants requested the Court to find a violation, to order a retrial, and to award them respectively 2,500 Turkish liras (TRY) for their pecuniary and non-pecuniary damages.

100. As no allegation has been raised regarding the finalisation of the expropriation proceedings, and considering that the individual application was lodged after the annulment decision rendered in favour of the applicants, it has been concluded that there is no legal interest

in conducting a retrial to redress the consequences of the violation of the right to property. However, it is evident that the mere finding of a violation would be insufficient to redress the damage suffered by the applicants. Therefore, in order to redress all consequences of the violation in accordance with the *principle of restitution*, and taking into account the applicants' claims, it is deemed appropriate to award non-pecuniary compensation of TRY 2,500 to the applicants respectively, except for İsmail Çetin and Mehmet Çetin, amounting to a total of TRY 32,500.

101. Furthermore, in its judgment in the case of *Tarık Yüksel*, the Court noted that in certain cases, bringing proceedings before different courts and judicial branches concerning the lawfulness of the expropriation procedure, the determination of expropriation price and its registration weakened the effectiveness of the administrative proceedings. In this context, the Court has decided to send a copy of the judgment to the legislature (see *Tarık Yüksel*, §§ 69–72).

102. In the present case, although the administrative court conducting the judicial review of the decision on urgent expropriation procedure held that the said measure was unlawful, this decision was rendered after the urgent confiscation of the immovable property and even after the registration decision by the civil court. Therefore, it failed to produce any tangible effect. Considering the relevant findings of the ECHR in *Yel and Others v. Türkiye*, it has been concluded that there is a structural problem with regard to the protection of the right to property. Although administrative courts acting swiftly in cases challenging urgent expropriation decisions may mitigate the risk, this is *per se* insufficient to resolve the underlying issues. Hence, introduction of legislative amendments with a view to ensuring the swift resolution of the administrative case and the civil court's waiting for the outcome of the administrative proceedings may enable the enforcement of a potential annulment decision issued at the end of the proceedings challenging the urgent expropriation procedure. Moreover, in cases

where the annulment decision loses effectiveness, compensation should be paid to the owner without imposing the burden of bringing a separate action, in addition to the payment of the expropriation amount. In this respect, it must be noted that expropriation-related disputes should be resolved with the fewest possible legal proceedings and without placing an additional litigation burden on those deprived of their property. In addition, the Human Rights Action Plan stipulates that Law no. 2942 and other relevant legislation will be revised, including provisions on urgent expropriation procedure, to ensure the effective protection of the right to property. Therefore, a copy of this judgment should be sent to the legislature for the resolution of the structural problem identified in relation to the urgent expropriation procedure.

103. It has been concluded that a total amount of TRY 19,057.50, including the court fee of TRY 257.50 and counsel fee of TRY 18,800, be reimbursed to the applicants, except for İsmail Çetin and Mehmet Çetin.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 25 October 2023 that

A. 1. The application be DISMISSED, insofar as it concerns the applicant İsmail Çetin, for *the abuse of the right to individual application*;

2. Lawyer Hatice Hande Atay be SENTENCED TO a disciplinary fine of TRY 2,000 under Article 51 of Code no. 6216 and Article 83 of the Internal Regulations of the Court;

3. The application be STRUCK OUT, insofar as it concerns the applicant Mehmet Çetin, for *the death of the applicant*;

B. The alleged violation of the right to property be declared ADMISSIBLE, insofar as it concerns the other applicants;

C. The right to property safeguarded by Article 35 of the Constitution was VIOLATED;

D. A total amount of TRY 32,500 be REIMBURSED to the applicants JOINTLY, except for İsmail Çetin and Mehmet Çetin, for non-pecuniary damages;

E. The judgment be NOTIFIED to the Grand National Assembly of Türkiye, for the resolution of the structural problem;

F. The total litigation costs of TRY 19,057.50, including the court fee of TRY 257.50 and counsel fee of TRY 18,800, be REIMBURSED to the applicants JOINTLY, except for İsmail Çetin and Mehmet Çetin;

G. The payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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 6th Chamber of the Council of State (E.2015/666, K.2016/4489) for information; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

DECISION

ŞEYHMUS YILMA

(Application no. 2018/37995)

11 January 2024

On 11 January 2024, the Plenary of the Constitutional Court found inadmissible the alleged violations of the right to property for being incompatible *ratione materiae* and the right of access to a court within the scope of the right to a fair trial for being manifestly ill-founded, in the individual application lodged by *Şeyhmus Yılma* (no. 2018/37995).

(I-IV) SUMMARY OF THE FACTS

[1-47] On 15 July 2016, Türkiye was confronted with a military coup attempt, which gave rise to the declaration of a state of emergency throughout the country from 21 July 2016 to 19 July 2018. Based on factual findings, the public authorities and judicial bodies assessed that the organisation behind the attempt was a structure that had been active in Türkiye for many years and had, in recent years, come to be referred to as the Fethullahist Terrorist Organisation (FETÖ) and/or the Parallel State Structure (PDY) (see *Aydın Yavuz and Others* [Plenary], no. 2016/22169, 20 June 2017, §§ 12-46).

During and after the attempted coup, investigations were launched throughout the country not only into those directly involved in the coup attempt, but also into the structuring of FETÖ/PDY within public institutions.

In this regard, an investigation was initiated against the applicant for his alleged membership of FETÖ/PDY and attempting to overthrow constitutional order. He was detained on remand on 20 July 2016 within the scope of this investigation.

On 25 October 2018, at the end of the proceedings conducted against him for membership of a terrorist organisation, he was sentenced to 6 years and 3 months' imprisonment. His conviction has not become final yet for pending of the appellate review of his case.

He had previously lodged an individual application (no. 2017/9944) with the Court concerning the criminal proceedings. It was, however, declared inadmissible by the Court.

While serving as a judge at the Tekirdağ Tax Court, the applicant was dismissed from the profession pursuant to Article 3 § 1 of Decree-Law no. 667 on Measures Taken within the Scope of State of. Emergency (Decree-Law no. 667), by the decision of the Plenary Assembly of the High Council of Judges and Prosecutors ("HCJP" or "CJP", as the name of the High Council of Judges and Prosecutors was replaced with "Council of Judges and Prosecutors" in 2017) on 24 August 2016.

The applicant then challenged to his dismissal by requesting re-consideration of his dismissal under Article 33 of Law no. 6087 on the Council of Judges and Prosecutors, dated 11 December 2010.

In its letter dated 30 September 2016, addressed to the Offices of Chief Public Prosecutors, Regional Court of Appeal Chief Public Prosecutors, Regional Administrative Court Presidencies, and Administrative Court Presidencies, the Ministry of Finance stated that, in cases where judges and public prosecutors were dismissed from the profession under Decree-law no. 667 or subjected to measures such as suspension, detention, arrest, or dismissal, salary payments should be made in accordance with the HCJP's announcement dated 7 September 2016 and the Ministry's announcement dated 6 September 2016.

The applicant's request for re-consideration was rejected by the HCJP on 29 November 2016, and the decision was served on the applicant on 6 December 2016.

On 15 December 2016, the applicant brought an action before the Tekirdağ Administrative Court against the Ministry, seeking the payment of half of his salary for October and November 2016 - the period during which he had been suspended from duty pursuant to Article 74 of Law no. 2802 - plus statutory interest. On 18 December 2016, the Tekirdağ Administrative Court dismissed the action on the grounds of lack of jurisdiction and ordered the transfer of the case-file to the competent İzmir Administrative Court.

Following uncertainty regarding which court had jurisdiction over the applicant's case, it was referred to the Council of State for the determination of the competent court. Following the designation of

the competent court by the Council of State, the applicant's case was dismissed on the grounds that the applicant had been dismissed from the profession, pursuant to Article 3 § 1 of Decree-Law no. 667, by the decision of the HCJP dated 24 August 2016, that decisions concerning the dismissal of judges and prosecutors pursuant to Article 3 of Decree-law no. 667 were of an administrative nature and did not constitute disciplinary sanctions within the meaning of Law no. 2802; therefore, Articles 74 and 78 of the said Law were not applicable to the applicant's case; and that as laid down in Article 4 of Decree-Law no. 670 on the Measures Taken under the State of Emergency (Decree-Law no. 670), individuals dismissed from public service under Articles 3 and 4 of Decree-Law no. 667 shall no longer use their titles such as ambassador, governor, president or member of a high court, undersecretary, judge, prosecutor, district governor, or similar professional titles and designations, nor shall they benefit from rights associated with such titles and designations. It was further indicated therein that the salaries and allowances payable to judges and prosecutors dismissed from the profession during the period -until the finalisation of the decision on their dismissal- also amounted to rights associated with their titles and professional designations, and accordingly, such payments shall not be made to them.

The applicant's appellate request was rejected by the İzmir Regional Administrative Court on 17 October 2018. The final decision was served on the applicant on 26 November 2018.

V. EXAMINATION AND GROUNDS

48. The Constitutional Court ("the Court"), at its session of 11 January 2024, examined the application and decided as follows:

A. Request for Legal Aid

49. The applicant stated that he could not afford to pay the litigation costs and therefore applied for legal aid.

50. In accordance with the principles set out by the Court in the case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the Court granted the applicant's request for legal aid, on the ground that it

was not manifestly ill-founded, since it has been established that the applicant was unable to afford the litigation costs without suffering a significant burden.

B. Alleged Violation of the Right to Property

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

51. The applicant stated that on 14 October 2016, the CJP decided to extend the suspension from office for an additional two months following the expiration of the initial suspension period on 16 July 2016. He accordingly maintained that he retained his status as a public official until 29 November 2016 when the process was finalised on administrative terms. He further stated that, in many provinces, half of the salaries continued to be paid until 29 November 2016. He accordingly argued that, due to the lack of any such payment during his period of detention, his family faced financial hardship, that he was subjected to discriminatory treatment, and that the failure to make any payment lacked a legal basis. Finally, he claimed that there was no legal regulation under Law no. 2802 on Judges and Prosecutors that removed the right of suspended judges to receive a salary. He also stated that the court decisions lacked sufficient reasoning. He accordingly argued that there had been violations of the equality principle, the prohibition of discrimination, the rights to legal remedies, to respect for private and family life, to a fair trial, as well as to property.

52. In its observations, the Ministry noted:

i. In its opinion dated 14 October 2016 regarding whether salaries would be paid to those dismissed from the profession, the High Council of Judges and Prosecutors stated that Decree-Law no. 667 did not include any provision requiring the finalisation of administrative measures taken pursuant to this Decree-Law in order for them to yield legal effects. Therefore, decisions on the dismissal of judges and prosecutors under Article 3 of Decree-Law no. 667 were of an administrative nature, thus not amounting to a disciplinary sanction imposed under Law no. 2802. Therefore, Articles 74 and 78 of Law no. 2802 were not applicable to the individuals concerned.

ii. It also noted that Article 4 of Decree-Law no. 670 provided that individuals dismissed from public service pursuant to Articles 3 and 4 of Decree-Law no. 667 shall no longer be entitled to use the official titles they previously held, such as ambassador or governor, nor may they refer to themselves by professional designations or ranks such as president or member of a high court, undersecretary, judge, prosecutor, district governor, and etc. Furthermore, they would be deprived of all rights attached to such titles and professional statuses. It was expressly stated that the term "rights" within the meaning of this provision would also cover monetary rights, including salaries and similar financial entitlements.

iii. As indicated in the letters of the Ministry of Finance, dated 14 October 2016, and the Ministry of Justice, dated 21 October 2016, the necessary steps should be taken in accordance with the letter issued on 14 October 2016 by the High Council of Judges and Prosecutors.

iv. The dismissal from public office as set out in Article 3 of Decree-Law no. 667 constitutes an *extraordinary measure* of a permanent and definitive nature, which aims to eliminate the existence and functioning, within public institutions and establishments, of terrorist organisations or other structures considered to be engaged in activities against national security. It was therefore distinct from a sanction imposed on account of a criminal or disciplinary offence.

v. It must be assessed whether the application insofar as it concerns the alleged violation of the right to property is inadmissible for lack of competence *ratione materiae*, on the grounds that the applicant did not own a possession within the meaning of Article 35 of the Constitution, or nor did he have a legitimate expectation based on a concrete and sufficient legal basis to acquire such a possession.

vi. As a general rule, judges and prosecutors dismissed under Decree-Law no. 667 would not be entitled to receive salary or allowances for the period until the finalisation of their dismissal decisions, and the applicant was not subjected to any difference in treatment.

vii. The impugned measure was taken pursuant to the legal

framework introduced by the decree-laws adopted during the state of emergency. In its decision in *Aydın Yavuz and Others*, the Court stated that, when examining individual applications concerning measures taken during periods in which emergency administration procedures were applied, it would take into account the protection regime concerning fundamental rights and freedoms as set out in Article 15 of the Constitution. It was emphasized that the assessment was essentially based on the applicant's affiliation, connection, or membership with the FETÖ/PDY organisation, and that the legal basis for the applicant's dismissal from public service was Article 4 of Decree-Law no. 670. Accordingly, the applicant's case should be examined under Article 15 of the Constitution.

2. The Court's Assessment

53. Article 35 of the Constitution, titled *"Right to property"*, reads as follows:

"Everyone has the right to own and inherit property.

These rights may be limited by law only in view of the public interest.

The exercise of the right to property shall not contravene the public interest."

54. Along with the right to a reasoned decision and the right to property, the applicant also claimed a violation of the equality principle, the prohibition of discrimination, the right to legal remedies, and the right to respect for private and family life. As the applicant's deprivation of his salary concerned in essence the right to property, the Court has considered that all complaints must be examined under the alleged violation of the right to property.

55. A person complaining that his/her right to property was violated must prove in the first place that he/she possesses such a right (see *Mustafa Ateşoğlu and Others*, no. 2013/1178, 5 November 2015, § 54). For this reason, it is primarily necessary to evaluate the legal status of the applicant on the point of whether he has an interest in relation to property which requires protection under Article 35 of the Constitution

(see *Cemile Ünlü*, no. 2013/382, 16 April 2013, § 26; and *İhsan Vurucuoğlu*, no. 2013/539, 16 May 2013, § 31).

56. The right to property safeguarded by Article 35 of the Constitution encompasses the rights over any kind of assets which represents an economic value and can be assessed in monetary terms (see the Court's decision 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 (see *Mahmut Duran and Others*, no. 2014/11441, 1 February 2017, § 60).

57. The concept and scope of the right to property differ from those accepted in private law or administrative jurisdiction, and the right to property that is acknowledged within these fields should be addressed by adopting an autonomous interpretation independently from the legal regulations and case-law (see *Hüseyin Remzi Polge*, no. 2013/2166, 25 June 2015, § 31 and *Mustafa Ateşoğlu and Others*, § 51).

58. The right to property enshrined in Article 35 of the Constitution is a safeguard that protects existing possessions, properties, and assets. A person's expectation 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. It should be noted in this context that Article 35 of the Constitution safeguards the right to property but not acquiring or enjoying the property on an abstract basis. As an exception to this, an "*economic value*" or a "*legitimate expectation*" to obtain an enforceable "*claim*" may enjoy the guarantee of the right to property which is protected under certain circumstances (see *Kemal Yeler and Ali Arslan Çelebi*, no. 2012/636, 15 April 2014, §§ 36, 37; *Mehmet Şentürk* [Plenary], no. 2014/13478, 25 July 2017, §§ 41, 53; and *Mustafa Ateşoğlu and Others*, §§ 52-54).

59. A legitimate expectation should not lack an objective basis. It is a sufficiently concrete expectation based on a legal provision, or an

established piece of judicial case-law or a legal procedure related to an interest in kind which demonstrates that there is a high prospect of success (see *Selçuk Emiroğlu*, no. 2013/5660, 20 March 2014, § 28; and *Mehmet Şentürk*, § 42). Therefore, the existence of the right to property based on a legitimate expectation, which falls into the scope of the joint protective realm of the Constitution and the European Convention on Human Rights ("the Convention"), is contingent upon the recognition of the ownership claim raised in the applicable legal system, and such recognition is ensured by virtue of provisions of law and judicial decisions (see *Üçgen Nakliyat Ticaret Ltd. Şti.*, no. 2013/845, 20 November 2014, § 37). 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 sufficient to create a legitimate expectation (see *Kemal Yeler and Ali Arslan Çelebi*, § 37).

60. The applicant was dismissed from the profession by the HCJP on 24 August 2016 pursuant to Article 3 § 1 of Decree-Law no. 667. The applicant's challenge to this decision, seeking re-consideration of his dismissal under Article 33 of Law no. 6087, was dismissed on 29 November 2016. The action brought by the applicant for the annulment of the dismissal decision was also rejected. The applicant's individual application involving the alleged violations of his various constitutional rights due to his dismissal had been still pending before the Court as of that date.

61. The applicant complained that as his dismissal became final following the rejection of his request for re-consideration on 29 November 2016, half of the salaries for October and November 2016, covering the period prior to finalisation, should have been paid to him.

62. Article 138 of the Constitution, which provides for the independence of tribunals, and Article 139, which provides for security of tenure as judges and prosecutors, set out the general principles regarding the exercise of judicial power and the maintenance of judicial independence and impartiality, which afford constitutional guarantee to the independence and impartiality of the judiciary. Article 140 of the Constitution sets forth that the qualifications, appointments, rights and

duties, salaries and allowances, promotion, temporary or permanent relocation, disciplinary investigations and sanctions, criminal investigations and prosecutions in relation to offences committed in connection with or during the exercise of judicial duties, criminal conducts or incompetence requiring dismissal from the profession, in-service training, and other personnel affairs of judges and prosecutors shall be regulated by law in accordance with the principles of judicial independence and security of tenure. The legislature indicated the necessity for a separate legal framework concerning judges and prosecutors, who exercise judicial power and are to issue independent and impartial decisions. Accordingly, Law no. 2802 regulating these matters was enacted.

63. It is stated in Article of Law no. 2802 that the legislative intent of the Law is to regulate the qualifications, appointments, rights and duties, salaries and allowances, promotion, temporary or permanent relocation, disciplinary investigations and sanctions, criminal investigations and prosecutions in relation to offences committed in connection with or during the exercise of judicial duties, criminal conducts or incompetence requiring dismissal from the profession, in-service training, and other personnel affairs of judges and prosecutors. Therefore, since its entry into force in 1983, all procedures concerning judges and prosecutors, including decisions on dismissal from the profession, have been carried out in accordance with the provisions of Law no. 2802.

64. In the section titled "*Disciplinary Sanctions and Suspension from Office*" of Law no. 2802, the types of disciplinary sanctions, as well as the acts and conducts entailing such sanctions are laid down in the relevant provisions. When Articles 73 and 74 of Law no. 2802 are taken together with Article 33 § 1 of Law no. 6087, it is clear that a request for re-consideration of suspension may be submitted to the Plenary of the High Council of Judges and Prosecutors within ten days from the date of notification of the initial dismissal decision. The decisions rendered upon such re-consideration are final. It is also clear that judges and prosecutors, who have been dismissed from the profession, shall be suspended from office until the sanction becomes final, during which

period they shall be entitled to half of their salary and allowances. In addition, Article 74 § 1 of Law no. 2802 stipulates that disciplinary sanctions shall take effect on the date they become final.

65. In the present case, the applicant was dismissed from the profession pursuant to Article 3 § 1 of Decree-Law no. 667. It is set out therein that those who are found to have membership, affiliation, or connection with terrorist organisations, or with structures, formations, or groups deemed by the National Security Council to be engaged in activities against the national security of the State, may be considered unfit to hold their professional position and may be dismissed from the profession.

66. Although the dismissal decision issued by the HCJP states that an application for re-consideration may be filed within ten days, there is no specific provision regarding when the dismissal decision rendered under Article 3 § 1 of Decree-Law no. 667 becomes final or when it starts to produce its legal effects. The courts have acknowledged that the dismissal from the profession under Article 3 of Decree-Law no. 667 constitutes an extraordinary measure, which is not a temporary sanction nor a disciplinary or criminal penalty, but rather a final and permanent measure aimed at removing from public institutions those individuals associated with terrorist organisations or with other structures considered to be acting against national security. The jurisprudence of the Chamber of the Council of State and the Regional Administrative Court on this matter is of a similar nature. In this context, judges and prosecutors who were dismissed from their profession pursuant to Article 3 of Decree-Law no. 667 are given opportunity to have recourse to a judicial remedy under Article 11 of Decree-Law no. 685. This has once again clarified that the dismissal measure imposed under Decree-Law no. 667 constitutes a separate and distinct procedure from the disciplinary dismissals under Article 33of Law no. 6087, for which judicial review is already available. In the same vein, the Court has declared inadmissible the applications involving alleged violations of various constitutional rights for the applicants' being dismissed from the profession as a judge or prosecutor, stating that they should have exhausted the available remedy before the Council of State under

Article 11 of Decree-Law no. 685 (see *Hacı Osman Kaya*, no. 2016/41934, 16 February 2017). The Court has thus found no clear or manifest error of assessment in the courts' interpretation that the impugned sanction, which was of an extraordinary measure, did not necessarily need to become final to bear consequences.

67. Accordingly, as the applicant was dismissed from the profession by means of an extraordinary measure under Article 3 of Decree-Law no. 667, and given that this measure, unlike sanctions imposed for criminal or disciplinary offences, produced immediate legal effects, the Court has concluded that the applicant did not own a possession safeguarded under Article 35 of the Constitution, nor a legitimate expectation based on a sufficient legal basis to receive salary payments for the period between the decision dismissing him from the profession and the rejection of the request for re-consideration of his dismissal.

68. For these reasons, this part of the application must be declared inadmissible for lack of competence *ratione materiae*, there being no need for further examination in the light of the other admissibility criteria.

C. Alleged Violation of the Right to a Fair Trial

1. Alleged Violation of the Right of Access to a Court

a. The Applicant's Allegations

69. The applicant alleged a violation of the right of access to a court, arguing that the litigation costs and attorney's fees imposed on him, amounting to a total of 1,250 Turkish liras (TRY), constituted an excessive burden.

b. The Court's Assessment

70. Article 36 of the Constitution, titled "*Right to legal remedies*", reads as follows:

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

No court shall refuse to hear a case within its jurisdiction."

71. The right of access to a court entails the right to bring a dispute before a court and to request an effective adjudication of that dispute. Restrictions that hinder an individual's ability to bring an action before a court or that render meaningless a judicial decision, thereby substantially undermining the effectiveness of a judicial decision, may amount to a violation of the right of access to a court (see *Özkan Şen*, no. 2012/791, 7 November 2013, § 52).

72. Regulations that impose litigation costs on a party based on the degree of success or failure in the proceedings may amount to an interference with the right of access to a court; however, proportionate measures intended to prevent far-fetched, fabulous or unsubstantiated claims may be considered justified (see *Özkan Şen*, § 61).

73. Under Decree Law no. 659 of 2 November 2011 on the Execution of Legal Services in Public Administrations Covered by the General Budget and Special Budget Administrations, legal proceedings involving the administration shall be conducted by in-house legal advisers or lawyers employed within the administration. It also provides that, in cases where the claim is dismissed, the court shall award attorney's fees in favour of the administration. With a view to preventing unnecessary applications and reducing the case-load, thereby enabling the courts to resolve disputes within a reasonable time without being unduly burdened, certain obligations may be imposed on applicants. The determination of the nature and scope of such obligations falls within the margin of appreciation of the public authorities. Provided that these obligations do not render access to a court impossible or excessively difficult, they cannot be regarded as an infringement of the right of access to a court (see *Serkan Acar*, no. 2013/1613, 2 October 2013, §§ 38, 39). Therefore, the litigation costs and attorney's fees to be imposed on the applicant if he fails at the end of the proceedings should be assessed within this framework.

74. However, the prospect or reality of being ordered to pay litigation costs or attorney's fees to the opposing party, which are calculated on the basis of the dismissed portion of the claim, may

deter -depending on the circumstances of the case- individuals from bringing their disputes before a court or render ineffective the right of access to a court. In this scope, the reasonable and proportionate nature of court expenses constitute, under the particular circumstances of a given case, the minimum limit of the right of access to a court (see, in the same vein, *Özkan Şen*, § 54).

75. In the present case, the applicant alleged that the litigation costs and attorney's fee, corresponding to TRY 1,250, placed an excessive burden on him. However, the Court has considered that the complained-of amount was not of a nature that would hinder or make excessively difficult the avenue to litigate.

76. For these reasons, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

2. Alleged Violation of the Right to a Trial within a Reasonable Time

a. The Applicant's Allegations

77. The applicant complained that his proceedings were not concluded within a reasonable time.

b. The Court's Assessment

78. 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 regards the pending cases, it is the date when the Court renders its judgment on the alleged violation of the right to a trial within a reasonable time (see *Selahattin Akyıl,* no. 2012/1198, 7 November 2013, §§ 45, 47).

79. In assessing whether the length of the administrative proceedings concerning civil rights and obligations was reasonable, the factors 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).

80. The applicant filed an action, seeking the payment of his salaries, on 15 December 2016. The action became final on 17 October 2018 upon the dismissal of his appellate request. Accordingly, the Court has found reasonable the length of proceedings, lasting one year and ten months.

81. For these reasons, this part of the application must be declared inadmissible for *being manifestly ill-founded*.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 11 January 2024 that

A. The request for legal aid be GRANTED;

B. 1. The alleged violation of the right to property be DECLARED INADMISSIBLE for lack of competence *ratione materiae*;

2. The alleged violations of the right of access to a court and the right to a trial within a reasonable time under the right to a fair trial be DECLARED INADMISSIBLE for *being manifestly ill-founded*; and

C. The applicant, whose request for legal aid was granted, be EXEMPTED FROM the litigation costs pursuant to Article 339 § 2 of the Code of Civil Procedure no. 6100 of 12 January 2011, which would otherwise cause him financial hardship.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MOHAMMAD ATAMLEH

(Application no. 2020/9691)

29 February 2024

On 29 February 2024, 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 *Mohammad Atamleh* (no. 2020/9691).

(I-IV) SUMMARY OF THE FACTS

[1-26] The applicant, who is a national of Israel and engaged in the gold trade in Jerusalem, declared 90,000 American dollars (USD) upon entry into the country in the cash declaration forms submitted to the İstanbul Airport Customs Directorate on 23 May 2019. In the declaration forms, the source of the cash was indicated as export proceeds. The applicant purchased various amounts of gold from the individuals and entities listed in the cash declaration form.

On 26 May 2019, the applicant arrived at İstanbul Airport to travel abroad. After passing through the customs cash declaration point without making any declaration and completing the passport control procedures, gold items were detected in the applicant's cabin baggage during a routine X-ray security scan. The applicant presented delivery invoices and a total of 3,100 grams of gold was found in the bag. The applicant stated that he always travelled to İstanbul once a month for the purpose of gold trading, that during his previous visits he had passed through by presenting the delivery invoices, and that he was unaware of the requirement to declare the invoices to customs upon departure.

On 23 September 2019, the Gaziosmanpaşa Chief Public Prosecutor's Office ("the Chief Public Prosecutor's Office") imposed an administrative fine of 338,243.50 Turkish liras (TRY) on the applicant. It also decided to return the gold items to the applicant in the absence of any provision concerning confiscation in Law no. 1567 on the Protection of the Value of Turkish Currency, dated 20 February 1930, ("Law no. 1567"). In its reasoning, the Chief Public Prosecutor's Office stated that the applicant had failed to declare the seized gold and had intended to take it abroad for commercial purposes. It further noted

that as the act remained at the attempt stage, the penalty was reduced to half of the market value of the undeclared assets.

On 1 October 2019, the applicant challenged the administrative sanction. In his challenge, the applicant claimed that he was unaware of the requirement to declare the gold which led to the imposition of the administrative fine. On 28 January 2020, the Gaziosmanpaşa 1st Magistrate Judge dismissed the applicant's challenge.

On 29 January 2020, the applicant appealed the decision, stating that he was unaware of the obligation to declare the purchased gold to the competent authorities when leaving the country and claimed that he had made an inevitable mistake in this regard. Accordingly, he asserted that the conditions for imposing the administrative fine were not met in the present case.

On 3 February 2020, the Gaziosmanpaşa 2nd Magistrate Judge rejected, with final effect, the applicant's appeal holding that the contested decision was in compliance with the procedure and the law.

Having been notified of the final decision on 8 February 2020, the applicant filed an individual application on 4 March 2020.

V. EXAMINATION AND GROUNDS

27. The Constitutional Court ("the Court"), at its session of 29 February 2024, examined the application and decided as follows:

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

28. The applicant complained of the disproportionate nature of the administrative fine imposed on him. As an Israeli citizen and not being able to speak Turkish, it was not reasonably foreseeable for him to be aware of the obligation to submit a customs clearance declaration upon leaving the country, as required under Law no. 1567 on the Protection of the Value of Turkish Currency (Law no. 1567). He therefore argued that he made an honest mistake in this regard. He further submitted

that he had never been subject to any investigation or prosecution for any offences such as money laundering, drug trafficking, financing of terrorism, or tax evasion. He also alleged that the allegations raised in his challenge to the administrative fine were not examined by the respective courts, thus infringing his right to a fair trial.

29. In its observations, the Ministry underlined that no sanction other than an administrative fine had been imposed on the applicant, and that the administrative fine in question was determined as half of the total amount not declared before the customs authority, on the grounds that the act remained at the attempt stage. In consideration of the margin of appreciation granted to the public authorities in this respect, the impugned interference cannot be said to have placed an excessive burden on the applicant.

30. In his counter-statements, the applicant reiterated his complaints and arguments in the application form.

B. The Court's Assessment

31. Article 35 of the Constitution, titled *"Right to Property"*, 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."

32. 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). Although the applicant alleged violations of the right to a reasoned decision and the right to a fair hearing under the scope of the right to a fair trial, along with the right to property, the Court found it appropriate to examine all these allegations under the right to property as the essence of his complaints concerned this right.

1. Admissibility

33. 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.

2. Merits

a. Existence of a Property

34. The right to property, enshrined in Article 35 of the Constitution, embraces all types of rights that have an economic value and can be valued in money (see the Court's decision no. E.2015/39, K.2015/62, 1 July 2015, § 20). In this respect, in addition to movable and immovable property, which is undoubtedly to be considered as property, the right to property includes the limited real rights (*rights in rem*) and the intellectual property rights established on the basis of these properties, as well as any enforceable claims (see *Mahmut Duran and Others*, no. 2014/11441, 1 February 2017, § 60).

35. In the present case, the incumbent Chief Public Prosecutor's Office imposed an administrative fine of TRY 338,243.50 on the applicant. There is no doubt that the amount collected from the applicant due to the administrative fine formed part of his assets, and that the fine resulted in a decrease in his overall assets. It is therefore clear that this sum constituted a possession for the applicant.

b. Existence of an Interference and its Type

36. The right to property, guaranteed as a fundamental right by Article 35 of the Constitution, is a right that allows the individual to use, enjoy, and dispose of what he/she owns, provided that he/she does not infringe the rights of others and that he/she respects the limitations imposed by law (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 32). Therefore, any restriction on the owner's power to use his/her property, to enjoy its fruits, and to dispose of it constitutes an interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, § 53).

37. In the light of Article 35 of the Constitution, read together with other provisions related to the right to property, the Constitution lays down three rules relating to interference with the right to property. In this respect, Article 35 § 1 of the Constitution provides that everyone has the right to property, which sets out the right to peaceful enjoyment of possessions, and Article 35 § 2 establishes the framework for interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution also defines the circumstances under which the right to property may be restricted in general and also sets out the general framework of the conditions for deprivation of property. The last paragraph of Article 35 of the Constitution prohibits any exercise of the right to property in contravention to the public interest, thus enabling the State to control and regulate the enjoyment of property. Certain other articles of the Constitution also contain special provisions enabling the State to have control over property. It should also be noted 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*, § 55-58).

38. The impugned interference with the applicant's right to property resulted from the imposition of an administrative fine. The interference was intended to regulate the transport into and from the country of precious metals and stones, as well as any goods or valuables made from or containing such materials. In these circumstances, given not only the consequences of the interference but also particularly its purpose, the applicant's case must be examined under the third rule of Article 1 of Protocol no. 1 to the Convention, which allows for the control of the use of property in the public interest.

c. Whether the Interference Amounted to a Violation

39. 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, to the requirements

of the democratic order of society and the secular republic, and to the principle of proportionality."

40. Article 35 of the Constitution does not envisage the right to property as an unlimited right; and 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. In order for the interference with the right to property to be constitutional, the interference must have a legal basis, pursue the aim of public interest, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

i. Lawfulness

41. The first criterion required to be examined in case of an interference with the right to property is whether the interference had a basis in law. 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, certain and foreseeable rules regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44-47).

42. The administrative fine giving rise to the present application was imposed by virtue of Article 3 § 2 of Law no. 1567. As the provision of law in question is clear, accessible and foreseeable, there is no doubt that the interference with the applicant's right to property was prescribed by law (for considerations in the same vein, see *Orhan Gürel*, no. 2015/15358, 24 May 2018, § 51).

ii. Legitimate Aim

43. According to Articles 13 and 35 of the Constitution, the right to property may be restricted only in the interest of the public. In addition to allowing for the restriction of the right to property as deemed

necessary by the public interest, thus being a justified ground for the restriction, the notion of public interest effectively protects the right to property by envisaging that this right cannot be restricted except for the cases in the interest of public and thus setting the limits of the restriction in this respect (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, § 53).

44. In the present case, it reveals that the obligation to declare and obtain authorisation for the gold intended to be transported overseas was considered necessary in order to ensure control over the export of such gold. This obligation also serves to enable the authorities to identify and keep track of the gold reserves intended for overseas transport. Therefore, there is a public interest in controlling the import and export of precious metals and stones, as well as any goods made from or containing such materials. It is thus beyond doubt that the said interference pursued a legitimate aim.

iii. Proportionality

(1) General Principles

45. Finally, it must be assessed whether there is a reasonable relationship of proportionality between the aim sought to be achieved by the public authorities' interference with the applicant's right to property and the means employed to achieve that aim.

46. The principle of proportionality reflects the relationship between the aims pursued in restricting fundamental rights and freedoms and the means employed to achieve these aims. The proportionality review is an assessment of whether the means chosen to achieve a legitimate aim are suitable and necessary to achieve the intended aim. The principle of proportionality consists of three sub-principles, which are suitability, necessity and commensurateness. The suitability test requires that a given interference be suitable for achieving the aim pursued; the necessity test requires that the impugned interference be necessary for achieving the aim pursued, in other words that it must not be possible to achieve the same aim through a less severe interference; and the test of commensurateness requires that a reasonable balance must be

struck between the interference with the individual's right and the aim sought to be achieved by the interference (see the Court's decisions no. E.2011/111, K.2012/56, 11 April 2012; E.2014/176, K.2015/53, 27 May 2015; E.2016/13, K.2016/127, 22 June 2016, § 18; and *Mehmet Akdoğan and Others*, § 38).

47. 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. In accordance with the principle of proportionality, the means employed to achieve a legitimate aim must not impose an excessive burden on the individuals concerned and must not be unduly burdensome for them. In the course of the judicial proceedings, it will be assessed whether a measure -albeit being suitable and necessary- entails a disproportion between the severity of the interference and the result achieved, and whether, for that reason, the interference should be discontinued. 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*, no. 2014/13966, 15 February 2017, §§ 58, 60).

48. In order for a fair balance to be struck between the aim of public interest sought to be achieved by the interference with the right to property and the protection of the individual's right to property, the property owner must firstly be given a chance to effectively present his defence submissions and objections against the measures put in place, and the allegations and defence submissions in question must be reasonably responded to (for cases where the interference was found proportionate thanks to the fact that the applicant was afforded the opportunity of effective exercise of the right to defence, see *inter alia*, *Fatma Çavuşoğlu and Bilal Çavuşoğlu*, no. 2014/5167, 28 September 2016, §§ 74-89; and *Eyyüp Baran*, no. 2014/8060, 29 September 2016, §§ 75-95; and see in contrast, for cases where the interference was

found disproportionate due to the denial of the same right during the proceedings, *Mahmut Üçüncü*, no. 2014/1017, 13 July 2016, §§ 79-102; and *Arif Güven*, §§ 57-72).

49. The existence of procedural safeguards may play an important role in the assessment of commensurateness. In this respect, an effective examination of the alleged unlawfulness by a court is important for the commensurateness of the interference (see *D.C.*, no. 2018/13863, 16 June 2021, § 52). Article 35 of the Constitution does not refer to an explicit procedural safeguard. However, in order to offer a real protection for the right to property, this provision, as noted in various judgments of the Court, encompasses the guarantee that the property owner is given the opportunity to effectively raise his/her defence submissions and objections before the responsible authorities that a given interference is unlawful, or arbitrary or unreasonable. This assessment must be made in consideration of the process as a whole (see *Bekir Yazıcı* [Plenary], no. 2013/3044, 17 December 2015, § 71; and *Züliye Öztürk*, no. 2014/1734, 14 September 2017, § 36).

50. The procedural guarantees inherent in the right to property are applicable not only in disputes between private parties but also where a public authority is involved. In this context, where the protection of the right to property is at stake, procedural safeguards can only be considered to have been fulfilled if the domestic courts have provided relevant and sufficient reasons in their decisions. It should also be noted that this obligation does not require the courts to respond to every argument raised by the applicant; however, they must duly consider and address the fundamental claims and objections that are decisive for the outcome of the case concerning the right to property (see *Kamil Darbaz and Gmo Yapı Grup End. San. Tic. Ltd. Şti.*, no. 2015/12563, 24 May 2018, § 53). It is essential that the parties are able to ascertain whether their arguments have been duly examined in accordance with the applicable procedural rules, as this also serves to ensure that the public is informed of the reasons underlying judicial decisions rendered in their name in a democratic society (see *Sencer Başat and Others* [Plenary], no. 2013/7800, 18 June 2014, §§ 31 and 34).

b. Application of Principles to the Present Case

51. It is a fact established by the public authorities that the applicant's gold was confiscated when he attempted to transport it overseas, which gave rise to the alleged violation of the applicant's right to property. Nor did the applicant deny these facts. Accordingly, the applicant intended to export 3,100 grams of gold, but failed to declare to the customs authorities in advance in this regard. For this reason, the applicant was sentenced to an administrative fine pursuant to Article 3 § 2 of Law no. 1567.

52. Taking into account that the administrative fine imposed on the applicant aimed to ensure the fulfilment of the declaration requirement for the transport of gold exceeding a certain value, there is no doubt that the interference was suitable to achieve a public interest. Secondly, it is necessary to examine whether the interference with the applicant's property rights was necessary. In the present case, the applicant's act was not classified as a criminal offence, nor was any judicial sanction prescribed for it. Accordingly, considering that the applicant's act was qualified as a misdemeanour, which was subject to merely an administrative fine, it cannot be said that the interference was unnecessary.

53. With regard to proportionality, it must first be assessed whether the applicant was afforded the opportunity to effectively present his claims and defence submissions against the administrative fine imposed on him. The applicant unsuccessfully filed a request for annulment of the fine with the incumbent magistrate judge and subsequently appealed the decision dismissing his request. In its decision, the magistrate judge emphasised that the administrative sanction imposed on the applicant was in compliance with the procedure, without providing an assessment specific to the particular circumstances of the case. It was therefore hardly possible to conclude that the magistrate judge conducted an effective judicial review. In the present case, it appears that the obstacle to effective judicial review is Article 3 § 2 of Law no. 1567. That is because this provision provides that in cases of unauthorised international transport of precious metals, precious

stones, or any goods and valuables made from or containing them, an administrative fine shall be imposed amounting to the market value of the goods and items, or half of that amount if such act remains at the attempt stage. Accordingly, it appears that Article 3 § 2 of Law no. 1567 does not grant the judge any discretion in consideration of the nature of a given case. Consequently, it was not possible for the magistrate judge to take into consideration the applicant's defence submissions against the administrative fine. Indeed, the provision entails the automatic imposition of an administrative fine at the rate prescribed by law once the misdemeanour is proven.

54. The Court has acknowledged, as a requirement of international treaties, that the control of cash flows without declaration and authorisation holds particular importance in the fight against crime, and that the State enjoys a broad margin of appreciation in regulating and enforcing administrative fines (see *Orhan Gürel*, § 63). However, this margin of appreciation is also subject to the limitation to the extent that it must comply with the necessities of protecting the right to property. Accordingly, as noted above, the interference must not impose an excessive individual burden on property owners (see above § 47).

55. Besides, in its judgment *Yıldız Eker* ([Plenary], no. 2015/18872, 22 November 2018), the Court has concluded that the amount of the fine imposed pursuant to the provision of law, which did not allow the courts to take into account the particular circumstances of the case and grant any margin of appreciation to the judge, imposed an excessive individual burden on the applicant, which rendered disproportionate the interference with the applicant's right of access to a court (see *Yıldız Eker*, § 54).

56. It should be emphasised that in the present application, no criminal charge was brought against the applicant by the public authorities, nor was there any allegation that the gold in the applicant's possession was associated with money laundering, the financing of terrorism, drug trafficking, or any other criminal activity, or that it constituted proceeds of any offence. Furthermore, the applicant

declared, upon entry into the country, both the amount of foreign currency (in US dollars) he brought with him and his intention to use this currency as export proceeds to purchase gold from the persons and entities who issued the invoices included in the application file. It should also be noted that, had the applicant made a declaration in accordance with the procedure set out in Law no. 1567, it would have been possible for him to take the gold abroad. Indeed, the gold was eventually returned to him. In this context, the legal interest pursued by the imposition of an administrative fine is to ensure compliance with the obligation of declaration and prior authorisation. Accordingly, it must be assessed whether there was a disproportion between the severity of the interference and its consequence.

57. Article 3 § 2 of Law no. 1567 provides that in cases where precious metals, precious stones, or any goods and assets made of or containing such materials are transported overseas without authorisation, an administrative fine shall be imposed in the amount of their market value, or half of that amount in cases where such act remains at the attempt stage. It appears that in its current form, Article 3 § 2 of Law no. 1567 does not allow for an assessment based on the gravity of the offence, the individual circumstances of the offender, or the specific nature of the case. It does not grant any margin of appreciation to the judge, nor does it provide the administrative authorities or the domestic courts with the necessary room for manoeuvre to consider the particular circumstances of the case. In other words, this provision not only fails to grant domestic courts the possibility to exercise judicial review based on the specific circumstances of each case, but also prevents them from assessing whether the means employed to achieve the legitimate aim were tolerable for the individuals concerned, whether there existed a disproportion between the severity of the interference and its consequence, and whether the consequence reached was fair. In this respect, it is also necessary to underline the proportionality of the administrative sanctions imposed in cases of transporting foreign currency or gold, as well as the developments in international law.

58. Consequently, under Article 3 § 2 of Law no. 1567, judicial authorities are not in a position to assess the degree of fault of the person

who committed the misdemeanour, the source of the declared assets, or the extent to which the legitimate aim pursued by the provision has been impaired. In other words, it does not allow the courts to evaluate the gravity of the misdemeanour or to individualise the sanction in consideration of the circumstances of the offender. Since the provision does not allow for the individualisation of the sanctions with respect to those who committed the misdemeanour, it also prevents any reasonable assessment of relevant factors such as the degree of fault, the origin of the funds, or the extent to which the legitimate aim has been undermined. It therefore hinders the possibility of reaching alternative outcomes that might render the interference proportionate to the specific circumstances of the case. Indeed, in the present case, there is no indication that the gold in question is connected to any criminal activity, or that its origin is unclear. It appears that the legal interest sought to be pursued by the administrative sanction is limited to monitoring the international transport of gold. Nevertheless, as the provision of law prescribes a fixed rate, the applicant was fined an amount equivalent to 50% of the confiscated gold. Therefore, the interference with the applicant's right to property, in the form of an administrative fine imposed for attempting to transport overseas gold without fulfilling the declaration requirement, placed an excessive individual burden on the applicant *vis-à-vis* the legitimate aim pursued. Therefore, the fair balance that must be struck between the legitimate aim pursued and the individual's right to property has been upset to the detriment of the applicant.

59. For these reasons, it must be held that there was a violation of the right to property enshrined in Article 35 of the Constitution.

Mr. Zühtü ARSLAN, Mr. Kadir ÖZKAYA, Mr. M. Emin KUZ and Mr. Yusuf Şevki HAKYEMEZ concurred with this conclusion, albeit on different grounds.

On the other hand, Mr. İrfan FİDAN, Mr. Muhterem İNCE and Mr. Yılmaz AKÇİL dissented from this conclusion.

VI. REDRESS

60. The applicant requested the Court to find a violation, to order a retrial, and to award him TRY 500,000 in compensation.

61. The Court's judgment *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018) points to the general principles on how to redress the violation in case of finding of a violation. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for the redress of the violation and the consequences thereof is to ensure *restitution* to the extent possible, that is to say, to ensure *restoration of the original state prior to the violation*. Before indicating the steps required to be taken for the redress of the violation and its consequences, the source of the violation must be identified. In this sense, a violation may arise from administrative acts and procedures, judicial proceedings, or legislative acts (see *Mehmet Doğan*, §§ 55, 57).

62. In the present case, it has been found that the violation stemmed from the law. In case of a violation arising from the law, two options come to the fore as a remedy. The first of these options is to notify the Grand National Assembly of Türkiye ("GNAT") of the necessity to introduce a statutory regulation within the framework of the restitution principle, which is applied in the Court's judgment *Sabri Uhrağ* ([Plenary], no. 2017/34596, 29 December 2020). Another method capable of redressing the violation, as indicated and adopted in the Court's judgment *Hulusi Yılmaz* ([Plenary], no. 2017/17428, 1 December 2022), is the claim of unconstitutionality to be raised by the respective court before the Court, on the grounds that the provision of law giving rise to the violation is unconstitutional. The Court has indicated the principles as to the manner of redress in cases where the violation has stemmed from the law.

63. In this sense, Article 11 of the Constitution pointing to the binding nature of the constitutional provisions and Article 138 thereof, which dictates that judges shall resolve disputes in accordance with the constitutional provisions, require judges to render decisions in line with the Constitution. In this regard, it must be pointed out that Article 152 of the Constitution also entrusts to the judge the duty of conducting

constitutionality review of the provisions of law that he will rely on in a given case. However, in the present case, during the proceedings conducted prior to the individual application, the ordinary courts did not raise, before the Court, a claim of unconstitutionality of the provision of law applied in this case within the scope of Article 152 of the Constitution. Nevertheless, during the retrial proceedings to be conducted in the applicant's case, it is possible to raise a claim of unconstitutionality of the applicable provision within the framework of the aforementioned constitutional provision (see *Hulusi Yılmaz*, §§ 65, 66).

64. Besides, in cases where a provision of law to be applied in the retrial contravenes any provision of the international agreements on fundamental rights and freedoms, the last paragraph of Article 90 of the Constitution, which sets forth that the dispute can be resolved in lieu of the provisions of international agreements, may also be applicable. However, given the particular circumstances of the present case, the more appropriate means is to apply to the Constitutional Court for the annulment of the allegedly unconstitutional provision of law, pursuant to Article 152 of the Constitution (see *Hulusi Yılmaz*, § 67).

65. In the light of the above-cited judgments of the Court and the respective constitutional provisions, the Court has found it appropriate to employ concurrently the following two methods so as to redress the found violation of the right to property, as well as the consequences thereof;

- As the found violation directly stemmed from the law, the judgment must be submitted to the GNAT for the prevention of similar violations in line with the objective and functioning of the individual application mechanism.

- A claim of unconstitutionality may be raised before the Court for the annulment of the respective provision of law pursuant to Article 152 of the Constitution, or the last paragraph of Article 90 of the Constitution may be applied. As there is a legal interest in conducting a retrial, a copy of the judgment must be remitted to the Gaziosmanpaşa 1st Magistrate Judge.

66. Accordingly, the total litigation costs of TRY 19,246.90, including the court fee of TRY 446.90 and the counsel fee of TRY 18,800, be REIMBURSED to the applicant.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 29 February 2024 that

A. The alleged violation of the right to property be DECLARED ADMISSIBLE;

B. BY MAJORITY and by the dissenting opinion of Mr. İrfan FİDAN, Mr. Muhterem İNCE and Mr. Yılmaz AKÇİL, that the right to property safeguarded by Article 35 of the Constitution was VIOLATED;

C. The judgment be NOTIFIED to the Grand National Assembly of Türkiye as the found violation stemmed from the law;

D. A copy of the judgment be REMITTED to the Gaziosmanpaşa 1st Magistrate Judge (Miscellaneous no. 2019/6971) for a retrial to redress the consequences of the violation of the right to property;

E. The total litigation costs of TRY 19,246.90, including the court fee of TRY 446.90 and counsel fee of TRY 18,800, be REIMBURSED to the applicant;

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

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

CONCURRING OPINION OF PRESIDENT ZÜHTÜ ARSLAN

1. The majority of the Court found a violation of the applicant's right to property due to the imposition of an administrative fine for transporting gold overseas without complying with the declaration and authorisation requirements. I concur with this conclusion, albeit for different reasons which I will explain below.

2. The right to property safeguarded by Article 35 of the Constitution entails that the property owner would be given the opportunity to effectively raise his/her arguments and objections before the responsible authorities that a given interference is arbitrary or unreasonable, and that the inferior courts would provide relevant and sufficient grounds in their decisions so as to address the substantial claims and objections that are decisive for the outcome of the case (see *Bekir Yazıcı* [Plenary], no. 2013/3044, 17 December 2015, § 71; and *Sencer Başat and Others* [Plenary], no. 2013/7800, 18 June 2014, §§ 31, 34).

3. In the present case, the applicant, challenging the Chief Public Prosecutor's decision imposing an administrative fine, argued that the fine lacked a legal basis, that no criminal investigation or prosecution had been initiated against him, and that he had submitted the invoices for the purchased gold to the customs authorities. He further maintained that it was not reasonably possible for him to be aware of the relevant provision of Law no. 1567 on the Protection of the Value of Turkish Currency, dated 20 February 1930, that he had made an unavoidable mistake in this regard, and that the administrative fine amounting to half of the market value was disproportionate. It is explicit that the applicant's arguments were of a substantial nature capable of affecting the outcome of the case.

4. However, the Gaziosmanpaşa 1st Magistrate Judge dismissed the applicant's challenge on the grounds that *"the administrative sanction decision had been issued in accordance with the procedure"*. The appellate request lodged by the applicant was also dismissed by the Gaziosmanpaşa 2nd Magistrate Judge, as *"the decision complied with the procedure and law"*.

5. I concur with the majority's finding of a violation of the applicant's right to property, albeit on different grounds that the decisions in questions failed to provide relevant and sufficient grounds to address the applicant's substantial arguments and objections, which were capable of affecting the outcome of the proceedings.

CONCURRING OPINION OF VICE-PRESIDENT KADİR ÖZKAYA

I concur with the majority's finding of a violation of the applicant's right to property, which stems from the imposition of an administrative fine for attempting to transport gold overseas without fulfilling the declaration and authorisation requirements, albeit on the different grounds set out in the concurring opinion of Mr. Zühtü Arslan.

CONCURRING OPINION OF JUSTICE M. EMİN KUZ

The majority of the Court found a violation of the applicant's right to property due to the imposition of an administrative fine amounting to half of the value of gold which the applicant attempted to transport overseas without complying with the declaration and authorisation requirements in the country.

The majority noted that the impugned interference had a legal basis and pursued a legitimate aim, but was not proportionate.

In a similar violation judgment referred to in the reasoning of the Court's judgment in the present case, seven applicants who attempted to transport overseas the assets specified in the relevant Law without prior authorisation and who admitted joint ownership thereof were each imposed administrative fines amounting to half of the value of the assets. The Court has held that imposing fines approximately 3.5 times the value of the undeclared assets constituted an excessive individual burden on the applicants and was disproportionate in consideration of the legal and material interests pursued by the sanction (see *Mohamed*

Kashet and Others [Plenary], no. 2015/17659, 20 June 2019). Nevertheless, the circumstances of the present case differ in this regard.

In the present case, the applicant was imposed a single administrative fine for a single act. In this respect, the present case is analogous to the judgments where the imposition of an administrative fine amounting to half of the value of assets, which were not subject to declaration and authorisation, was found proportionate or not excessive (see *Orhan Gürel*, no. 2015/15358, 24 May 2018; and *Mehdi Gholizadeh*, no. 2019/19633, 18 January 2022).

In the present case as there is no circumstance requiring a departure from the aforementioned judgments as regards proportionality, I do not concur with the majority's assessment and conclusion in this regard. However, I agree with the majority's finding of a violation but on different grounds that the applicant's challenges before the magistrate judge against the Chief Public Prosecutor's decision imposing the administrative fine, where he raised arguments capable of affecting the proceedings as a whole, were dismissed without relevant and sufficient reasoning, or indeed any assessment in this respect. Consequently, procedural safeguards inherent in the right to property were not ensured, resulting in a violation thereof.

CONCURRING OPINION OF JUSTICE YUSUF ŞEVKİ HAKYEMEZ

I concur with the majority's finding of a violation of the applicant's right to property, which stemmed from the imposition of an administrative fine for attempting to transport gold overseas without complying with the declaration and authorisation requirements. I nevertheless concur with the majority's conclusion, albeit for the reasons expressed by Mr. M. Emin Kuz.

DISSENTING OPINION OF JUSTICES İRFAN FİDAN, MUHTEREM İNCE AND YILMAZ AKÇİL

1. The applicant arrived at İstanbul Airport to travel abroad and passed through the customs cash declaration point without making any declaration. During an x-ray screening, 3,100 grams of gold were discovered in the applicant's bag. The Chief Public Prosecutor's Office imposed an administrative fine of TRY 338,243.50 on him, on the grounds that the gold had not been declared and that he intended to take it abroad for commercial purposes. In the absence of any provision regarding confiscation in Law no. 1567 on the Protection of the Value of Turkish Currency, dated 20 February 1930, the Chief Public Prosecutor's Office ordered the return of the gold to the applicant.

2. In its decision, the Chief Public Prosecutor noted that the value of the goods constituting a misdemeanour in the present case was indicated as TRY 676,487.00 in the expert report. Since the act occurred within the customs area before departure, it was considered to remain at the attempt stage, resulting in the administrative fine being reduced to half of the market value. The applicant challenged the administrative sanction. The 1st Magistrate Judge dismissed the challenge. The applicant further appealed this decision, which was also dismissed by the 2nd Magistrate Judge.

3. The applicant's complaints were examined under the right to property within the framework of the third rule concerning the use of property in the public interest.

4. 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. In assessing the 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*, no. 2014/13966, 15 February 2017, §§ 58, 60).

5. On the other hand, in order to ensure a fair balance between the aim of public interest and the protection of the individual's right to property when interfering with property rights, the owner must first be granted the opportunity to effectively present their defence submissions and objections against the measures imposed, and those arguments and submissions must be reasonably addressed (see *Orhan Gürel*, no. 2015/15358, 24 May 2018, § 57).

6. As regards the proportionality of the interference with the right to property in terms of procedural safeguards, the applicant is subject to declaration and authorisation requirements under the relevant legislation enacted to enable the identification and monitoring of gold reserves to be transported overseas, to protect the value of Turkish currency, and to combat crime. The applicant, however, failed to fulfil these obligations. The administrative fine imposed on the applicant by the Chief Public Prosecutor's Office was reduced to half of the value as the act had remained at the attempt stage, and no other sanction was applied against the applicant. Furthermore, the confiscated gold was ordered to be returned to the applicant. The decision on the administrative sanction clearly stated that the applicant had failed to declare the gold to the competent authorities upon departure, and this reasoning was upheld by the appellate authority. In the present case, it appears that the applicant had no separate or distinct claims that would affect the substance of the dispute and require a specific response. Moreover, the applicant was afforded the opportunity to effectively present his claims and defence submissions against the administrative fine, having submitted petitions containing detailed objections to the respective Magistrate Judges on two occasions. It has been also established that there was no manifest arbitrariness in the judicial decisions.

7. As a matter of fact, in its judgment *Mehdi Gholizadeh*, which concerned a similar incident where the applicant was fined for failing to declare jewellery intended to be taken abroad to the public authorities,

the Court has noted that the applicant could present his arguments and challenges against the administrative fine, be represented by a lawyer, and avail himself of the appellate remedy. It has also indicated that in consideration of the quantity and value of the gold jewellery, the Chief Public Prosecutor's assessment that the items had been purchased for commercial purposes, as well as the decisions of the inferior courts which addressed the applicant's challenges, did not involve any manifest error of assessment or blatant arbitrariness. It has also stated that the applicant was afforded a genuine opportunity to effectively present his arguments and defence submissions against the administrative fine. It has accordingly declared the application inadmissible for being manifestly ill-founded, finding the interference with the applicant's right to property proportionate (see *Mehdi Gholizadeh*, no. 2019/19633, 18 January 2022, §§ 37-40).

8. Having regard to all these considerations taken together, we have concluded that the interference with the applicant's right to property did not impose an excessive individual burden on him *vis-à-vis* the legitimate public interest pursued, and that the burden placed on the applicant was proportionate to the aim of the interference. We have also considered that the fair balance which must be struck between the right to property and the general interest of the public was not upset, and that the justifications provided by the magistrate judges were sufficient in light of the circumstances of the case. Therefore, the interference with the applicant's right to property was also deemed proportionate to the procedural safeguards. As a result, as we consider that there has been no violation of the right to property in the present case, we have dissented from the majority's finding to the contrary.

RIGHT TO A FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AYŞE DURUCAN SAYGI AND OTHERS

(Application no. 2020/17478)

29 November 2023

On 29 November 2023, the Plenary of the Constitutional Court found a violation of the right of access to a court under the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Ayşe Durucan Saygı and Others* (no. 2020/17478).

(I-IV) SUMMARY OF THE FACTS

[1-23] The Ministry of National Defence announced an internal examination for transfer to the position of national defence expertise, consisting of both written and oral parts. The applicants succeeded in the written examination held on 16 July 2017 and subsequently took part in the oral examination conducted between 2 and 17 October 2017 together with 833 other candidates. Following their success in the oral examination, the applicants, along with 262 candidates in total, were appointed as national defence experts by a decision of 28 October 2017 and attended a special training programme.

On 19 January 2018, the Bureau of Civil Servants' Trade Union brought an action for annulment of the oral examination before the 13th Chamber of the Ankara Administrative Court. On 22 November 2018, the Administrative Court dismissed the case, finding that the examination had been conducted in accordance with objective criteria and that there was no general unlawfulness affecting the entire examination. Upon appeal by the trade union, the 3rd Chamber of the Ankara Regional Administrative Court annulled the oral examination by a final decision of 26 June 2019, holding that the six criteria set for the assessment of candidates had not been assigned any weighting out of the full score, thereby rendering the examination unlawful. The appeal on points of law by the Ministry was dismissed by the 2nd Chamber of the Council of State on 14 November 2019, on the ground that the decision was final.

Following the annulment judgment, the appointments of all personnel, including the applicants, who had been successful in the examination, were revoked by a letter of the Ministry of 12 February 2020, which was served on the applicants on the same date. The

applicants lodged an individual application on 25 June 2020, alleging that their right of access to a court, safeguarded under the right to a fair trial, had been violated on account of not having been notified of the proceedings which directly affected their legal status.

V. EXAMINATION AND GROUNDS

24. The Constitutional Court ("the Court"), at its session of 29 November 2023, examined the application and decided as follows:

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

25. The applicants maintained that, although the annulment judgment delivered in the action underlying the individual application directly produced legal consequences for them, they had not been notified of the case by the court. As a result, they were deprived of the opportunity to present evidence and to substantiate their claims during the proceedings. The applicants further contended that the trade union which initiated the action for the annulment of the oral examination lacked legal standing. According to them, the union discriminated among its members, as two of its members, S.Y. and İ.E., had succeeded in the disputed oral examination and were duly appointed, yet the union filed an action against the examination results without safeguarding the rights and interests of all its members. The applicants also noted that, approximately six months prior to the judgment of the Regional Administrative Court annulling the oral examination, the 11th Chamber of the Ankara Administrative Court had dismissed a similar action concerning the interview examination for transfer to the position of national defence expertise through inter-institutional appointment, and the appeal lodged against that dismissal had likewise been rejected. In their view, therefore, the oral examination had previously been upheld as lawful. Furthermore, the applicants alleged that the Presiding Judge of the Chamber, whose name appeared in the judgment of the Regional Administrative Court subject to the individual application, should have recused herself on the grounds of disqualification. They argued that the judge's daughter had participated in the same examination for transfer to the position of national defence expertise but had been eliminated at the written

stage, thereby giving rise to a potential conflict of interest. Finally, the applicants claimed that, as a result of the annulment of their appointments, they were deprived of their vested rights. They thus alleged a violation of their right to a fair trial as safeguarded by Article 36 of the Constitution.

26. In its observations, the Ministry stated that the inferior courts had reached their conclusions by interpreting the applicable rules of law. As regards the alleged violation of the right of access to a court, it argued that the procedural provisions governing the notification mechanism, designed to allow third parties who might be affected by the outcome of the case to present their arguments before the court in connection with their rights, fall within the discretionary power of the inferior courts. Lastly, with respect to the impartiality of the judges of the Regional Administrative Court, it was emphasised that there was no indication showing that the judges conducting the proceedings had displayed any prejudiced or biased attitude towards either party, or that they had any personal opinion, interest, or partiality capable of rebutting the presumption of their impartiality.

27. In its submissions transmitted through the Ministry, the administration argued that it was contrary to the ordinary course of events for the applicants not to have become aware of the final judgment at issue in the individual application before 12 February 2020, as the case in question had been discussed for months on social media. It further pointed out that the claimant union had announced the outcome of the case on its website on 11 September 2019 under the title "Another Legal Victory by Our Union" and maintained that, for this reason, the applicants could easily have requested to intervene in the proceedings before the case was concluded. Lastly, it was stated that although the daughter of the Presiding Judge at the relevant chamber of the Regional Administrative Court had participated in the examination in question, she had failed at the written stage; therefore, there was no ground for recusal in respect of the oral examination, which was held after the written stage.

28. The applicants, in their submissions in reply to the Ministry's observations, reiterated the allegations set out in their application form.

B. The Court's Assessment

29. Article 36 § 1 on the Constitution, titled *"Right to legal remedies"*, reads as follows:

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

30. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself. The essence of the applicants' complaints was that they had not been allowed to participate in the administrative proceedings whose outcome directly affected them. Therefore, their complaints were examined within the scope of the right of access to a court.

1. Admissibility

31. In the present case, it was observed that the case subject to the individual application was concluded by a final judgment on 26 June 2019, whereas the individual application was lodged on 25 June 2020. The applicants argued that the case had not been notified to them, that they first became aware of the final judgment through the letter dated 12 February 2020 regarding the annulment of their appointments, and that, accordingly, they had submitted their individual application within the prescribed time limit.

32. At this juncture, it is important to recall that the applicants primarily grounded their allegations of a violation in the present individual application on the fact that they had not been notified of the aforementioned case, which, in their view, directly affected their interests in terms of its outcome.

33. It was observed that the material and legal consequences of the case, which could have enabled the applicants to become aware of the proceedings, did not emerge immediately. Accordingly, in the specific circumstances of the case, there is no concrete evidence

in the file justifying the conclusion that the applicants became aware of the violation prior to 12 February 2020, the date indicated in the individual application form as the date on which they learned of the alleged violation and when the relevant communication from the Administration began to be delivered. Nor is there any indication that the applicants failed to exercise the due diligence required of them in this regard.

34. On the other hand, under the measures adopted in response to the COVID-19 pandemic, Article 1, paragraph 1(a) of the Provisional Article 1 of Law no. 7226, dated 25 March 2020, which was also applied in the context of individual applications, provided for the suspension of filing periods from 13 March 2020 to 30 April 2020. The final date of the suspension was subsequently set as 15 June 2020 by the President, pursuant to the authority conferred under the same paragraph (see *Senih Özay*, no. 2020/13969, 9 June 2020, § 32).

35. In the present case, the time-limit for lodging an individual application started on 12 February 2020, the date on which the applicants became aware of the final decision. The last day of this period corresponded to 13 March 2020, which fell within the period during which legal time-limits were suspended due to the COVID-19 pandemic. As of 15 June 2020, these time-limits resumed, and pursuant to the relevant legal provisions, where fifteen days or less remained as of the start of the suspension, such periods were deemed extended by fifteen days from the day following the end of the suspension. Accordingly, in the present case, where the time-limit had begun to run on 13 February 2020, the individual application had to be lodged within fifteen days as from 15 June 2020 in accordance with the principles governing suspension and extension of time-limits set forth in the above-mentioned legislation. Therefore, the individual application lodged on 25 June 2020 was considered to have been filed within the prescribed time-limit.

36. The alleged violation of the right of access to a court must be declared admissible for not being manifestly ill-founded, and there being no other grounds for its inadmissibility.

2. Merits

a. Existence of an Interference and Its Type

37. It is set out in Article 36 § 1 of the Constitution that everyone has the right of litigation either as plaintiff or defendant, as well as the right to defence before the courts. Accordingly, the right of access to a court is an element inherent in the right to legal remedies safeguarded under Article 36 of the Constitution. In the legislative intent of adding the notion of fair trial to Article 36 of the Constitution, it is underlined that the right to a fair trial, which is also enshrined in the international conventions to which Türkiye is a party, has been incorporated into the said provision. The European Court of Human Rights, interpreting the Convention, notes that Article 6 § 1 of the Convention embodies the right of access to a court (see *Özbakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti.*, no. 2014/13156, 20 April 2017, § 34).

38. The right to legal remedies enshrined in Article 36 of the Constitution, beyond being a fundamental right in itself, constitutes one of the most effective guarantees ensuring the effective exercise and protection of other fundamental rights and freedoms. In this regard, for a case to be heard by a court and for an individual to avail himself or herself of the procedural safeguards inherent in the right to a fair trial, the individual must first be afforded the opportunity to assert his or her claims. In other words, in the absence of proceedings, it is not possible to benefit from the guarantees secured by the right to a fair trial (see *Mohammed Aynosah*, no. 2013/8896, 23 February 2016, § 33).

39. In its assessments within the scope of individual application, the Court has noted that any restrictions which preclude a person from applying to the court or render a court decision meaningless, in other words, which render the court decision ineffective to a significant extent may give rise to a violation of the right of access to a court (see *Özkan Şen*, no. 2012/791, 7 November 2013, § 52).

40. In addition to enabling individuals to bring actions against administrative acts affecting their interests, affording them the possibility to intervene in proceedings instituted by third parties -where

they are not direct parties but whose outcome nonetheless affects their interests- also constitutes one of the safeguards to be assessed within the scope of the right of access to a court. Accordingly, individuals whose interests will be affected by the outcome of a case must be afforded the opportunity to obtain knowledge of the proceedings, to make submissions on matters they consider necessary and relevant for the resolution of the dispute, and to submit evidence in support of their claims. This requirement also bears upon the principles of equality of arms and adversarial proceedings, as it ensures that judicial authorities render reasoned judgments after having taken into account and assessed all the relevant material. Indeed, Article 27 of Code no. 6100 contains a provision overlapping with the safeguards inherent in the right of access to a court, by stipulating that, in addition to the parties, intervenors and other persons concerned by the proceedings shall enjoy the right to be heard in connection with their rights. Therefore, a court may not rule on the merits of a case without affording the parties, the intervenors, and the other relevant persons the opportunity to exercise their right of defence (see *Yusuf Bilin*, no. 2014/14498, 26 December 2017, § 44 and *Mehmet Ali Bedir and Tevfik Günay*, no. 2013/4073, 21 January 2016, § 35).

41. The failure to notify an individual of proceedings whose outcome is liable to affect his or her interests, thereby depriving the individual of the possibility of effective participation and of the procedural opportunity to be heard before the court, amounts to an interference with the right of access to a court.

42. In the present case, the individual application concerned an administrative action challenging the oral examination in which the applicants had been successful. In that action, instituted by a trade union, the annulment of the oral examination in its entirety was sought. Following the proceedings, the impugned oral examination was annulled. It was observed that the annulment judgment directly produced effects and consequences *vis-à-vis* the applicants, as their appointments were subsequently annulled pursuant to that judgment. Accordingly, it was concluded that an interference with the applicants' right of access to a court had occurred on account of their exclusion

from the proceedings of an administrative case whose outcome directly affected them.

b. Whether the Interference Constituted a Violation

43. Article 13 of the Constitution, insofar as relevant, 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 requirements of democratic order of the society ... and the principle of proportionality."

44. The aforementioned interference would amount to a violation of Article 36 of the Constitution unless it complies with the conditions set out in Article 13 thereof.

45. Therefore, it must be determined whether the interference complied with the requirements of being prescribed by law, pursuing a legitimate aim, not being contrary to the principle of proportionality, and the requirements of a democratic society order, which are relevant for the present application and laid down in Article 13 of the Constitution.

i. Lawfulness

46. Article 31 of Code no. 2577 provides that notification of a case shall be effected by the court *ex officio*. It has been understood that this provision also encompasses a discretionary power vested in the judicial authority as to whether or not to notify a case to a third party. In the present case, the lower courts exercised their discretion in favour of not notifying the case to the applicants, with the result that the applicants were unable to participate in the proceedings. Having regard to the fact that this practice of the court was based on Article 31 of Code no. 2577, it was concluded that the interference with the applicants' right of access to a court had a legal basis.

ii. Legitimate Aim

47. Although Article 36 of the Constitution does not set forth any explicit ground for restricting the right to legal remedies, this right cannot be regarded as an absolute right that must be free of any limitation. It is accepted that even rights for which no specific ground of restriction is prescribed may nonetheless be subject to certain inherent limitations arising from their very nature. Moreover, even in the absence of a restriction clause in the provision regulating the right, limitations may be imposed on the basis of other rules contained in the Constitution. It is clear that certain rules concerning the scope and conditions of the exercise of the right to bring an action lay down the inherent limitations of the right to legal remedies and delineate its normative boundaries. However, such limitations must not be contrary to the safeguards enshrined in Article 13 of the Constitution (see the Court's decision, E.2015/96, K.2016/9, 10 February 2016, § 10; *Ertuğrul Dalbaş*, no. 2014/7805, 25 October 2017, § 58; *Osman Uslu*, no. 2014/9414, 26 October 2017, § 75).

48. Notification of a case is a procedural mechanism designed to ensure that an individual, although not a party to the proceedings, is nevertheless informed thereof so as to be able to exercise his or her rights through intervention or other means in cases whose outcome affects his or her interests. However, in order to secure the conduct of proceedings within a reasonable time, in an orderly manner and without incurring unnecessary costs -and thereby to realise the principle of procedural economy- notification of a case has been made subject to certain conditions and procedural rules. Taking procedural economy into account in the determination of procedural rules, and thereby ensuring good administration of justice and the protection of the public interest, constitutes a requirement of the principle of the rule of law as enshrined in Article 2 of the Constitution. Therefore, it is permissible to subject the notification of a case to certain conditions and procedural requirements with a view to the principles of procedural economy and good administration of justice (see *Yusuf Bilin*, § 54).

49. That said, the ability of individuals to present their claims and defences in proceedings initiated by third parties, the outcome of which

nonetheless bears directly upon their interests, forms an essential aspect of the right of access to a court. In such instances, public authorities are required to ensure a reasonable balance between the public interest pursued through procedural economy and the individual interest in effective judicial protection. Where the individual interest in access to a court clearly prevails, restrictions imposed solely on the grounds of procedural economy may fall short of pursuing a legitimate aim. In other words, in such circumstances, it may not be sustainable to maintain that the principle of the rule of law enshrined in Article 2 of the Constitution authorises limitations on the right of access to a court (see *Yusuf Bilin*, § 55).

50. In the present case, given that the annulment of the oral examination in which the applicants had succeeded had a direct and decisive impact on their interests, there are serious reservations as to whether the public interest in procedural economy could provide a compelling justification for overriding the applicants' individual interest in participating in the proceedings. Accordingly, it has been deemed more appropriate to examine the existence of a legitimate aim in conjunction with the principle of proportionality when assessing the interference.

iii. Proportionality

(1) General Principles

51. The principle of proportionality consists of three sub-principles, which are *suitability*, *necessity* and *commensurateness*. The *suitability* test requires that a given interference be suitable for achieving the aim pursued; the *necessity* test requires that the impugned interference be necessary for achieving the aim pursued, in other words that it must not be possible to achieve the same aim through a less severe interference; and the test of *commensurateness* requires that a reasonable balance must be struck between the interference with the individual's right and the aim sought to be achieved by the interference (see *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

52. The principle of commensurateness, as the third sub-principle

of the test of proportionality, requires the establishment of a fair balance between the protection of the public interest and the rights and freedoms of the individual. Where the measure in question imposes an extraordinary and excessive burden on the individual, the interference cannot be regarded as proportionate and, consequently, as necessary. Accordingly, it must be determined whether the measure imposed placed an excessive and disproportionate burden on the applicants.

53. The Constitutional Court has held in its case-law on individual applications that restrictions preventing a person from bringing a case before a court, or rendering a judicial decision meaningless -in other words, significantly impairing the effectiveness of the decision- may amount to a violation of the right of access to a court (see *Özkan Şen*, § 52).

54. The introduction of certain conditions and procedural safeguards for third parties to participate in proceedings that affect their interests is not, in itself, incompatible with the right of access to a court, so long as these requirements do not render participation impossible or disproportionately burdensome. However, an arbitrary or manifestly unlawful application of such conditions by judicial authorities, resulting in the exclusion of individuals who seek to safeguard their interests in proceedings, may constitute a violation of the right of access to a court. Accordingly, when determining whether these conditions have been met and when applying procedural rules, courts must avoid interpretations and practices that may compromise the fairness and integrity of the proceedings (see *Yusuf Bilin*, § 51).

55. Article 31 of Code no. 2577 provides that, with respect to the participation of third parties in proceedings and the notification of cases, the provisions of the Code of Civil Procedure shall apply; however, it expressly stipulates that notification of a case shall be effected by the court *ex officio*. Article 66 of Code no. 6100 further establishes that a third party who has a legal interest in the success of one of the parties may join the proceedings as an ancillary intervenor in support of that party until the close of the investigation phase. In administrative proceedings, where the lawfulness of administrative acts and actions is

subject to judicial review, it is of particular importance for third parties who assert a right in relation to the dispute, or who have a legal interest in the success of one of the parties, to participate in the case not merely formally but effectively, in order to secure the guarantees of the right to a fair trial. The most significant procedural implication of this right is the necessity of notifying third parties -whose legal interests entitle them to intervene because they will be directly or indirectly affected by the judgment to be delivered- of the existence of the proceedings (see *Yusuf Bilin*, § 59).

56. At this point, it should be noted that Article 31 of Code no. 2577, which provides for the notification of a case by the court *ex officio*, cannot be construed as imposing an obligation on the administrative courts to notify every administrative case before them to all potentially concerned individuals. Accordingly, the discretion to apply the procedural provisions governing the notification mechanism -introduced to enable third parties who may be affected by the outcome of a case to put forward their arguments before the court in connection with their rights- rests with the inferior courts. In this respect, it is essentially for the inferior courts to assess, in the circumstances of each case, whether a third party would be affected by the outcome of the proceedings and whether he or she has a legal interest in joining the case. It does not fall within the Constitutional Court's remit to review the exercise of such discretion by the inferior courts, unless there is evidence demonstrating that the discretion was exercised in a manner that undermined the fairness of the proceedings by depriving an applicant -whose rights and obligations were directly at stake and whose legal interest in joining the proceedings was manifest- of the opportunity to present his or her arguments in the dispute (see *Yusuf Bilin*, § 60).

57. In addition, it has also been observed that the nature of certain cases falling within the jurisdiction of the administrative courts inherently entails difficulties such as the large number of persons to whom notification would need to be given, the question of by whom and in what manner the costs of service would be borne, and how and under what circumstances an annulment judgment would be

enforced in respect of persons who had not brought an action but who had previously derived certain benefits from the annulled act. Nevertheless, it is evident that such problems, which frequently arise in connection with the application of the notification mechanism and the enforcement of judgments within the scope of such cases, can only be resolved through legislative measures. In fact, Article 20/B § 2 of Code no. 2577 stipulates that, in actions brought concerning centralised and common examinations conducted by the Ministry of National Education and the Student Selection and Placement Centre, as well as in actions concerning the procedures and results of such examinations, suspension of execution and annulment judgments shall be implemented in a manner that produces results in favour of all candidates who participated in the examination. It is understood that this provision was enacted in response to the need arising from similar practical difficulties encountered in practice.

(2) Application of Principles to the Present Case

58. Having regard to the cause of action and the nature of the dispute in the case forming the subject-matter of the individual application, it was evident at first sight, and in a manifest manner, that the applicants would be directly affected by the outcome of that case and therefore had a legal interest in participating in the proceedings. This is because the action did not merely concern the annulment of the measure declaring a particular candidate unsuccessful in the oral examination. Rather, the inferior court annulled the entire oral examination on the ground that "*the instruction relating to the conduct of the examination was unlawful*," thereby rendering invalid the examination, and not only in respect of certain candidates. In these circumstances, even though the applicants' names were not individually mentioned in the case, the annulment judgment in essence directly entailed the annulment of their own oral examination results as well.

59. In the present case, it is evident that the applicants shared certain interests with the defendant administration. In this regard, some of the arguments which could also have been raised by the applicants, namely those concerning the absence of any unlawfulness necessitating

the annulment of the oral examination, were already put forward by the defendant administration during the proceedings. Nevertheless, given that the applicants were those who had actually been appointed as a result of the disputed oral examination, it was foreseeable that they could have advanced additional arguments specific to their position. Indeed, certain arguments relied on by the applicants in their individual application form -particularly within the scope of the right to a fair trial and which, according to them, should have been taken into consideration by the appellate chamber- had not been raised by the defendant administration during the proceedings. Therefore, it cannot be said that the inferior courts reached their conclusions after having addressed those arguments. Accordingly, it must not be overlooked that, had the applicants been allowed to participate in the proceedings, they could have put forward distinct arguments requiring further consideration and assessment beyond those contained in the judgment of the Regional Administrative Court.

60. Accordingly, in the present case, it was established that the applicants were unable to participate in the proceedings concerning the oral examination they had passed, as the case had not been notified to them. As a result, they remained entirely excluded from the dispute and were deprived of the opportunity to present their views on matters they considered relevant and decisive for the outcome, as well as to submit evidence in support of their allegations. Moreover, it was assessed that the individual interest of the applicants in being informed of a case directly affecting their rights clearly outweighed the public interest in ensuring procedural economy, and that the failure to notify the case seriously impaired the balance to be struck between public and individual interests, to the detriment of the applicants.

61. In this case, it was established that the applicants were deprived of the opportunity to advance their arguments before the court due to the inferior courts' failure to comply with the procedural provisions on notification of cases set forth in Article 31 of Code no. 2577, which imposed an excessive and disproportionate burden on them. On the other hand, although the subject matter of the case -namely, the annulment of an examination attended by a large number of

candidates- might give rise to certain difficulties in the application of the notification mechanism in the context set out above (see § 57), it is evident that refraining from notification, even for the purpose of avoiding such difficulties, would in effect place the entire burden arising from the absence of legislative solutions on the applicants. Therefore, it was concluded that the interference with the applicants' right of access to a court was disproportionate.

62. For the reasons set out above, it must be held that the right of access to a court, safeguarded by Article 36 of the Constitution, was violated.

Mr. Basri BAĞCI expressed a dissenting opinion in this respect.

VI. REDRESS

63. The applicant requested the Court to find a violation and to order a retrial.

64. There has been a legal interest in conducting a retrial in order to redress the consequences of the violation found. In this regard, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (see *Mehmet Doğan*, no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others* (2), no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu* (3), no. 2020/32949, 21 January 2021, §§ 93-100).

VII. JUDGMENT

For these reasons, the Constitutional Court held on 29 November 2023:

A. UNANIMOUSLY, that the alleged violation of the right of access to a court be DECLARED ADMISSIBLE;

B. BY MAJORITY and by the dissenting opinion of Mr. Basri BAĞCI, that the right to access to a court under the right to a fair trial safeguarded by Article 36 of the Constitution WAS VIOLATED;

C. A copy of the judgment be REMITTED to the 13th Chamber of the Ankara Administrative Court (E.2018/703, K.2018/2310) to conduct a retrial so as to redress the consequences of the violation of the right of access to a court;

D. The total litigation costs of TRY 19,246.90, including the court fee of TRY 446.90 and counsel fee of TRY 18,800, be REIMBURSED JOINTLY to the applicants;

E. The payments be made within four months as from the date when he applicants apply to the Ministry of Treasury and Finance following the notification of the judgment. In the 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.

DISSENTING OPINION OF JUSTICE BASRİ BAĞCI

1. In the present case, the oral part of the examination for transfer within the Ministry of National Defence to the position of national defence expertise was annulled in an action for annulment brought before the administrative courts by the Bureau of Civil Servants' Trade Union, on the ground that "the weight of the six criteria determined as assessment criteria had not been specified out of the full score."

2. The applicants, who were regarded as having passed the examination, lodged an individual application on the grounds that they had not been informed of the judicial proceedings affecting their legal status and that, as a result, their right of access to a court had been violated.

3. Although Article 31 § 1 of the Code of Administrative Procedure (Code no. 2577) includes notification of a case among the matters in which the provisions of the Code of Civil Procedure (Code no. 6100) are applicable in administrative proceedings, Article 31 § 2 introduces a distinctive regulation that diverges from the corresponding mechanism under the Code of Civil Procedure with respect to the institution of notification.

4. While Article 61 § 1 of the Code of Civil Procedure (Code no. 6100) leaves the initiative for notification of a case to the parties, Article 31 § 2 of the Code no. 2577 on Administrative Procedure stipulates that "notification of a case shall be effected by the Council of State, the court or the judge *ex officio*" thereby conferring both a power and an obligation on the adjudicating authority.

5. There is no doubt that the power to be exercised *ex officio* also confers on the relevant judicial authority a margin of discretion as to in which cases, and under what circumstances, notification of the case shall be made and to whom it shall be addressed.

6. In the present case, although the outcome of the proceedings had an absolute impact on the situation of the applicants who had succeeded in the examination, the judicial authorities did not consider it necessary to effect notification of the case.

7. The ground on which the action was annulled was not related to the applicants' personal circumstances but rather concerned the fact that the weight of the six criteria envisaged for the assessment in the oral examination had not been determined out of the full score, which was entirely an act of the administration with respect to the conduct of the examination. Therefore, it does not appear possible to argue that the applicants' participation or non-participation in the proceedings would have affected the outcome. In this context, it also cannot be said that the attitude adopted by the judicial authorities in not notifying the case to the applicants was arbitrary.

8. Moreover, Article 141 of the Constitution, in its final paragraph, stipulates that "*it shall be the duty of the judiciary to conclude cases with the minimum of cost and as speedily as possible,*" thereby prescribing that attention must be paid to the saving of time and expenses in the course of judicial proceedings.

9. In the present case, there is no doubt that notifying the case to all of the successful candidates in the examination would have required considerable time and expense. Moreover, having regard to the nature of the case, it does not appear likely that the outcome would have been different even if the applicants had participated in the proceedings.

10. For these reasons, I dissent from the majority's finding of violations, since I am of the opinion that imposing an obligation to notify all individuals who succeeded in examinations subject to annulment actions involving thousands of candidates, irrespective of the particular characteristics of such cases, would not be appropriate. In my view, such an approach would lead to unnecessary delays and litigation costs, and would also disproportionately restrict the discretion of the judicial authorities in determining whether notification of a case is required.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AHMET ÖZGAN AND ŞULE ÖZGAN

(Application no. 2020/21347)

21 December 2023

On 21 December 2023, the Plenary of the Constitutional Court found a violation of the right of access to a court within the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual applications lodged by *Ahmet Özgan and Şule Özgan* (no. 2020/21347).

(I-IV) SUMMARY OF THE FACTS

[1-29] The applicants' relative, S.Ö., died in a traffic accident on 28 April 2006 while travelling in a vehicle driven by M.S.K. On 27 October 2010, the applicants filed an action before the 2nd Chamber of the Ceyhan Civil Court of First Instance against the insurance company and the vehicle operator, seeking pecuniary and non-pecuniary compensation plus legal interest. An actuarial report of 16 July 2012 calculated the damages as 90,578.59 Turkish liras (TRY) for Şule Özgan and TRY 13,193.27 for Ahmet Özgan. While the defendants objected to this report, the applicants did not, and they later amended their claims in line with these amounts.

A second expert report of 4 March 2013 increased the amounts slightly. Although the applicants raised no objection, the defendants argued that the method of calculating on the basis of a multiple of the minimum wage was flawed. The court therefore sought a further report based on comparable payroll data. The third report of 19 May 2014, prepared on this basis, significantly raised the damages, calculating TRY 378,308.59 for Şule Özgan (TRY 352,659.62 if her son pursued higher education) and TRY 112,914.93 for Ahmet Özgan (TRY 56,543.58 otherwise).

The applicants subsequently filed a new action on 11 June 2014 for the additional amounts and requested its joinder with the first case. On 4 November 2014, the 2nd Chamber of the Ceyhan Civil Court of First Instance partly upheld the claims, awarding Şule Özgan TRY 43,768 and Ahmet Özgan TRY 6,630.60 in pecuniary damages, together with TRY 20,000 in non-pecuniary damages to each applicant, and dismissed the remainder. The court held that the applicants' failure to object to the first expert report had created a procedurally vested right in favour

of the defendants, which precluded reliance on the higher amounts of subsequent reports.

On appeal, the 17th Civil Chamber of the Court of Cassation, by its judgment of 19 April 2018, upheld the pecuniary awards but quashed the non-pecuniary damages as excessive. Following retrial, the amounts were adjusted. The applicants' subsequent request for rectification was dismissed on 12 February 2020, and the final judgment was served on 18 March 2020.

The applicants lodged an individual application on 30 June 2020 within the statutory time-limit, alleging that their right to a fair trial, within the scope of the right of access to a court safeguarded by Article 36 of the Constitution, had been violated.

Their complaint arose from the dismissal in part of their action for compensation for loss of financial support resulting from a fatal traffic accident, on the ground that a procedurally vested right had arisen in favour of the defendants with respect to the number of damages, since the applicants had not objected to the first expert report. As a result, the higher amounts subsequently established in later expert reports were not taken into account by the court. Their individual application was confined to the part of the case that concerned the pecuniary damages which had become final.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court ("the Court"), at its session of 21 December 2023, examined the application and decided as follows:

A. The Applicant's Allegations

31. The applicants alleged that their right to a fair trial had been violated. They maintained that their additional action, brought to claim the excess pecuniary damages calculated in the supplementary expert report, had been dismissed on the ground that a procedurally vested right had arisen in favour of the opposing party due to their failure to object to the first expert report. In their view, such reasoning lacked any legal basis, as neither the Code of Civil Procedure no. 6100,

nor the Turkish Civil Code no. 4721 of 22 November 2001, nor the Turkish Code of Obligations no. 6098 of 11 January 2011 provided for an institution of procedurally vested right.

B. The Court's Assessment

32. Article 36 § 1 of the Constitution provides as follows:

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

No court shall refuse to hear a case within its jurisdiction."

33. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The essence of the applicants' above-mentioned complaints was that, in the action they had brought for compensation for loss of the support of the deceased, their additional claims for the excess amount, submitted through a supplementary action, were dismissed without any examination on the merits. The dismissal was based on the reasoning that their failure to contest the first expert report had created a procedurally vested right in favour of the opposing party with respect to the amount of compensation. It has therefore been considered that the alleged violation in this respect must be examined within the scope of the right of access to a court, which is one of the safeguards inherent in the right to a fair trial.

1. Admissibility

34. Pursuant to Article 47 § 5 of the Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court, dated 30 March 2011, and Article 64 § 1 of the Internal Regulations of the Constitutional Court, an individual application must be lodged within 30 days starting from the exhaustion of legal remedies or, if no remedies are envisaged, from the date when the violation became known.

35. It has been observed that the final judgment forming the basis of the present application was served on 18 March 2020, whereby

the applicants became aware of the decision, and that the individual application was lodged on 30 June 2020.

36. Within the scope of the measures taken against the COVID-19 pandemic, Provisional Article 1 § 1 (a) of Law no. 7226, dated 25 March 2020, which was also applicable to individual applications, provided for the suspension of time-limits for filing actions from 13 March 2020 to 30 April 2020. Pursuant to the authority granted under the same paragraph, the President subsequently extended the end date of the suspension until 15 June 2020 (see *Senih Özay*, no. 2020/13969, 9 June 2020, § 32).

37. In the present case, the entire period available for lodging an application as from 18 March 2020, the date on which the applicants became aware of the final judgment, coincided with the suspension period of judicial time-limits between 13 March 2020 and 15 June 2020 due to the pandemic. Pursuant to the above-mentioned statutory provision, these time-limits resumed running on the day following the end of the suspension, namely on 16 June 2020. Accordingly, in the present case where the individual application period started on 16 June 2020, it has been concluded that the application lodged on 30 June 2020 was within the statutory time-limit, in compliance with the principles set out in the legislation concerning the suspension and extension of time-limits.

38. The alleged violation of the right of access to a court must be declared admissible for not being manifestly ill- founded and there being no other grounds for their inadmissibility.

2. Merits

a. Existence of an Interference and Its Type

39. Article 36 § 1 of the Constitution sets out that everyone has the right of litigation either as plaintiff or defendant as well as the right to defence before the courts. Accordingly, the right of access to a court is an element inherent in the right to legal remedies safeguarded under Article 36 of the Constitution. In the reasoning of the amendment

introducing the phrase "the right to a fair trial" in Article 36, it was emphasised that the right to a fair trial, safeguarded by the international conventions to which Türkiye is a party, was incorporated into the text of the article. The European Court of Human Rights, interpreting the Convention, notes that Article 6 § 1 of the Convention embodies the right of access to a court (see *Özbakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti.*, no. 2014/13156, 20 April 2017, § 34).

40. The right of access to a court entails the right to bring a dispute before a court and to request an effective adjudication of that dispute (see *Özkan Şen*, no. 2012/791, 7 November 2013, § 52). Therefore, any interferences that prevent an individual from bringing an action before a court, render a judicial decision meaningless, or substantially undermine its effectiveness fall within the scope of the right of access to a court.

41. In the present case, the dismissal, without any assessment on the merits, of the applicants' claims for additional compensation arising from loss of financial support on the ground that a procedurally vested right had arisen in favour of the opposing party with respect to the amount of compensation, due to the applicants' failure to contest the first expert report, through the application of a procedural rule developed by case-law, constituted an interference with the applicants' right of access to a court.

b. Whether the Interference Constituted a Violation

42. The right of access to a court, as an aspect of the right to a fair trial, cannot be regarded as absolute. Any restriction of this right must comply with Article 13 of the Constitution, which prescribes the general framework for the limitation of fundamental rights and freedoms.

43. Article 13 of the Constitution, insofar as relevant, 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 requirements of democratic order of the society ... and the principle of proportionality."

44. The aforementioned interference would amount to a violation of Article 36 of the Constitution unless it complies with the conditions set out in Article 13 thereof.

45. Therefore, it must be determined whether the interference complied with the requirements of being prescribed by law, pursuing a legitimate aim, and not being contrary to the principle of proportionality and the requirements of a democratic society order, which are relevant for the present application and laid down in Article 13 of the Constitution.

i. Lawfulness

46. The regulation by law of rights and freedoms, as well as the interferences and restrictions to be imposed thereon, is one of the most important elements of a democratic state governed by rule of law, which prevent arbitrary interference with these rights and freedoms and ensure legal security (see *Tahsin Erdoğan*, no. 2012/1246, 6 February 2014, § 60). The fact that the interference is based on law primarily necessitates the formal existence of a law. The absence of a formal legal provision enacted by the Grand National Assembly of Türkiye ("GNAT") leads the interference with a given right to be deprived of a constitutional basis (see *Ali Hıdır Akyol and Others* [Plenary], no. 2015/17510, 18 October 2017, § 56)

47. 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). For an interference to be based on law, there must be sufficiently accessible and foreseeable provisions regarding the interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44). When assessing the requirement of lawfulness, it would be incompatible with the very

purpose of the individual application to review the inferior courts' interpretation and application of the statutory provisions enabling an interference, unless such interpretation or application discloses a manifest error of judgment or manifest arbitrariness. However, where it is evident that the inferior courts have misinterpreted or misapplied the relevant statutory provision, it must be concluded that the interference lacked lawfulness (see *Ramazan Atay*, no. 2017/26048, 29 January 2020, § 29).

48. The principle of procedurally vested right was first introduced into procedural law through the unification of case-law decisions of the Court of Cassation. According to the framework established by these decisions, this principle entails that, for first-instance courts, once they comply with a quashing decision, they are thereafter bound to conduct the proceedings and/or deliver judgment in line with that decision, and they may not re-examine or adjudicate the parts of the case that were not quashed. For the appellate authority, the principle likewise means that it is bound by the grounds of the quashing decision and may not re-consider the issues outside the scope of the quash (see, with certain distinctions, the Court's decision, no. E.2019/115, K.2020/31, 12 June 2020, §§ 3, 4).

49. It appears that the scope of application of the principle of procedurally vested right has, over time, been expanded through case-law beyond the framework originally delineated by the unification of case-law decisions. In this broader understanding, the principle is no longer confined to the context of quashing judgments and compliance therewith, but rather has been interpreted to cover any procedural step taken during the course of proceedings by the parties, the court, or the Court of Cassation which results in the creation of such a right in favour of one of the parties, thereby becoming binding. In this regard, the Court of Cassation has further held that the failure of a party to challenge an expert report within the statutory time-limit — based on the premise that an uncontested report attains finality against that party— gives rise to a procedurally vested right in favour of the opposing party, thus representing one of the situations included within the scope of this principle.

50. However, there is no statutory provision in the legislation governing civil procedural law which explicitly regulates the principle of procedurally vested right, either in those exact terms or in the forms of application developed through case-law. Indeed, in the decisions where it has applied the said principle, the Court of Cassation has expressly acknowledged this point, noting that there is no explicit statutory rule concerning procedurally vested rights and that the principle has evolved through judicial practice.

51. In the present case, the court applied the principle of procedurally vested right in such a manner as to deprive the applicants of certain substantive rights. Although this practice was based on the case-law of the Court of Cassation, it is evident that judicial precedent cannot serve as a legal basis for an application of this scope and nature. To hold otherwise would be incompatible with Article 13 of the Constitution, which prescribes that fundamental rights and freedoms may be restricted only by law. Undoubtedly, judicial precedents constitute a principal source for clarifying the implementation of statutory provisions governing a particular matter and thereby ensuring legal certainty. However, the essential prerequisite for this function is the existence of a statutory norm regulating the relevant matter. Indeed, in administrative proceedings, the principle of procedurally vested right, which had previously rested solely on case-law, was accorded a statutory basis by virtue of the amendment introduced by Article 23 of Law no. 6545 of 18 June 2014 to Article 50 § 4 of the Code of Administrative Procedure no. 2577 of 6 January 1982, whereby it was provided that "*where the Council of State's quashing decision is complied with, the appellate review shall be limited to the conformity with the quashing decision*". Thus, in the field of administrative procedure, the principle has been enshrined in law, albeit confined to the context of quashing decisions and the scope of appellate review.

52. In addition, when applying the notion of a procedurally vested right in the present case, the Court relied on the fact that the applicants had failed to contest the initial expert report. Therefore, the examination of whether the interference with the right of access to a court satisfied the requirement of lawfulness also necessitates an assessment of

Article 281 of the Code of Civil Procedure no. 6100, which lays down the framework for objections to expert reports.

53. Pursuant to this provision, the parties may, within two weeks of service of the expert report on them, contest its findings and request that deficiencies be remedied by the same expert or, alternatively, that a new expert be appointed. The court, for its part, may likewise order an additional report ex officio, or appoint a new expert for a re-examination if deemed necessary for the ascertainment of the truth.

54. In the reasoning of the said provision, it is stated as follows: "*The fifteen-day period granted to the parties for objecting to the report constitutes a peremptory and preclusive time-limit. Accordingly, if the parties fail to lodge their objections within this period, the expert report becomes final in respect of them, meaning that they lose their opportunity to challenge the report altogether. However, this situation does not prevent the court, where it deems necessary, from exercising its powers set forth in paragraphs two and three of this Article, namely, to request an additional report from the expert ex officio or to appoint a new expert to carry out a fresh examination*."

55. When read together with its legislative intent, the relevant statutory provision is to be understood as stipulating that a party who fails to object to the expert report within the prescribed time-limit forfeits the opportunity to contest it thereafter. That said, this provision cannot be construed as attaching to the failure to object—a procedural omission—any consequence that would extinguish a substantive right of the party concerned or create such a right in favour of the opposing party. In other words, the only right that may be lost by not objecting to the expert report is the procedural right to lodge such an objection. As explicitly provided in Article 94 § 3 of the Code, failure to perform a procedural act within a peremptory time-limit merely extinguishes the right to perform that act. To hold otherwise would not only render meaningless Article 281 § 3 of the Code - which allows the court, where it considers it necessary for establishing the truth, to order a re-examination through a newly appointed expert- but would also create inconsistencies within the Code itself. Accordingly, deriving from the procedural rule on objections to expert reports an interpretation to

the effect that a party is precluded from claiming its receivable would amount to an unforeseeable construction of the rule.

56. Accordingly, it has been concluded that an interpretation of the relevant provision of the Code governing objections to expert reports, to the effect that the failure to object to an expert report gives rise to a procedurally vested right in favour of the opposing party, cannot be regarded as a foreseeable construction of that provision. Therefore, the interference in question, namely the dismissal of the claim exceeding the amount calculated in the first expert report on the ground that a procedurally vested right had arisen in favour of the defendant due to the applicants' failure to object to that report, was found to lack a legal basis.

57. Nevertheless, in view of the importance of the matter, it was deemed necessary to further examine the interference in the present case with reference to the criteria of legitimate aim and proportionality.

ii. Legitimate Aim

58. The right to a fair trial is, by its very nature, a right that necessitates regulatory action by the State. Its mere enshrinement in the Constitution does not carry practical meaning unless the State, at a minimum, establishes a judicial organisation and sets forth procedural rules governing trials to enable individuals to avail themselves of this right. It must therefore be acknowledged that in areas where the State has regulatory competence, it enjoys a certain margin of discretion. For this reason, there is no exhaustive list of legitimate aims binding the legislator when imposing restrictions on the right to a fair trial. However, the exercise of such discretion by the legislator remains subject to review by the Constitutional Court (see *Bekir Sözen* [Plenary], no. 2016/14586, 10 November 2022, § 74).

59. It can be said that linking the failure to object to an expert report within the prescribed time-limit to the emergence of a procedurally vested right in favour of the opposing party aims at securing procedural economy by ensuring that the parties diligently follow the proceedings. At the same time, such a measure may also serve to

prevent a situation where a party who objects to the expert report ends up in a less favourable position as a result of their own objection. In other words, it aims to ensure that the procedural act of objecting to the report does not benefit the opposing party to the detriment of the objecting party, thereby protecting the rights of the latter. Otherwise, if the objecting party were to face a less favourable outcome than the pre-objection situation, this could effectively deter them from exercising their right to object.

60. However, it must not be overlooked that the possibility of requesting a new expert report when the existing one is deemed deficient, erroneous, or in need of clarification constitutes not only a procedural safeguard afforded to the parties but also a judicial duty and power vested in the court, which is entrusted with resolving disputes and establishing the material truth. In this sense, regard must also be had to the possibility that the court, if it considers it necessary, may of its own motion order a further expert examination. The judicial authority's obligation to ascertain the material truth and to ensure the proper resolution of the dispute cannot be disregarded for the sake of the aims referred to above. For the settlement of disputes requires, first and foremost, the clarification of the relevant facts, which forms part of the State's duty to secure and safeguard the rights in question. Unless a legitimate statutory ground is demonstrated, it cannot be asserted that parties, or either of them, should be deprived of the benefit of the findings reached by the court through clarifying the facts. To hold otherwise, and to restrict a substantive claim on such grounds, would undermine the function of procedural law, which is to serve the realisation of substantive law and the protection of rights within the framework of the guarantees inherent in the right to a fair trial. Moreover, reliance on an interpretation that subordinates the establishment of the material truth to procedural formalism, in a manner incompatible with the State's obligation to protect rights as well as with the requirements of the right to a fair trial, would also impair the principle of the rule of law.

61. Accordingly, while doubts remain as to the existence of a legitimate aim, it has been considered appropriate to examine this

matter with reference to proportionality, bearing in mind that in the present case, the respective court also requested a further expert report *ex officio.*

iii. Proportionality

(1) General Principles

62. The principle of proportionality consists of three sub-principles: *suitability*, *necessity* and *commensurateness*. The *suitability* test requires that the interference must be suitable to achieve the aim pursued; the necessity test requires that the interference must be necessary in order to achieve the aim pursued, in other words that it must not be possible to achieve the same aim through a less severe interference; and the test of *commensurateness* requires that a reasonable balance must be struck between the interference with the individual's right and the aim sought to be achieved by the interference (see the Court's judgments, no. E.2011/111, K.2012/56, 11 April 2012; no. E.2016/16, K.2016/37, 5 May 2016; and *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

63. The means employed to restrict the right of access to a court must be suitable for the aim pursued. In addition, the means employed must be the least restrictive of the right in question. However, in order to conclude that the instrument which least restricts the impugned right should be preferred, the instrument in question must also be suitable for achieving the same aim. If the aim pursued could not be achieved by preferring the less restrictive instrument, it is not unconstitutional to resort to a more restrictive one. The public authorities also have a certain degree of margin of appreciation as to which means of interference are to be preferred (see *Mustafa Berberoğlu*, no. 2015/3324, 26 February 2020, § 48).

64. On the other hand, interferences with the right of access to a court must be proportionate. Proportionality requires that a fair balance be struck between the public interest sought to be attained by the restriction and the rights and freedoms of the individual. Where the measure in question imposes an excessive and extraordinary

burden on the individual, it cannot be regarded as proportionate and, therefore, as compatible with the requirement of necessity. In this respect, it must be ensured that the measure applied does not place an excessive and disproportionate burden on the applicants (see *Levent Tütüncü*, no. 2015/3690, 18 July 2018, § 52).

65. Given the subsidiary nature of the individual application, the interpretation of the relevant legislation falls within the jurisdiction of the inferior courts, while the Constitutional Court's role in individual applications is confined to examining whether the fundamental rights and freedoms safeguarded by the Constitution have been violated. In this regard, it is not for the Constitutional Court to assess, *in abstracto*, the legal consequences attached to the failure to object to an expert report within the prescribed time-limit under the relevant legal provisions. Rather, the Court's role is to examine, in the light of the particular circumstances of the case, the effect on the right of access to a court, as guaranteed under the right to a fair trial, of the inferior courts' interpretation that such failure gives rise to a procedurally vested right in favour of the opposing party.

66. Accordingly, depriving the judge of the discretion to assess the expert report obtained for the resolution of the dispute and thereby preventing the rights and interests of individuals, who seek to protect them through judicial proceedings, from being secured by a court judgment may amount to a violation of the right of access to a court. Therefore, when applying procedural rules attaching such legal consequences to the failure to contest an expert report within the prescribed time-limit, courts must refrain from attitudes, interpretations, and assessments that would undermine the fairness of the proceedings.

(2) Application of Principles to the Present Case

67. In its assessments within the scope of individual application, the Court has noted that any restrictions which preclude a person from applying to the court or render a court decision meaningless, in other words, which render the court decision ineffective to a significant extent may give rise to a violation of the right of access to a court (see *Özkan Şen*, § 52).

68. In assessing the proportionality of the interference in the present case, the decisive element is whether the measure was proportionate. Accordingly, it must be examined whether the court, by refusing to rely on the additional expert report which calculated a higher amount of pecuniary loss and by dismissing the applicants' claims exceeding the amount established in the initial report on the ground that their failure to object to that report had created a procedurally vested right in favour of the opposing party, imposed an excessive and disproportionate burden on the applicants.

69. Bringing an action refers to the recourse of individuals to a judicial authority in order to obtain a legal ruling concerning a right they claim to possess. Accordingly, what is expected from the adjudicating court is to ascertain the material truth underlying the dispute by assessing the evidence and interpreting the rules of law, thereby securing that each party receives what is rightfully due to them. Indeed, the provision under the Code of Civil Procedure no. 6100, which allows the judge to freely assess the evidence, including expert reports, and, if necessary, to request a further expert report, essentially serves this very purpose.

70. To accept that a judge is precluded from relying, whether upon a party's request or of his own motion, on an expert report obtained for the resolution of the dispute, merely on the ground that the failure to object to a previous report has conferred a procedurally vested right upon the opposing party, would effectively strip the judge of his discretion to assess the evidence indispensable for the adjudication of the case. Such an approach would also prevent the judge from rendering a decision that reflects the material reality established through that evidence and the legal consequences thereby arising. In essence, even where the existence of a right has been established as an empirical fact during the proceedings, this approach would entail that the judicial authority -to which recourse has been sought precisely for the recognition of that right- disregards or overlooks such reality. The extinguishment of a right which an individual substantively enjoys under private law, not through the normal operation of judicial proceedings but solely on procedural grounds, is antithetical to the very rationale of bringing an action. It renders judicial recourse futile

and produces an inequitable outcome whereby the opposing party acquires, through procedural technicalities, a right which it does not substantively possess.

71. In the present case, the civil court ordered an expert examination to calculate the pecuniary compensation to be awarded to the applicants on account of the loss of financial support resulting from the death of their relative. Considering that the calculation in the initial expert report had been based on assumptions and also taking into account the objections raised by the defendant, the court requested an additional report. In this subsequent report, the applicants' pecuniary loss was calculated at a higher amount, and the applicants claimed the excess amount through an additional action. Nevertheless, the court, holding that the applicants' failure to contest the first expert report had created a procedurally vested right in favour of the opposing party in respect of the compensation amount, declined to rely on the additional report and dismissed the applicants' claims in so far as they exceeded the amounts calculated in the initial report.

72. In this respect, although the applicants' pecuniary losses had been factually established by means of the expert examination ordered by the court for the resolution of the dispute, the refusal to compensate these losses solely on procedural grounds effectively extinguished, by a judicial decision, rights which they substantively enjoyed under private law, thereby depriving them of the opportunity to fully claim their receivables. It has therefore been considered that such a procedural practice rendered the action brought by the applicants for the enforcement of the said right devoid of meaning and imposed a heavy and disproportionate burden on them. Accordingly, it has been concluded that the interference with the right of access to a court was disproportionate.

73. For these reasons, it must be held that the right of access to a court, safeguarded by Article 36 of the Constitution, was violated.

74. Additionally, although the applicants also alleged a violation of their right to property, in view of the conclusion reached with respect to their complaint concerning the right of access to a court, it has been

deemed unnecessary to carry out a separate examination into this allegation.

VI. REDRESS

75. The applicants requested the Court to find a violation and to order a retrial in their cases, as well as to award them TRY 1,000,000 and TRY 100,000 in compensation for pecuniary and non- pecuniary damages, respectively.

76. There is a legal interest in conducting a retrial in order to redress the consequences of the violations found. In this regard, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others* (2), no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu* (3) [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

77. Furthermore, since it is evident that the retrial will provide an adequate redress in view of the nature of the violation, the applicant's claim for compensation must be dismissed.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 21 December 2023 that

A. The alleged violation of the right of access to a court be DECLARED ADMISSIBLE;

B. The right of access to a court under the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

C. The alleged violation of the right to property NEED NOT BE EXAMINED;

D. A copy of the judgment be REMITTED to the 2nd Chamber of the Ceyhan Civil Court of First Instance (E.2010/470, K.2014/487) for

a retrial to be conducted in order to redress the consequences of the violation of the right of access to a court;

E. The applicant's claim for compensation be REJECTED;

F. The total litigation costs of TRY 19,246.90, including the court fee of TRY 446.90 and counsel fee of TRY 18,800, be REIMBURSED to the applicants;

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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

İSMAİL TUNCEL

(Application no. 2019/8609)

21 December 2023

On 21 December 2023, the Plenary of the Constitutional Court found a violation of the right of access to a court within the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *İsmail Tuncel* (no. 2019/8609).

(I-IV) SUMMARY OF THE FACTS

[1-25] The applicant, a mine worker, was injured on 24 June 2010. The Inspection Board of the Ministry of Labour and Social Security classified the incident as an occupational accident under social security law. Subsequently, the Social Security Institution ("SSI") determined a 14% permanent incapacity rate on 26 October 2011.

On 19 January 2012, the applicant filed a compensation claim based on unquantified debt before the Soma Civil Court, relying on the SSI report. In his petition, the applicant requested 1,000 Turkish liras (TRY) and TRY 50,000 in pecuniary and non-pecuniary damages, respectively, while reserving any rights for surplus.

The defendant employer objected the SSI report. The court then sought independent medical assessment from the Forensic Science Specialized Board ("FSSB"), which determined a higher disability rate of 19% on 24 February 2014. In his petition dated 5 June 2014, the applicant requested that this new, higher rate, be relied on for the compensation calculation or that the FSSB should issue a definitive assessment to settle the discrepancies between the reports. However, rejecting this request, the first instance court ruled that a procedurally vested right had been accrued in favour of the employer since the employer was the one who had objected to the original SSI report, and the applicant had not initially challenged it. Therefore, the court based its judgment solely on the lower 14% disability rate from the SSI report, ordering expert examination for the determination of the contribution rates to the fault. Subsequently, expert report found the employer 70% and the applicant 30% at fault. Although both parties challenged this report, the court dismissed the challenges. It ordered for the calculation of compensation on the basis of 14%

permanent incapacity rate. Upon the challenges of the applicant, the court awarded the applicant TRY 35,000 in pecuniary damages and TRY 17,000 in non-pecuniary damages, dismissing any claims over additional damages. In its reasoning, it reiterated that the FSSB report could not be relied on due to the institution of procedurally vested rights. The reasoning of the decision underlined that granting additional time for the applicant to applying SSI to settle the discrepancies would only prolong the proceedings. The trial court advised the applicant to seek remedies by applying again to the SSI for recalculation and filing a new case based on this recalculation.

Both parties appealed the decision of the Soma Labour Court. In his appeal petition, the applicant argued that the court had misinterpreted the institution of procedurally vested rights. According to the applicant, for this procedurally vested right to bear legal consequences, there must be an action taken by the parties or the court during the proceedings. Additionally, the applicant alleged that when issues of public order are at stake, such a right cannot be invoked, as established in Court of Cassation precedents. Furthermore, the applicant, who stated that the determination of his actual disability had been the main subject matter of the action he had filed, expressed that a report should be obtained from the FSSB to address conflicting reports. He indicated that the report of SSI and FSSB had been drafted in 2011 and the report of FSSB had been drawn up in 2013 upon the request of the trial court and a new medical examination, his worsening condition between 2011 and 2013 undermined the reliance on the SSI report.

On 31 January 2019, the Court of Cassation upheld the decision and the final judgment was communicated to the applicant on 12 February 2019. The applicant filed an individual application with the Constitutional Court on 13 March 2019.

V. EXAMINATION AND GROUNDS

26. The Constitutional Court ("the Court"), at its session of 21 December 2023, examined the application and decided as follows:

A. Alleged Violation of the Right of Access to a Court

1. The Applicant's Allegations

27. The applicant indicated that the institution of the procedurally vested right had been misconstrued in the proceedings he had initiated, that the judicial authorities had failed to conduct a substantive assessment, and that there had been, therefore, no valid reason to disregard the expert opinion issued by the Forensic FSSB. The applicant also maintained that no new report had been obtained from the General Assembly of FSSB on his incapacity rate to eliminate the discrepancies between the existing reports, and his claim in this regard had not been duly addressed in the appeal examination stage. Therefore, the applicant claimed a violation of his right to a fair trial.

2. The Court's Assessment

28. Article 36 of the Constitution, insofar as relevant, provides as follows:

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

No court shall refuse to hear a case within its jurisdiction."

29. The essence of the applicant's complaints pertains to the lack of assessment on the merits of the dispute. Accordingly, the compensation proceedings concerning his occupational incapacity allegedly failed to establish the extent of actual damage on the basis that a procedurally vested right had been previously acquired by the opposing party following the applicant's failure to contest the SSI incapacity report drawn up prior to filing the case. The court had not relied on a subsequent expert report obtained during the proceedings, which had assessed a higher incapacity rate. It has accordingly considered it appropriate to examine the applicant's complaints within the scope of the right of access to a court, which is one of the safeguards inherent in the right to a fair trial.

a. Admissibility

30. The application regarding the alleged violation of the right of access to a court must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of the Interference and the Scope of the Right

31. Article 36 § 1 of the Constitution stipulates that everyone has the right of litigation either as plaintiff or defendant, as well as the right to defence before the courts. Accordingly, the right of access to a court is a component inherent in the right to legal remedies safeguarded under Article 36 of the Constitution. In the legislative intent of the amendment adding the phrase "*the right to a fair trial*" to Article 36 of the Constitution, it was emphasized that the right to a fair trial, also safeguarded by the international conventions, to which Türkiye is a party, was incorporated into the text of the article. In its interpretation of the European Convention on Human Rights ("Conventioın"), the European Court of Human Rights ("ECHR") indicates that Article 6 § (1) of the Convention embodies the right of access to a court (see *Özbakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti.*, no. 2014/13156, 20 April 2017, § 34).

32. The right of access to a court refers to the ability to bring a dispute before a court and to have the dispute effectively settled (see *Özkan Şen*, no. 2012/791, 7 November 2013, § 52). Therefore, interferences that prevent an individual from bringing an action before a court, significantly diminish the prospects of success, or substantially impair the effectiveness of judicial decisions fall within the scope of the right of access to a court.

33. In the present case, the applicant brought an action seeking compensation for loss of earning capacity resulting from an occupational accident. Within these proceedings, the applicant requested that the additional damages be calculated based on discrepancies identified among expert reports concerning the degree

of incapacity. However, the applicant's claim was dismissed pursuant to established procedural case-law on the grounds that he had not contested the incapacity rate set forth in the SSI report drawn up prior to the proceedings and that the opposing party had thereby acquired a procedural right concerning the incapacity assessment to the detriment of the applicant. It was determined that the dismissal of the applicant's claims without a substantive examination of this aspect of the dispute had constituted an interference with the right of access to a court.

ii. Whether the Interference Constituted a Violation

34. The right of access to a court, one of the essential components of the right to a fair trial, is not an absolute right and may be subject to certain limitations. However, any interference with this right must comply with the requirements set forth under Article 13 of the Constitution, which regulates the general principles concerning the limitations on constitutional fundamental rights and freedoms.

35. Article 13 of the Constitution, insofar as relevant, 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 ... and the principle of proportionality*."

36. The impugned interference would amount to a violation of Article 36 unless it complies with the conditions prescribed in Article 13 of the Constitution.

37. In this respect, it must be determined whether the said interference complies with the conditions of being prescribed by law, pursuing the legitimate aims prescribed in the relevant article of the Constitution, and the principle of proportionality, which are stipulated in Article 13 of the Constitution and applicable to the present case.

(1) Lawfulness

38. A fundamental characteristic of a democratic state governed by the rule of law is the establishment of legal norms that regulate interferences with and limitations upon fundamental rights and freedoms to prevent arbitrary interference with these rights and freedoms (see *Tahsin Erdoğan*, no. 2012/1246, 6 February 2014, § 60). The principle of being prescribed by law primarily entails the existence of a legislation in formalistic sense. The absence of a formal legal provision enacted by the Grand National Assembly of Türkiye leads the interference with a given right to be devoid of a constitutional basis (see *Ali Hıdır Akyol and Others* [Plenary], no. 2015/17510, 18 October 2017, § 56).

39. In addition to the existence of the law, the text and application of the law must have legal certainty to a degree that individuals may foresee the consequences of their actions (see *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55). The principle of being prescribed by law also requires accessible and foreseeable legal regulations to be in place in respect of this interference (see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44). It would be inappropriate for the purpose of the individual application to conduct a separate assessment of the interpretation and application of the pertinent statutory provisions unless there is a manifest error of appreciation or arbitrariness in the decisions of the inferior courts. Nevertheless, if it is established that inferior courts have misinterpreted the statutory provisions prescribing the interference, such interference may be deemed to lack a legal basis (see *Ramazan Atay*, no. 2017/26048, 29 January 2020, § 29).

40. The principle of the procedurally vested right was first incorporated into procedural jurisprudence through the Court of Cassation's decisions on the unification of conflicting judgments (see for the decision of the General Assembly of the Court of Cassation for Unification of Jurisprudence no. E.1957/13, K.1959/5, dated 4 February 1959; see, in the same vein, the decision of the General

Assembly of the Court of Cassation for Unification of Jurisprudence no. E1960/21,K1960/9 dated 9 May 1960). According to the case-law unification decisions, this principle means that, for first-instance courts, once they comply with a decision of quashing, they are obliged to conduct their examination and/or render a judgment strictly in line with the reasoning set out in that decision. They are also precluded from re-examining or ruling on matters not covered by the quashing decision. Similarly, for the appellate body, the principle implies that it is bound by the grounds for quashing specified in its own decision and may not reopen or reassess issues that fall outside the scope of the quashing (see, *mutatis mutandis*, the Court's decision no. E.2019/115, K.2020/31, 12 June 2020, §§ 3, 4).

41. Over time, the jurisprudence has expanded the scope of implementation of this principle beyond its initial procedural framework. In this regard, this principle has gone beyond a mere procedural rule concerning quashing decisions and decisions complying with the quashing decisions. In fact, it now encompasses the emergence of a mandatory right, acquired as a result of procedural acts undertaken by a party prior to the initiation of proceedings which which lead to a favourable outcome for that party. Indeed, it has been recognised by the Court of Cassation that situations in which one party fails to contest a report or procedural action prior to proceedings or relies on such actions as legal grounds or evidence may give rise to a procedurally vested right in favour of the party opposing the said act/report during the course of the trial (see *Ahmet Özgan and Şule Özgan* [Plenary], no. 2020/21347, 21 December 2023, § 28).

42. Furthermore, this principle has no explicit statutory basis within the current legislation governing civil procedure. The principle has been developed and shaped solely through judicial interpretation and by judicial practice. The Court of Cassation has acknowledged, in its decision, that the principle at issue had not been explicitly regulated in legislation but rather developed through case-law (see

Ahmet Özgan and Şule Özgan [Plenary], no. 2020/21347, 21 December 2023, § 50).

43. In the present case, however, the first-instance court applied the principle of procedurally vested rights in a manner that ultimately precluded the applicant from asserting a right stemming from material law. Although the practice in question relies on the jurisprudence of the Court of Cassation, a judicial jurisprudence cannot possibly create a basis for such a practice with its scope and nature to this extent. Should the contrary approach prevail, such practice would be incompatible with Article 13 of the Constitution, which prescribes that fundamental rights and freedoms may only be restricted by law. Undoubtedly, jurisprudence serve as a guide to demonstrate the application of legal norms and constitute one of the principal sources for ensuring legal certainty. Nevertheless, the existence of a norm regulating the subject in question is a prerequisite in order for the judicial jurisprudence to function. As a matter of fact, the principle of procedurally vested right, which previously had only a jurisprudential ground of application in administrative cases was incorporated into statutory regulation with the addition of an expression by Article 23 of Law no. 6545, dated 18 June 2014, to Article 50 § 4 of the Code of Administrative Procedure (Code no. 2577). This amendment indicates: "*If the quashing decision of the Council of State is complied with, the appellate review of this decision shall be limited to compliance with the quashing decision*," which restricted the context and the scope of the appellate review (see *Ahmet Özgan and Şule Özgan*, § 51).

44. The Court has concluded that within the scope of the implementation of the procedurally vested right to the present case, the applicant had not challenged to the report drafted by SSI prior to the proceedings; that in fact, he had relied upon it in filing his claim and that the report drawn up by FSSB had been obtained in response to the defendant's objections to the SSI report.

45. It must also be emphasised that, as a general rule, any

procedural action by the parties or the court in civil proceedings presupposes the formal commencement of the proceedings, namely, the filing of the lawsuit. Therefore, it is not technically possible to characterise the acts and proceedings carried out or involved in by individuals or administrative authorities at a stage where the proceedings have not yet commenced by filing a lawsuit, as a procedural act. In this respect, the report issued by the SSI regarding the determination of the incapacity rate of the applicant is a report issued in an administrative process at a stage where the proceedings have not yet started. Accordingly, the applicant's failure to object to this report cannot be interpreted as a judicial procedural act pursuant to the relevant provisions of the applicable legislation.

46. However, the Court treated the said report, which was submitted by the applicant to the file as a legal evidence to substantiate the existence of his incapacity, as if it were an expert report obtained during the judicial process. In this regard, the inferior court made certain assessments within the framework of Article 281 of Code no. 6100, which governs objections to expert reports. As a matter of fact, it appears that following the defendant's objection to the report during the trial, the court referred the case-file to the FSSB to prepare a new report on the incapacity rate of the applicant. Consequently, the applicant's prior failure to contest the report issued by the SSI in the administrative process was treated as if it were a procedural action undertaken during the judicial proceedings.

47. In this respect, Article 281 of Code no. 6100 should also be considered in assessing whether the interference with the applicant's right of access to a court satisfies the requirement of being prescribed by law.

48. Pursuant to the said provision, the parties may object to an expert report within two weeks from the date of its notification, and may request that the court either instruct the expert to address perceived deficiencies in the report or appoint a new expert. Likewise, the court may *ex officio* request an additional report from the same

expert or appoint a new expert to conduct a re-examination, which it deems necessary for the purpose of establishing the material truth.

49. In the reasoning of the aforementioned provision, it is stated: "*The fifteen-day period granted to the parties herein for objecting to the report is definitive; it has a time-barred nature. Therefore, if the parties do not raise their objections within this period, the expert report becomes final for them; in other words, the parties completely lose their right to object to the report. However, this does not preclude the court from exercising its authority under the second and third paragraphs of the article, including the power to ex officio request an additional report or to appoint a new expert*."

50. Considering its reasoning part, the provision in question establishes that a party who fails to object to the expert report within the prescribed time limit irreversibly loses the procedural right to object to the report. However, it cannot be said that the aforementioned provision attaches such consequences to *the failure to object to the expert report*, which is a procedural act, as to forfeiture of a material right of the party who did not object or to preclude that party from asserting such a right within the same proceedings, or to give rise to a corresponding acquired right in favour of the opposing party. In other words, only possible right that can be lost by the failure of challenging the expert report, a procedural act, is itself another procedural right, namely, the right to challenge the report. In fact, as it was indicated in Article 94 § 3 of the Law in question, the failure of a party to complete an act within a determined statutory period results solely in the loss of the right to carry out that specific act. Should the contrary approach prevail, the sentence in Article 281 § 3 prescribing that the court *ex officio* may appoint a new expert to conduct a re-examination, if it deems such action necessary to uncover material truth, would be rendered meaningless and functionless. Accordingly, the provisions of the same law would contradict with each other. Therefore, interpretation of this procedural provision in question in such a way that one of the parties cannot raise a claim constitutes unforeseeable interpretation (compare with *Ahmet Özgan and Şule Özgan*, § 55).

51. In this context, the provision governing objections to expert reports was interpreted as encompassing acts carried out prior to the initiation of judicial proceedings. Based on such interpretation, it was concluded that a party's failure to object to the expert report gave rise to an acquired right in favour of the opposing party. However, both the interpretation and the conclusion reached thereby are unforeseeable (compare with *Ahmet Özgan and Şule Özgan*, § 56). Thus, the dismissal of the applicant's claim based on the higher incapacity rate determined in the subsequent expert report on the grounds that he failed to challenge the earlier report issued during the administrative stage before the commencement of proceedings, and due to the alleged existence of a procedurally vested right, lacks a valid legal basis.

52. However, given the significance of the issue, the Court considered it appropriate to assess the interference in the present case with regard to its legitimate aim and proportionality.

(2) Legitimate Aim

53. The right to a fair trial is inherently one that necessitates active regulation by the State. Accordingly, mere mention of this right in the Constitution, in itself, remain insufficient. In order for individuals to meaningfully exercise this right, the State must at a minimum establish a functioning judicial system and define pertinent procedural rules. It must be acknowledged that the State enjoys a certain margin of appreciation in exercising its regulatory powers. Accordingly, there is no specific list of legitimate aims binding upon the legislature when imposing restrictions on the right to a fair trial. However, it is clear that this discretionary power of the legislature is subject to the review of the Constitutional Court (see *Bekir Sözen* [Plenary], no. 2016/14586, 10 November 2022, § 74).

54. The fact that the consequence of failing to object to an expert report issued during the proceedings within the statutory time limit constitutes a procedurally vested right in favour of the opposing party, may arguably serve the purpose of ensuring procedural

economy and diligence by the parties. The very same practice adopted for the reports issued before the proceedings and submitted to the court as legal evidence may be aimed at preventing an outcome that may be more unfavourable to the party who had expressed its objections to this report in the first place when the proceedings begin due to his/her objection. In other words, this may serve the purpose of preventing an outcome where the objecting party's procedural action inadvertently benefits the opposing party to the detriment of the objector. Accordingly, it protects the rights of the objector from a worse unfavourable outcome arising as a consequence of exercising their procedural right. Indeed, if a party who objects to an expert report encounters a less favourable position as a result of their objection than the position they would have been in without objecting, this may discourage the use of the right to object (compare with *Ahmet Özgan and Şule Özgan*, § 59).

55. However, it must not be overlooked that the possibility of requesting a new expert report when the existing one is deemed deficient, erroneous, or in need of clarification constitutes not only a procedural safeguard afforded to the parties. The State's obligations to safeguard and ensure the effective exercise of the rights entail uncovering the facts/material truth to resolve the disputes at hand. This obligation which is also the requirement of the principle of the rule of law and the right to a fair trial, falls upon the courts enjoying judiciary power. As a matter of fact, the law imposes this judiciary duty on the courts to uncover the facts/material truth. It cannot be argued that the parties or one of them cannot benefit from the outcome reached by the court through uncovering the facts regarding the merits of the dispute, unless a legitimate aim prescribed by the law is demonstrated. To accept otherwise, namely restricting possibility to set forth a claim for material right, would fall contrary to execution of the material law within the framework of the procedural safeguards offered by the right to a fair trial and to the aim of protecting the rights. In addition, it would undermine the principle of the rule of law to rely on such an interpretation, which is incompatible with

the obligations of the state to protect and actualize rights and the requirements of the right to a fair trial and which means sacrificing material reality for the sake of procedural formality (compare with *Ahmet Özgan and Şule Özgan*, § 60).

56. Accordingly, while doubts remain as to the existence of a legitimate aim, it has been considered appropriate to examine this matter with reference to proportionality.

(3) Proportionality

(a) General Principles

57. The principle of proportionality consists of three sub-principles: *suitability, necessity and commensurateness. Suitability* requires that a given interference be suitable for achieving the aim pursued; *necessity* requires that the impugned interference be necessary for achieving the aim pursued, in other words, it is not possible to achieve the pursued aim with a less severe interference; and *commensurateness* requires that a reasonable balance be struck between the interference with the individual's right and the aim sought to be achieved by the interference (see the Court's judgments, no. E.2011/111, K.2012/56, 11 April 2012; E.2016/16, K.2016/37, 5 May 2016; *Mehmet Akdoğan and Others*, no. 2013/817, 19 December 2013, § 38).

58. The means employed for restricting the right of access to a court must above all be suitable, in other words, be capable of achieving the public interest aim pursued by this measure. Moreover, the chosen means must impose minimal impairment upon these rights. However, if the less restrictive measure is effective in achieving the intended objective, it should be preferred. If the chosen more lenient means fails to achieve its goal, opting for a more severe mean would not fall contrary to the Constitution. In this respect, it is primarily for the relevant public authorities to decide which means to be employed, since they are in a better position to make the appropriate decision (see *Mustafa Berberoğlu*, no. 2015/3324, 26 February 2020, § 48).

59. Furthermore, the interferences with the right of access to a court should be *commensurate*. In case of an interference with a given right, the commensurateness requires that a reasonable balance be struck between the public interest sought and the individual's fundamental rights and freedoms. If the intended measure imposes an extraordinary and excessive burden on the individual, the interference cannot possibly be commensurate and therefore proportionate. Accordingly, the burden imposed on the individual by the said interference must not be excessive and disproportionate (see *Levent Tütüncü*, no. 2015/3690, 18 July 2018, § 52).

60. Furthermore, as a requirement of the subsidiary nature of the individual application mechanism, it is incumbent upon the inferior courts to interpret the legislation. In its assessments of individual applications, the Court examines whether the fundamental rights and freedoms safeguarded in the Constitution were violated. It is not upon the Court to assess the legal consequences of a party's failure to object an expert report drawn up during or prior to the proceedings within the scope of the national legislature. In this context, the role of the Court is limited to assessing whether the interpretation as to the existence of procedurally vested right stemming from the failure to challenge an expert report by the opposing party during the proceedings before the inferior court amounts to a violation of the right of access to a court, which is inherent in the right to a fair trial.

61. In this regard, restricting the discretionary power of a judge to evaluate an expert report, which he/she requested in order to resolve the dispute, and preventing individuals from obtaining a judicial ruling in defence of their interests may constitute an interference with the right of access to a court. For this reason, the courts must refrain from practices, interpretations and assessments capable of prejudicing the fairness of the proceedings in the application of the procedural rules concerning the legal consequences of a party's failure to object to an expert report.

(b) Application of Principles to the Present Case

62. In its previous decisions on the individual applications, the Court has consistently held that restrictions which prevent individuals from bringing a legal claim before a court, or render judicial decisions meaningless or substantially ineffective, may constitute a breach of the right of access to a court (see *Özkan Şen*, § 52).

63. Considering the nature of the interference in the present case, the proportionality assessment mainly relies on the assessment of the *commensurateness* element. It must therefore be examined whether the court's decision to rely on the expert report of SSI in the calculation of compensation and to dismiss the report of FSSB, which calculated a higher rate of incapacity due to the existence of procedurally vested right in favour of the opposing party imposed an excessive and disproportionate burden on the applicant.

64. Bringing an action refers to the recourse of individuals to a judicial authority in order to obtain a legal ruling concerning a right they claim to possess. Accordingly, what is expected from the adjudicating court is to ascertain the material truth underlying the dispute by assessing the evidence and interpreting the rules of law, thereby securing that each party receives what is rightfully due to them. Indeed, the provision under the Code of Civil Procedure no. 6100, which allows the judge to freely assess the evidence, including expert reports, and, if necessary, to request a further expert report, essentially serves this very purpose (see *Ahmet Özgan and Şule Özgan*, § 69)

65. To accept that a judge must not rely on an expert report prepared upon the request of one of the parties or obtained *ex officio* due to the existence of a prior expert report prepared before the commencement of proceedings and for allegedly giving rise to a procedurally vested right in favour of the opposing party, would amount to an unjustified restriction of discretionary power of judge. Such a limitation would hinder the judge's ability to examine the necessary evidence for the resolution of the dispute and undermine the court's capacity to

establish the material truth and render a judgment. In other words, it would mean that even if the existence of the individual's right was established as a factual reality in the legal proceedings, this reality would be disregarded by the judicial authority that is entrusted with the delivery of that very right. Disregarding a right under material law on solely procedural grounds without the possibility of obtaining it through judicial means is incompatible with the basic logic of *filing a case*. Such a practice renders the initiation of legal proceedings meaningless and may lead to an inequitable outcome, whereby a party acquires a right it does not lawfully possess through the use of procedural formalities (compare with *Ahmet Özgan and Şule Özgan*, § 70).

66. In this context, the trial court in the present case requested a report from the FSSB to determine the incapacity rate of the applicant upon the defendant's objection to the SSI report previously issued before the trial. The FSSB report determined a higher degree of incapacity for the applicant. Nevertheless, the trial court refused to rely on the findings of the FSSB on the grounds that the applicant's failure to object to the earlier SSI report gave rise to a procedurally vested right in favour of the defendant. On that basis, the court proceeded to calculate the applicant's compensation based solely on the incapacity rate set out in the pre-trial SSI report without requesting a new expert opinion to address the discrepancy between the two reports.

67. In this regard, although the trial court factually established, via the FSSB expert report, a higher level of incapacity suffered by the applicant, this factual finding was not taken into account in assessing damages solely due to procedural considerations. Furthermore, the applicant was advised to initiate a new action to pursue additional claims in relation to the finding of FSSB. This approach effectively deprived the applicant of the opportunity to fully assert the material right in question within the context of the same proceedings. As a result, the application of procedural considerations in the present case rendered the proceedings meaningless while placing an excessive

and disproportionate burden on the applicant. In this respect, it has been concluded that the interference with the applicant's right of access to a court was disproportionate.

68. Moreover, the proceedings in question concern compensation for damages arising from a loss of working capacity due to an occupational accident. In such cases, the determination of the degree of incapacity involves complex technical assessments which necessitates expert analysis whether initiated *ex officio* or upon the request of a party. Expecting a plaintiff to accurately foresee the precise degree of incapacity, which is a highly technical matter and a matter even the courts consult an expert report, at the time of filing an action and to formulate or limit their claims accordingly contradict with the fundamental nature and function of filing a case. In this respect, although the applicant referred in his petition to the 14% incapacity rate ascertained in the SSI report as supporting evidence of the existence of an incapacity, he did not use any expression explicitly limiting his claims with this percentage. On the contrary, the petition explicitly reserved all miscellaneous claims and legal rights in relation to the subject matter of the case apart from the specified compensation amount. Accordingly, as the claim as to the rate of the applicant's incapacity cannot be limited, the above-mentioned assessments finding a violation do not undermine the principle of *ne ultra petita*, which denotes that a judge is bounded by the claims of the parties and cannot award more than what is claimed by the parties.

69. For these reasons, it must be held that there was a violation of the applicant's right of access to a court within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution

B. Alleged Violation of the Right to a Trial within a Reasonable Time

70. The applicant also alleged that his right to be tried within a reasonable time had been violated due to the excessive length of the proceedings.

71. The Court has determined the constitutional principles to be applied in the case of *Veysi Ado* ([Plenary] no, 2022/100837, 27 April 2023) with facts and circumstances that are similar to the concrete application. Within this framework, the Court concluded that according to the amendment made by Article 40 of Law no. 7445, dated 28 March 2023, to the provisional Article 2 of Law no. 6384 dated 9 January 2013 on the Settlement of Some Applications Lodged with the ECHR by means of Paying Compensation, applications that were pending as of 9 March 2023 (including this date) and concerning allegations of a violation of the right to be tried within a reasonable time must first be submitted to the Compensation Commission. Consequently, the examination of individual applications filed without first exhausting this domestic remedy would contravene the subsidiary nature of individual application mechanism. In the present case, there is no reason to depart from the principles set forth and the conclusion reached in the aforementioned judgment.

72. For these reasons, this part of the application must be declared inadmissible for *non-exhaustion of legal remedies*, without any further examination in the light of the other admissibility criteria.

VI. REDRESS

73. The applicant requested the Court to find a violation and to award him compensation in the amount of TRY 50,000 and TRY 20,000 for his pecuniary and non-pecuniary damages respectively.

74. There is a legal interest in conducting a retrial in order to redress the consequences of the violations found. In this regard, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (see *Mehmet Doğan* [Plenary], no: 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no: 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no: 2020/32949, 21 January 2021, §§ 93-100).

75. Furthermore, since it is evident that the retrial will provide an adequate redress in view of the nature of the violation, the applicant's claim for compensation must be dismissed.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 21 December 2023 that

A. 1. The alleged violation of the right of access to a court be DECLARED ADMISSIBLE;

2. The alleged violation of the right to a trial within a reasonable time be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

B. The right of access to a court under the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the Soma Labour Court (E.2014/436, K.2015/373) to conduct a retrial so as to redress the consequences of the violations of the right of access to a court;

D. The applicant's claim for compensation be REJECTED;

E. The total litigation costs of TRY 19,164.60, including the court fee of TRY 364,60 and the counsel fee of TRY 18,800, be REIMBURSED to the applicant;

F. The payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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 TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

FADİME KOLUTEK AND OTHERS

(Application no. 2017/25008)

31 January 2024

On 31 January 2024, the Plenary of the Constitutional Court found violations of the right to respect for private life and right to a fair trial, respectively safeguarded by Articles 20 and 36 of the Constitution, in the individual application lodged by *Fadime Kolutek and Others* (no. 2017/25008).

(I-IV) SUMMARY OF THE FACTS

[1-25] Upon the death of the applicant Celaleddin Kolutek, his wife Fadime Kolutek continued the application in his stead as well as on behalf of their children.

An investigation had been launched against the deceased applicant Celaleddin Kolutek for his alleged membership of the Fetullahist Terrorist Organization/Parallel State Structure ("FETÖ/PDY"), during which he was detained on remand.

Meanwhile, the Administration and Monitoring Board of the Penitentiary Institution ("the Board") issued a decision allowing for the monitoring of the meetings of detainees, who were held in the penitentiary institution on charges of membership of the FETÖ/PDY, with their lawyers in accordance with the Decree Law no. 667 on the Measures Taken within the Scope of the State of Emergency ("Decree Law no. 667"). The applicant's meeting with his lawyer was monitored by an officer in charge at the penitentiary institution in accordance with the said decision.

Afterwards, a disciplinary investigation was launched by the Disciplinary Board of the Penitentiary Institution due to the statements allegedly made by the applicant during the monitored meeting. According to the official record prepared subsequently, during the meeting the applicant complained about prison conditions and made statements to the effect that prison officials were treating him and other detainees, whom he described as judges, prosecutors, and teachers, with disrespect, that he would hold them accountable, and that he would take legal action, including claims for compensation, once reinstated to his judicial post.

At the end of the investigation, the applicant was placed in solitary confinement for five days pursuant to the Law no. 5275 on the Execution of Sentences and Security Measures for allegedly insulting and threatening the officer in charge.

The applicant appealed the decision before the execution judge, requesting its revocation for its alleged unlawfulness. However, the former dismissed the applicant's appeal. The applicant's subsequent appeal was also dismissed by the assize court with no right of further appeal.

V. EXAMINATION AND GROUNDS

26. The Court, at its session of 31 January 2024, examined the application and decided as follows:

A. Request for Legal Aid

27. The applicant, who is unable to afford the litigation costs, should be granted legal aid (see *Mehmet Şerif Ay*, no. 2012/1181, 17 September 2013).

B. Preliminary Issue

28. Article 46 of the Code no. 6216 of 30 March 2011 on the Establishment and the Rules of Procedure of the Constitutional Court, titled "*Persons entitled to lodge an individual application*," sets out who is entitled to lodge an individual application. Pursuant to paragraph (1) thereof, three fundamental preconditions must be met for a person to be eligible to lodge an individual application with the Constitutional Court: (i) the existence of a public act, action, or omission that allegedly caused a violation; (ii) the applicant must be personally and directly affected by the alleged *violation of a current right*; and (iii) the applicant must claim to be a *victim* of the violation (see *Onur Doğanay*, no. 2013/1977, 9 January 2014, §§ 42-45).

29. Article 80 of the Internal Regulations of the Court, titled "*Striking-out decision*", reads as follows:

"*(1) A striking-out decision can be issued by the Sections or the Commissions at any stage of the proceedings in the following circumstances:*

…

(2) The Sections or the Commissions can still continue to examine an application which indeed falls within the scope of the paragraph above in cases 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."

30. In the present case, the applicant Celaleddin Kolutek, passed away after lodging the application. His heirs, through a petition submitted on 6 November 2023, expressed their intention to pursue the application. Considering the nature of the complaints raised in the application form, it has been assessed that the case bears significance in terms of the application and interpretation of the Constitution and the determination of the scope and limits of fundamental rights. Accordingly, it has been deemed appropriate to proceed with the examination of the application.

C. Alleged Violation of the Right to Respect for Private Life

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

31. The deceased applicant, Celaleddin Kolutek, claimed that his meeting with his lawyer had been monitored by penitentiary institution officials, and argued that meetings between a lawyer and client must take place in an environment where no restrictions are imposed and where authorities are unable to overhear the conversation. He maintained that preserving the confidentiality of communication between lawyer and client is a requirement of the right to defence, and that the imposed restriction had been unlawful, resulting in a violation of his freedom of communication, the right to protection of corporeal and spiritual existence, and the right to personal liberty and security.

32. The Ministry, in its observations, stated that certain rights enshrined in the Constitution may be restricted for detainees and prisoners, and argued that the applicant's freedom of communication

had been limited on the legitimate grounds of maintaining the order and security of the penitentiary institution and preventing crime—grounds that are inherent and unavoidable consequences of imprisonment. The Ministry further asserted that a balance had been struck between individual and public interests, and that the interference had been proportionate to the legitimate aim pursued. In his counter-statement, the applicant Celaleddin Kolutek reiterated the allegations and claims put forward in his application form.

2. The Court's Assessment

33. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself (see *Tahir Canan,* no. 2012/969, 18 September 2013, § 16). In the present case, it has been understood that the essence of the applicant's allegations does not relate to ongoing judicial proceedings or legal assistance in that context, but rather concerns the presence of a prison officer during his meeting with his lawyer. Accordingly, this part of the application has been examined within the scope of the right to respect for private life (see, in the same vein, *Çetin Arkaş ve Nasrullah Kuran,* no. 2016/371, 13 January 2021, §§ 67, 68; and *Mehmet Emin İmret,* no. 2019/16013, 2 May 2023, §§ 23, 24).

a. Admissibility

34. The alleged violation of the right to respect for private life must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

35. The Court has emphasised that the primary condition for effectively benefiting from the assistance of a defence counsel is that meetings with the counsel must be conducted in a manner that ensures a certain degree of confidentiality. It has underlined that confidentiality is of great importance for enabling the suspect or accused to freely exchange information with their defence counsel, and that the absence

of such confidentiality in meetings would substantially diminish the benefit of the assistance provided by the latter (see the Court's decision no. E.2016/205, K.2019/63, 24 July 2019, §§ 78-92). It should also be noted that face-to-face meetings with a lawyer are not only intended to enable the prisoner to receive legal assistance regarding the ongoing proceedings but may also include sensitive matters related to the latter's private life which he does not wish to disclose publicly, or any treatment he is subjected to at the penitentiary institution. The right to consult with a lawyer serves both to allow convicts and detainees to establish and maintain contact with the outside world and to enable them to make decisions affecting their lives, through legal assistance. Accordingly, ensuring a certain level of confidentiality in meetings between the lawyer and the prisoner is crucial for protecting the privacy of the latter's private life, both inside and outside the institution. In this regard, monitoring the meeting through technical devices, supervising the exchange of documents between the lawyer and the client, or holding meetings under the supervision of a penitentiary institution officer would impair the confidentiality of the lawyer-client relationship (see *Çetin Arkaş and Nasrullah Kuran*, § 50).

36. While the principle rule is that communication between a lawyer and their client must remain confidential, it must be emphasised that exceptions may be introduced for legitimate aims such as maintaining public order, ensuring the security of the institution, and preventing the commission of crimes. However, any restrictions imposed for such purposes must be temporary in nature, must not turn into a general and permanent practice that effectively nullifies the exercise of the right, and must be demonstrated to be necessary through sufficient reasoning in the relevant decisions (see *Çetin Arkaş and Nasrullah Kuran*, § 81).

37. If the restrictions on the right to consult with a lawyer are imposed during a state of emergency and aim to eliminate the dangers posed by such extraordinary circumstances, the examination regarding whether the right to respect for private life has been violated must be carried out within the scope of Article 15 of the Constitution (see *Engin Karataş*, no. 2018/3488, 13 September 2022; and *Şükran Dağ Cabir*, no. 2019/19839, 15 March 2023). The review to be conducted under

Article 15 of the Constitution is limited to determining whether the interference concerns non-derogable core rights, whether it infringes on the rights and freedoms enumerated in the second paragraph thereof, whether it contradicts the state's obligations under international law, and whether it is to the extent strictly required by the exigencies of the situation (see *Ayla Demir İşat* [Plenary], no. 2018/24245, 8 October 2020, § 146; and *Şükran Dağ Cabir*, § 28).

38. The right to respect for private life is not among the non-derogable core rights listed in Article 15 § 2 of the Constitution, which applies during periods governed by extraordinary administrative regimes such as war, mobilization, or a state of emergency. Accordingly, measures that contravene the constitutional safeguards may be adopted with regard to this right during a state of emergency. Moreover, this right is not listed among the non-derogable core rights in international human rights instruments to which Türkiye is a party, particularly in Article 4 § 2 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 § 2 of the European Convention on Human Rights (ECHR), or in the additional protocols thereto. Additionally, it has not been established that the measure concerning private life in the present case violated any other guarantees under international law that continue to apply during states of emergency (see *Ayla Demir İşat*, §§ 147, 148; and *Şükran Dağ Cabir*, § 29).

39. The right to respect for private life prohibits any arbitrary interference with an individual's privacy and, thus, their private sphere. Even in times of emergency when extraordinary administrative regimes are adopted, disputes arising under this right must be resolved in accordance with the requirements of the right to respect for private life and through the fulfilment of procedural obligations (see *Ayla Demir İşat*, §§ 149, 150).

40. Pursuant to Article 15 of the Constitution, the final step in determining whether a measure interfering with fundamental rights and freedoms during a state of emergency was legitimate is to assess whether the measure was *strictly required by the exigencies of the situation* (see *Şükran Dağ Cabir*, § 31).

41. The principle of proportionality specified in Article 15 of the Constitution refers to the proportionality of measures taken in response to the circumstances necessitating the implementation of extraordinary administration procedures. Accordingly, the means employed to restrict or suspend the exercise of fundamental rights and freedoms must be suitable to achieve the aim pursued, necessary, and proportionate in terms of the relationship between the means and the aim (see the Court's decision no. E.1990/25, K.1991/1, 10 January 1991). A given measure must be capable of achieving the objective of eliminating the threat or danger giving rise to the state of emergency and must be necessary to attain that aim; furthermore, there must not be a disproportionate burden on the individual resulting from the measure in relation to the public interest pursued (see *Ayla Demir İşat*, § 154; *Şükran Dağ Cabir*, § 33; see also the Court's decision no. E.2013/57, K.2013/162, 26 December 2013).

42. In determining the elements of proportionality, all the prevailing conditions during the period in which the measure was adopted must be taken into consideration. The nature of the interfered right or freedom is also of particular importance. Likewise, the timing of the measure is a relevant factor in assessing proportionality. Therefore, a measure adopted during the period when the events constituting the state of emergency were actively unfolding and the imminent danger was still present must be assessed differently from a measure adopted at a time when the threat or the underlying danger had largely subsided. Moreover, the duration, scope, and severity of a measure interfering with fundamental rights and freedoms are relevant to the assessment of proportionality. As the duration of an interference increases, so too does the burden imposed on the individual. Additionally, even a short-term measure may, due to its scope or severity, have a significant impact on fundamental rights and freedoms. As such, the severity of the measure—regardless of its duration—may place an excessive burden on the individual (see *Ayla Demir İşat*, §§ 155, 156; and *Şükran Dağ Cabir*, § 34).

43. Furthermore, individuals must be afforded procedural safeguards to challenge arbitrary or disproportionate interferences

with their fundamental rights and freedoms. In this regard, administrative authorities and courts must provide relevant and sufficient reasoning demonstrating that the measure is not arbitrary. A significant deprivation of such safeguards would be incompatible with the principle of proportionality. While public authorities—being those directly faced with the threat or danger and bearing the primary responsibility for addressing it—are afforded a wide margin of appreciation in determining whether a measure is suitable, necessary, and proportionate to eliminate such threats, it is for the Constitutional Court to review whether the impugned measure falls within this margin when subject to an individual application (see *Ayla Demir İşat*, § 157; and *Şükran Dağ Cabir*, § 35).

ii. Application of Principles to the Present Case

44. In the present case, the said measure was taken against the applicant during a period when a state of emergency was declared nationwide. It has been observed that the impugned measure was aimed at preventing potential threats to the security of the society and the penitentiary institution, management of terrorist organisations or other criminal organisations, communication of orders and instructions to them, or transmission of covert, overt or encrypted messages through expressions, and at eliminating the risks posed by the state of emergency. Thus, the alleged violation of the applicant's right to respect for private life will be examined within the scope of Article 15 of the Constitution.

45. In order for the measure requiring the presence of a penitentiary institution official during the applicant's meeting with his lawyer to be considered proportionate to the exigencies of the situation within the meaning of Article 15 of the Constitution, it must, first and foremost, not be arbitrary. Considering the circumstances of the state of emergency, it may be reasonable to impose additional measures on the persons concerned, in accordance with the legitimate purposes, provided that there are objective and convincing grounds.

46. Pursuant to Decree Law no. 667, which was in force at the material time, the prisoner's right to meet his lawyer in private was

protected and the confidentiality of the said meeting was acknowledged as a rule. According to the relevant regulation, if there is certain information, findings or documents indicating the involvement of the prisoners of given offences in endangering the security of the society and the penitentiary institution, managing terrorist organisations or other criminal organisations, communicating orders and instructions to them, or transmitting covert, overt or encrypted messages through expressions, then the public prosecutor may restrict the prisoner's right to meet his lawyer by a decision. However, it has been observed that the relevant decree law did not limit the right to meet a lawyer for a definite period of time and did not establish a specific inspection mechanism as to the ongoing necessity of the impugned measure (see, in the same vein, *Çetin Arkaş and Nasrullah Kuran*, §§ 85, 86).

47. it has been established that the decision dated 27 July 2016 regarding the monitoring of meetings with lawyers was issued not by the public prosecutor—as explicitly required by Decree Law no. 667—but instead by the Board. It was also noted that the decision was of a general nature and did not contain any specific reasoning as regards the deceased Celaleddin Kolutek. As a result, when considered from the standpoint of Article 15 of the Constitution, which allows for the suspension and limitation of the exercise of fundamental rights and freedoms during the state of emergency, it has been evaluated that the impugned measure was not proportionate *to the extent required by the exigencies of the situation*.

48. Consequently, it must be held that the right to respect for private life, safeguarded by Article 20 of the Constitution, was violated.

D. Alleged Violation of the Right to a Fair Trial

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

49. The deceased applicant, Celaleddin Kolutek, argued that the incident cited as the basis for the disciplinary sanction imposed on him did not reflect the truth, that the evidence obtained as a result of an unlawful practice had no legal value, that certain documents he requested were not provided to him, that the official report was

prepared without his knowledge, and that the written request for a defence did not indicate which disciplinary offence the alleged act constituted. He also contended that the decisions of the inferior courts lacked reasoning. On these grounds, he claimed that there had been violations of the right to a fair trial and the principle of legality in crime and punishment.

50. The Ministry, in its observations, stated that the inferior courts had conducted a thorough examination and concluded that the applicant's right to a fair trial had not been violated. In his counter-statement, Celaleddin Kolutek reiterated the arguments put forward in his individual application form.

2. The Court's Assessment

51. The Constitutional Court has acknowledged that the concept of a *fair hearing* under Article 6 § 1 of the Convention is directly linked to the minimum rights of a *person charged with a criminal offence* as laid down in Article 6 § 3 (see *Erol Aydeğer*, no. 2013/4784, 7 March 2014, § 34). The Court has further held that, insofar as applicable, the procedural safeguards enshrined in Article 6 § 3 (b), (c) and (d) of the Convention should be applied by analogy in cases concerning objections to disciplinary sanctions (see *Sözdar Oral*, no. 2018/21028, 13 September 2022, § 36). Accordingly, the allegations in question have been examined within the scope of the right to a fair trial.

a. Admissibility

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

b. Merits

53. In the present case, the applicant was imposed a disciplinary punishment based on the minutes kept by the officers at the penitentiary institution as well as their statements.

54. In view of the conclusion reached as regards the monitoring of the applicant's meetings with his lawyer, it has been concluded that the

use of the said minutes and the statements of the officials as decisive evidence in the disciplinary proceedings undermined the overall fairness of proceedings (see *Orhan Kılıç* [Plenary], no. 2014/4704, 1 February 2018, §§ 45,46; and *Murat Albayrak* [Plenary], no. 2020/16168, 8 March 2023, §§ 92, 93).

55. Consequently, it must be held that the right to a fair trial, safeguarded by Article 36 of the Constitution, was violated.

VI. REDRESS

56. The applicant claimed 10,000,000 Turkish liras (TRY) for non-pecuniary damages.

57. The procedures and principles regarding the redress of the violation found and its consequences are laid down in Article 50 of Code no. 6216.

58. In the present case, the Court has found violations of the right to respect for private life and the right to a fair trial. Considering that the applicant, Celaleddin Kolutek, had passed away as of the date of examination, the Court has concluded that there is no legal interest in ordering a retrial to redress the consequences of the violations.

59. As the finding of a violation alone would not be sufficient to redress the non-pecuniary damages suffered, the Court has awarded the applicants Fadime Kolutek, Ömer Selahaddin Kolutek, Nureddin Kolutek, and Alaaddin Kolutek, jointly, a total of TRY 30,000 for non-pecuniary damages.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 31 January 2024 that

A. The request for legal aid be GRANTED;

B. 1. The alleged violation of the right to respect for private life be declared ADMISSIBLE;

2. The alleged violation of the right to a fair trial be declared ADMISSIBLE;

C. 1. The right to respect for private life, safeguarded by Article 20 of the Constitution, was VIOLATED;

2. The right to a fair trial, safeguarded by Article 36 of the Constitution, was VIOLATED;

D. A net amount of TRY 30,000 be REIMBURSED JOINTLY to the applicants for non-pecuniary damages, and their remaining claims for compensation be REJECTED;

E. The payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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 Execution Judge of Osmaniye (E.2016/2999, K.2017/1196) for information; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MEHMETHAN KAMBUROĞLU

(Application no. 2019/27554)

31 January 2024

On 31 January 2024, the Plenary of the Constitutional Court found a violation of the presumption of innocence, safeguarded by Article 36 and Article 38 § 4 of the Constitution, in the individual application lodged by *Mehmethan Kamburoğlu* (no. 2019/27554).

(I-IV) SUMMARY OF THE FACTS

[1-17] The applicant successfully passed the gendarmerie specialised sergeant recruitment examination and commenced service as a specialised sergeant trainee.

However, his contract was terminated following the findings of the security clearance investigation to his detriment. Therefore, the applicant lodged an administrative action seeking the annulment of the act of termination. In his petition, the applicant argued that the impugned act was unlawful, and that no specific reasons for the termination of the contract had been communicated to him.

Afterwards, the trial court ordered the annulment of the impugned act. The decision stated that in the actions brought against the applicant for the offences of threat and intentional injury, a decision on the suspension of the pronouncement of the judgment (HAGB) had been rendered and that a penalty had been imposed for the offence of property damage. In the decision, it was further observed that the applicant's file contained a negative note indicating he had been tried for the impugned offences and *convicted as a result of the acts being established*, and that *a decision had been rendered on the suspension of the pronouncement of the judgment (HAGB).* Consequently, the security clearance investigation had been concluded negatively.

The trial court established that the impugned offences were not among the catalogue offences listed in Article 6 of the Regulation on Specialised Sergeants in force at the material time. Having regard to the occurrence and nature of the disputed acts, the trial court asserted that the applicant could not be characterised as having a criminal personality or to be a repeating offender. The trial court concluded that the acts complained of were not unlawful, since the applicant,

who had not received any negative feedback during the recruitment procedure and who had successfully completed his training, had a legitimate expectation to continue in his post.

Following an appeal by the Gendarmerie General Command, the Regional Administrative Court revoked the decision and dismissed the action.

The applicant's subsequent appellate request was dismissed with final effect.

V. EXAMINATION AND GROUNDS

18. The Court, at its session of 31 January 2024, examined the application and decided as follows:

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

19. The applicant claimed that although a decision of HAGB should not have legal consequences, it was treated as a conviction in the proceedings brought against the termination of his contract. He further argued that his contract was terminated unlawfully in breach of the applicable laws and regulations, and that therefore, his right to a fair trial and the presumption of innocence had been violated. The Ministry, in its observations, stated that the applicant had not been accused of any offence merely on the basis of the negative outcome of the security clearance investigation, which should be taken into account during the assessment of admissibility. As regards the assessment on the merits, the Ministry noted that the Regulation forming the basis of the applicant's dismissal entered into force during the state of emergency period, and therefore it would be appropriate to assess the matter in light of Article 15 of the Constitution. In his counter-statement, the applicant reiterated the claims and requests put forward in his application form.

2. The Court's Assessment

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

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

21. Article 38 § 4 of the Constitution reads as follows:

"*No one shall be considered guilty until proven guilty in a court of law.*"

a. Admissibility

22. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 1 of the Code no. 6216 on the Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, in order for an individual application to be examined, a given right allegedly violated by the public power must be safeguarded by the Constitution and fall within the scope of the European Convention on Human Rights ("the Convention") and additional protocols thereto to which Türkiye is a party, as well. In other words, it is not possible to declare admissible an application that contains an alleged of a violation of a right which does not fall within the joint protection scope of the Constitution and the Convention (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

23. Article 36 § 1 of the Constitution safeguards the right to a fair trial. The legislative intent of Article 14 of Law no. 4709, dated 3 October 2001, which amended Article 36 § 1 of the Constitution by adding the phrase *right to a fair trial*, states: "*the amendment incorporates into the text the right to a fair trial, which is also guaranteed under the international conventions to which the Republic of Türkiye is a party.*" Therefore, it has been understood that the purpose of incorporating this phrase into Article 36 of the Constitution was to ensure the constitutional safeguard of the right to a fair trial as set out in the Convention (see *Yaşar Çoban* [Plenary], no. 2014/6673, 25 July 2017, § 54). Accordingly, the scope and content of the right to a fair trial enshrined in the Constitution must be interpreted in the light of Article 6 of the Convention, titled "*Right to a fair trial*" (see *Onurhan Solmaz*, § 22).

24. Article 6 § 2 of the Convention provides that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. The presumption of innocence is therefore not only

a component of the right to a fair trial safeguarded by Article 36 of the Constitution, but it is also specifically protected under Article 38 § 4 of the Constitution, which provides that no one shall be considered guilty until proven guilty in a court of law.

25. The guarantee afforded by the presumption of innocence under the right to a fair trial has two aspects.

26. The first aspect of the guarantee relates to the period until the conclusion of the criminal proceedings against the individual, that is to say, the period in which a criminal offence was imputed to the applicant. This guarantee forbids putting forward premature declarations as to the individual's culpability or acts until a court ruling establishing the guilt of the individual is rendered. The first aspect of the guarantee does not only apply to the trial court. This aspect also requires all other administrative and criminal authorities to avoid making statements or implying that the individual is guilty until it has been established by a court decision. Therefore, a violation of the presumption of innocence may occur not only in the criminal proceedings dealing with the imputed offence but also in other legal procedures and proceedings (administrative, civil, disciplinary, etc.) that are conducted simultaneously (see *Galip Şahin*, no. 2015/6075, 11 June 2018, § 39).

27. The second aspect of the guarantee comes into play after the court rendered a decision other than a conviction as a result of criminal proceedings. This aspect ensures that no suspicion as to the individual's innocence in relation to the alleged offence will become a matter of concern in future proceedings, and requires public institutions to avoid procedures and practices that give the impression to the public that the individual is guilty (see *Galip Şahin*, § 40).

28. Once the scope of these guarantees under the presumption of innocence is established, it must then be determined whether they are applicable to the present case. This is essential for assessing the applicability of Article 36 of the Constitution and thus the admissibility of the individual application.

29. In order for the presumption of innocence to be applicable in a civil case, the applicant must demonstrate a connection between the civil proceedings in question and the ongoing or concluded criminal proceedings against him. Such a connection may be deemed to exist if the civil court has taken into account the outcome of the criminal proceedings, examined the evidence submitted in the criminal file, assessed the applicant's involvement in the alleged criminal acts, or made statements about the applicant's potential guilt. However, it is not possible to list exhaustively all indicators of such a connection, as they may vary depending on the nature and content of the proceedings and the decisions rendered. Nevertheless, the language used in the reasoning of the decisions is of critical importance when assessing whether such a connection exists (see *S.M. [Plenary]*, 2016/6038, 20 June 2019, § 38).

30. The applicant's complaint regarding the alleged violation of the presumption of innocence relates to the expressions and reasoning stated in the administrative court's decision in the action brought by the applicant seeking the annulment of the termination of his employment contract. It appears that the applicant's contract had been terminated after the conclusion of the criminal proceedings against him, and that the administrative proceedings were conducted a long time after the criminal proceedings had been concluded. In the light of the timing and the context of the proceedings, the present complaint falls under the second aspect of the presumption of innocence. Accordingly, it has been concluded that the guarantees afforded by the presumption of innocence, and thus Article 36 of the Constitution, are applicable to the present case. Therefore, it has been understood that the alleged violation falls within the scope of the common protection afforded by the Constitution and the Convention and is not incompatible *ratione materiae* with the relevant provisions thereof.

31. The alleged violation of the presumption of innocence must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

(1) General Principles

32. Being an aspect of the right to fair trial safeguarded by Article 36 of the Constitution, the presumption of innocence is regulated in Article 38 of the Constitution, which envisages that no one shall be considered guilty until proven guilty in a court of law (see, *Fameka İnş. Plastik San ve Tic. Ltd. Şirke*ti, no. 2014/3905, 19 April 2017, § 27). The presumption of innocence is one of the substantive requirements of the principle of the rule of law and it means that everyone charged with a criminal offence shall be presumed innocent until proven guilty by a final judgment rendered as a result of a fair trial (see the Court's judgment no. E.2013/133, K.2013/169, 26 December 2013). The presumption in question guarantees that an individual will not be presumed guilty without a finalised court decision as to the commission of an offence. Moreover, no one can be declared guilty and treated as a criminal by the judicial and public authorities unless their guilt has been established by a court decision (see *Kürşat Eyol*, no. 2012/665, 13 June 2013, § 26).

33. However, it is possible for the other public (administrative/judicial) authorities to separately assess the material facts, which have been subject-matter of the criminal proceedings, and to take an action/decision in line with the conclusion reached at the end of this assessment. In this regard, the reliance on any evidence obtained during the criminal proceedings or referral to the criminal proceedings in the course of the disciplinary actions and proceedings does not per se constitute a breach of the guarantees afforded by the presumption of innocence. However, in cases where the judicial and administrative authorities declare the person as guilty, exceeding the limits of their competence, or make certain inferences in this respect may lead to the violation of the presumption of innocence. In assessing whether the guarantees inherent in the presumption of innocence have been fulfilled, the reasoning of the decision in question must be considered as a whole (see *Galip Şahin*, § 48).

34. In the assessment of whether the presumption of innocence has been violated, an essential issue to be considered, particularly in the

context of civil and administrative proceedings, is whether the trial court has imputed criminal liability to the individual and whether it has called into question the findings of the criminal courts. In cases where a public authority or official expresses an opinion suggesting that a person under investigation or prosecution is guilty before his conviction has been ordered, or where the criminal proceedings end with a decision other than a conviction but the reasoning implies that the person might still be guilty as charged, then the presumption of innocence may be violated. In this sense, *the language used by the decision-makers* is of critical importance (see *Mustafa Akın*, no. 2013/2696, 9 September 2015, §§ 38, 39).

35. The suspension of the pronouncement of the judgment (HAGB), as regulated under Article 231 of the Code of Criminal Procedure (Code no. 5271), is one of the mechanisms for the individualization of punishment, similar to postponement and alternative sanctions to short-term imprisonment. In such cases, the judge pronounces a conviction but refrains from formally issuing the judgment and places the accused under supervision for a certain period. If the accused does not commit another offence intentionally and complies with the conditions of probation during this period, the suspended judgment is annulled, and the proceedings are discontinued (see *Enez Ersöz*, no. 2018/19673, 31 March 2022, § 35).

36. General Assembly of Civil Chambers of the Court of Cassation has evaluated the nature of the HAGB mechanism and held that the HAGB does not have any legal effect or binding force against the accused for a certain period of time. It has emphasized that the accused remains in the same legal position as before, as if the proceeding have been suspended for a while, and that, although the defendant technically retains the status of an accused during the suspension period, he cannot under any circumstance be considered a convict (see the decisions of the General Assembly of Civil Chambers of the Court of Cassation, 1 February 2012, E.2011/19-639, K.2012/30; 23 October 2018, E.2017/4-1353, K.2018/1552; and 31 January 2019, E.2017/13-681, K.2019/46).

37. The HAGB mechanism is a legal opportunity provided under specific conditions, intended to prevent individuals without prior convictions for intentional offences from being socially stigmatised and to facilitate their reintegration into society (see the Court's decision no. E.2015/23, K.2915/56, 17 June 2015). As specified in the legislative intent of the Code no. 5271, the HAGB is designed to implement one of the aims of modern criminal law, which is to avoid stigmatizing individuals wherever possible and to promote their social rehabilitation.

38. The Court has stressed that regarding a decision of HAGB as an establishment of guilt may result in violations of fundamental rights, particularly the presumption of innocence (see *Ümmügülsüm Salgar* [Plenary], no. 2016/12847, 21 October 2021, § 85). However, the mere fact that a person was prosecuted and an HAGB decision was issued within the scope of the resolution of an administrative dispute is not, in itself, sufficient to find a violation of the presumption of innocence. To reach such a conclusion, the full reasoning of the decision must be considered, and it must be examined whether the final administrative judgment was based solely on the acts referred to in the decision of the HAGB (see *Hüseyin Şahin* [Plenary], no. 2013/1728, 12 November 2014, § 40).

(2) Application of Principles to the Present Case

39. In the present case, the applicant was prosecuted for the offences of threat and intentional injury, and a decision of HAGB was rendered in respect of those charges. In addition, he was sentenced to a judicial fine for the offence of damage to property. The applicant's security clearance investigation had an unfavourable result, on the basis of the existence of a negative remark in his file, stating that he had been prosecuted for the aforementioned offences, that *the relevant acts had been found established, and that he had been subjected to a decision of HAGB*; therefore, his employment contract was terminated. In the administrative proceedings brought by the applicant for the annulment of the termination decision, the incumbent court annulled the impugned measure, finding that the offences in question did not fall within the scope of the catalogue crimes listed in the relevant Regulation, and that

in view of the acts subject to the proceedings, it could not be concluded that the applicant had a criminal character or a tendency to commit an offence again. However, the regional administrative court, while acknowledging that a decision of HAGB did not amount to a final conviction, dismissed the case on the basis of *the nature and gravity of the offences imputed to the applicant, the fact that he had been sanctioned for more than one criminal act, and the importance and particular qualifications required by the public service duty he was to perform.*

40. In the proceedings against the applicant for the offences of threat and intentional injury, it was determined that Article 231 of Code no. 5271 was applicable to the imputed offences, and a decision of HAGB was rendered. Therefore, if the period of judicial supervision expired without any further offence being committed, the criminal action against the applicant might be discontinued. Undoubtedly, the applicant's culpability was not established and his innocence was maintained throughout the period of supervision (see *Enez Ersöz*, § 36).

41. In view of the fact that the applicant must still be presumed innocent, it must be examined whether, in the period following the conclusion of the criminal proceedings, the administrative and judicial authorities adopted an approach that undermined this presumption—that is to say, whether the second limb of the safeguards inherent in the presumption of innocence was violated. In this regard, and in line with the principles set out above, in assessing whether there has been a breach of the presumption of innocence, it is necessary to consider whether the authority conducting the proceedings imputed criminal liability to the applicant, whether it called into question the findings of the criminal court, and whether its reasoning relied exclusively on the judgment delivered in the criminal proceedings.

42. In the reasoning of the decision of the regional administrative court, it was stated that "*...the decision on the suspension of the pronouncement of the judgment was rendered, and pursuant to the relevant article, if the pronouncement of the judgment shall entail so, no legal consequences shall bore for the accused, in other words, no conviction decision shall be issued against the applicant...*". Notwithstanding this clause, the subsequent

part of the reasoning indicated "*...the nature, gravity and multiplicity of the offences committed by the applicant, which led to his conviction, as well as the importance of the public duty at stake and the qualifications associated therewith...*". Accordingly, the administrative court considered that the applicant had committed the imputed offences and was convicted despite the issuance of a decision of HAGB, basing its assessment on the nature and gravity of the criminal offences. In doing so, the applicant was deemed guilty even though the criminal proceedings against him had not resulted in a final conviction and the grounds for terminating the applicant's contract were not substantiated based on the relevant facts and circumstances.

43. In its reasoning, the regional administrative court relied, on one hand, on decisions issued within criminal proceedings that had not resulted in a final conviction and, on the other hand, used statements insinuating that the applicant had committed the imputed offences. It has been observed that the facts and circumstances subject to the criminal proceedings were not examined in the reasoning part of the administrative court's decision. It has therefore been considered that the language used in the reasoning, including statements attributing criminal liability to the applicant without a final conviction, undermined his innocence. This rendered the decisions of HAGB ineffective and casted doubts as to the applicant's innocence. In addition, the assessment made in the impugned administrative proceedings is not compatible with the regulation under Code no. 5271, which stipulates that a decision of HAGB shall not bear any legal consequences for the accused.

44. Consequently, given the expressions used as well as the direct references to the decisions of HAGB rendered by the criminal court in the reasoning of the regional administrative court's decision, it has been concluded that the impugned decision implied the applicant's having committed the acts subject to the criminal proceedings and was guilty.

45. Therefore, it must be held that the presumption of innocence was violated.

Mr. İrfan FİDAN dissented from this conclusion.

VI. REDRESS

46. The applicant requested the Court to find a violation, and order a retrial.

47. There is a legal interest in conducting a retrial in order to redress the consequences of the violation found. In this regard, the procedure to be followed by the judicial authorities is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

VII. JUDGMENT

For these reasons, the Constitutional Court held on 31 January 2024:

A. UNANIMOUSLY, that the alleged violation of the presumption of innocence be DECLARED ADMISSIBLE;

B. BY MAJORITY and by dissenting opinion of Mr. İrfan FİDAN, that the presumption of innocence safeguarded by Articles 36 and 38 § 4 of the Constitution was VIOLATED;

C. That a copy of the judgment be REMITTED to the Kastamonu Administrative Court (E.2017/1912, K.2018/704) in order to be referred to the 2nd Administrative Chamber of the Ankara Regional Administrative Court (E.2018/2468, K.2018/3241);

D. That the total litigation costs of 19,164.60 Turkish liras (TRY), including the court fee of TRY 364.60 and counsel fee of TRY 18,800,00, be REIMBURSED to the applicant;

E. That the payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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 İRFAN FİDAN

1. The applicant claimed that although a decision of HAGB should not bear any legal consequences, it was treated as a conviction in the proceedings the applicant initiated against the termination of his contract. He further claimed that his contract was terminated in violation of the applicable law and regulations, and thus his presumption of innocence was infringed.

2. The presumption of innocence is enshrined in Article 38 § 4 of the Constitution, which provides that "*No one shall be considered guilty until proven guilty in a court of law*." Article 36 of the Constitution provides that everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial. The legislative intent in incorporating the phrase "fair trial" into the relevant article emphasises the fact that the right to a fair trial as protected by the international treaties to which Türkiye is a party has been incorporated into the legal text. In addition, it is set forth in Article 6 § 2 of the European Convention on Human Rights that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Hence, the presumption of innocence is an integral part of the right to a fair trial guaranteed under Article 36 of the Constitution and is separately regulated under Article 38 § 4 (see *Fameka İnş. Plastik San. ve Tic. Ltd. Şti.*, no. 2014/3905, 19 April 2017, § 27).

3. The presumption of innocence entails that a person charged with a criminal offence shall be presumed innocent until a final court decision establishing his guilt is rendered at the end of a fair trial, which is a fundamental principle of the rule of law (see the Court's decision no. E.2013/133, K.2013/169, 26 December 2013). This presumption safeguards individuals from being treated as guilty without a final conviction. Furthermore, no one may be considered or treated as guilty by judicial or public authorities prior to such a final conviction (see *Kürşat Eyol*, no. 2012/665, 13 June 2013, § 26).

4. It has been established that the proceedings before the Şebinkarahisar Criminal Court of First Instance conducted against the applicant were concluded with a decision dated 8 May 2015, whereby

he was sentenced to a judicial fine for the offence of "*intentional injury*" the pronouncement of which was suspended, and to a judicial fine for the offence of "*damage to property*" the pronouncement of which was not suspended. The judgment became final on 8 September 2015.

5. While serving as a specialised sergeant at the Kastamonu 5th Training Regimental Command under the General Command of Gendarmerie, the applicant brought an action for annulment of the decision terminating his contract, dated 1 November 2017.

6. The Kastamonu Administrative Court annulled the termination decision.

7. Upon appeal, the 2nd Administrative Chamber of the Ankara Regional Administrative Court revoked the administrative court's judgment and dismissed the action, on the following grounds:

"In the present case, it has been observed that the plaintiff was prosecuted for the offence of "threat" allegedly committed in 2012, under file no. E.2017/21, K.2017/72 before the Şebinkarahisar Criminal Court of First Instance. At the end of the proceedings, the court established that the plaintiff, who had been found to be driving under the influence of alcohol, uttered the words "I will wipe out your entire family, you scum bag, b…, come to the square and we'll settle this" against a person named H.M.E., whom he suspected of reporting him to the authorities. The court concluded, beyond any reasonable doubt and with firm conviction, that the plaintiff had committed the offence of "threat," and sentenced him to 5 months' imprisonment, the pronouncement of which was suspended for a period of 5 years. Furthermore, in the proceedings conducted under file no. E.2013/26, K.2015/124 of the same court, it was established that the plaintiff and other co-defendants had been involved in a fight resulting in injuries to multiple persons and damage to vehicles. The court found that the acts attributed to the plaintiff had been proven and sentenced him to a judicial fine of 1,500 Turkish liras for the offence of "intentional injury" committed against two persons, and suspended the announcement of the judgment. In addition, ***the plaintiff was sentenced to a judicial fine of 1,500 Turkish liras for the offence of "damage to property".***

Pursuant to Article 231 § 5 of the Code of Criminal Procedure (Code no.

5271), "If the sentence imposed as a result of the proceedings conducted for the imputed offence is imprisonment of two years or less or a judicial fine, the court may suspend the pronouncement of the judgment. The provisions on reconciliation are reserved. Suspension of the pronouncement of the judgment means that the judgment shall not have any legal effect on the accused." Furthermore, Article 231 § 8 provides that "Where a decision on suspension of the pronouncement of the judgment is rendered, the accused shall be placed under a probationary period of five years. During this period, no further decision to suspend the pronouncement of the judgment may be issued in respect of a new intentional offence committed by the accused. (...) The statute of limitations shall be suspended during the probationary period." Article 231 § 10 stipulates that "If the accused does not commit an intentional offence and complies with the obligations related to probation during the probationary period, the suspended judgment shall be annulled and the case shall be dismissed."

Pursuant to the aforementioned legal provisions, prior to rendering a decision to suspend the pronouncement of the judgment, the court determines an appropriate sentence corresponding to the proven act and establishes a conviction. However, as explicitly specified in Article 231 of the Code of Criminal Procedure, such a suspended judgment shall not have any legal consequences for the accused. Accordingly, although the act in question is established, if the probation conditions and other statutory criteria are fulfilled, the offence shall be deemed as never having been committed.

In the present case, the incumbent criminal court assessed the plaintiff's situation under Article 231 of the Code of Criminal Procedure in respect of the offences of "threat" and "intentional injury" and, having found that the statutory conditions were met, rendered a decision on suspension of the pronouncement of the judgment. The relevant provision clearly states that such a judgment has no legal consequences for the accused and, in other words, cannot be deemed as a criminal conviction. Furthermore, although the offences of threat, intentional injury, and damage to property—of which the plaintiff was found guilty—are not among the catalogue offences listed under Article 6 § 1 of the Regulation on Specialised Sergeants, the nature, gravity, and multiplicity of the offences committed by the plaintiff, as well as the significance and required qualifications of the public office to be undertaken,

were taken into consideration. In light of these factors, it was concluded that the plaintiff's security clearance investigation and archive research yielded negative results within the meaning of Article 6 § 1 (g) of the aforementioned Regulation. Therefore, the administrative act concerning the termination of the plaintiff's contract was found to be lawful, and the decision of annulment issued by the administrative court was not considered lawful."

8. The decision was upheld by the Council of State and thus became final.

9. At the outset, it must be noted that the applicant was not only subject to a decision of HAGB for the offence of "*intentional injury*", but was also convicted for the offence of "*damage to property*". It has been understood that the Regional Administrative Court based its judgment, inter alia, on the offence of damage to property, for which no decision of HAGB was rendered and which appeared in the applicant's criminal record.

10. The decision rendered in respect of the applicant for the offence of "*intentional injury*", which resulted in a decision of HAGB, constitutes the second ground relied upon by the court.

11. It is undisputed that a decision of HAGB does not amount to a criminal conviction. HAGB, similar to suspension of the sentence and other alternative sanctions to short-term imprisonment, is a mechanism for individualisation of the sentence. Although the judge delivers a conviction, the pronouncement of the judgment is suspended and the accused is placed under supervision for a specific period of time. If, during this probationary period, the accused does not commit an intentional offence and complies with the terms of the probation, the suspended judgment is annulled (see *Enez Ersöz*, no. 2018/19673, 31 March 2022, § 35).

12. In the present case, the applicant was found guilty of two separate offences in the criminal proceedings. The first concerns the conviction for the offence of "*damage to property*", with respect to which no decision of HAGB or another suspension decision was rendered. The second relates to the offence of "*intentional injury*", established

through *forensic reports*, which resulted in a decision of HAGB. The Regional Administrative Court, while referring to the nature of the HAGB mechanism, clearly emphasised that it does not constitute a conviction.

13. The applicant serves as a gendarmerie officer. Considering the nature of the applicant's duties and the role such duties play in maintaining public order, it is beyond doubt that he performs a more sensitive duty compared to other public officials.

14. In the present case, the applicant was proven guilty as charged at the end of the criminal proceedings. Given the applicant's official duty and the reasoning of the decision against him, it was considered that these elements could constitute legitimate reasons for the termination of the employment contract. Although the reasoning of the Regional Administrative Court referred to the decision of HAGB, it did not include any subjective assessment implying that the applicant was guilty or had committed an offence. The judgment refrained from using incriminating language and took into account the applicant's conviction for "*damage to property*", for which no decision of HAGB was rendered. In this regard, it was concluded that there had been no violation of the presumption of innocence.

15. For the foregoing reasons, I consider that the applicant's presumption of innocence was not violated in the circumstances of the present case. Therefore, I do not concur with the majority's finding to the contrary.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ERDAL SONDUK

(Application no. 2020/23093)

15 February 2024

On 15 February 2024, the Plenary of the Constitutional Court found a violation of the right of access to a court within the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Erdal Sonduk* (no. 2020/23093).

(I-IV) SUMMARY OF THE FACTS

[1-31] The applicant was indicted on 31 March 2016 for criminal charges including usury, extortion, insult and fraudulent use of promissory notes. Initially prosecuted before the Bursa Criminal Court of First Instance, the case was later joined with another case, which was also pending before 4th Chamber of Bursa Assize Court for plundering.

At the first hearing of 11 October 2016, the applicant presented his defence submissions, and the intervening party expressed his claims. At subsequent hearings, both prosecution and defence witnesses were examined. However, the court's composition changed frequently. From the second to the fifth hearing sessions, where sixteen witnesses testified, the president and one member of the court bench remained constant, but the second member changed. Furthermore, the presiding judge of the court bench also changed at the ninth hearing before the final judgment was delivered at the tenth hearing. In the final hearing, a newly constituted court bench, with only one judge having attended the witness hearings, convicted the applicant.

In the reasoning part of the decision, the court explicitly indicated that it mainly relied on the witness statements in ordering the applicant's conviction. The court attached greater weight to the prosecution's witnesses over the defence's witnesses. It underlined that a full and conscientious conviction as to the impartiality of the prosecution witnesses was formed, and the statements of the defence witnesses were found to be unreliable for being contrary to the ordinary course of events and carrying the purpose of concealing the truth.

The applicant appealed against this decision. In his appeal petition, the applicant alleged that the principle of immediacy had been violated on the grounds that the judges who had ruled the final decision had not

been the ones who had directly heard the statements and evaluated the credibility of the witnesses. In addition, he argued that the court had distorted witness statements, that the facts referred to in witnesses' statements had not been verified through the consultations with the relevant institutions, and such requests of him had not been recorded in the minutes of hearing.

The 9th Criminal Chamber of Bursa Regional Court of Appeal ("Criminal Chamber") dismissed the applicant's appeal. The conviction decision concerning the offence of the usury was finalised on 2 June 2020 while the appeal process has been still ongoing concerning the applicant's appeal against the decision of dismissal on merits for the offence of plundering. As of the date when the Constitutional Court's decision was rendered, the appeal review regarding the offence of plundering has been still pending.

On 18 June 2020, the applicant became aware of the final conviction rendered by the Criminal Chamber for the offence of usury. On 9 July 2020, the applicant filed an individual application with the Constitutional Court.

V. EXAMINATION AND GROUNDS

32. The Constitutional Court ("the Court"), at its session on 15 February 2024, examined the application and decided as follows:

A. Request for Legal Aid

33. The applicant stated that he could not afford to pay the litigation costs of the individual application and therefore sought legal aid. The Court has granted the applicant's request for legal aid since it has been established that the applicant was unable to afford the litigation costs without suffering a significant burden (see *Mehmet Şerif Ay*, no. 2012/1181, 17 September 2013).

B. Alleged Violation of the Right to a Fair Hearing

1. The Applicant's Allegations

34. The applicant alleged that his right to a fair trial had been violated

on the grounds that the composition of the court bench ordering his conviction was different than the one participating in trials, questioning and hearing all participating witnesses, so the court bench had not indeed communicated with the witnesses and the parties of the case.

2. The Court's Assessment

35. Article 36 of the Constitution, titled "*Right to legal remedies*" provides, insofar as relevant, as follows:

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

36. The Court is not bound by the legal qualification of the facts by the applicant and it conducts such an assessment itself. The Court has concluded that the application must be assessed under the right to a fair hearing within the scope of the right to a fair trial.

a. Admissibility

37. The alleged violation of the right to a fair hearing must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. The Scope, Significance and Constitutional Basis of the Principle of Immediacy

38. The right to a fair trial under Article 36 of the Constitution embodies safeguards to secure a fair trial process in principle. In this regard, the right to a fair trial does not assure that the outcome of the case will result in favour of either party. In other words, the right to a fair trial ensures that the trial process and procedures are conducted on an equitable basis (see, *mutatis mutandis*, *M.B.* [Plenary], no. 2018/37392, 23 July 2020, § 80).

39. One of the safeguards provided by the right to a fair trial is the right to a public hearing. This right inherently presupposes that the trial be conducted open to public, that is, *an oral trial* (see *Ali Bacacı*, no.

2014/18688, 9 March 2017, § 35). Hearings are essentially an appearance of oral proceedings, enabling judges to engage directly with the parties and examine the evidence first-hand through face-to-face interaction. In other words, it is only through the physical presence of the parties before the adjudicating body that the direct and immediate presentation of arguments and evidence becomes possible. This allows for a first-hand comparison of the statements of parties and witnesses, as well as for an assessment of their reliability. The public and oral nature of the trial plays a crucial role for the parties to formulate and present a defence in an effective and appropriate manner and to influence the judge's perception, which is central to the outcome of the proceedings (see, *mutatis mutandis*, the Court's decision no. E.2020/79, K.2023/113, 22 June 2023, §§110, 111). As a matter of fact, Article 141 of the Constitution explicitly codifies the principle of public hearings (see *Muhsin Hükümdar*, no: 2016/15853, 7 November 2019, § 37).

40. As a safeguard of the right to a fair trial, an oral hearing can be conducted under the following circumstances:

i. Where it is necessary to assess whether investigative authorities have properly established the factual basis of the case and verified the integrity of the evidence;

ii. Where substantial factual disputes arise and detailed examination are needed in addition to legal matters;

iii. Where the credibility of witnesses or informants must be directly assessed through the impression of the judges hearing their witnesses;

iv. Where the defendant must respond in person to the imputed offences and the evidential basis of the allegations in criminal proceedings;

v. Where certain aspects of the case can be possibly clarified only during a trial (compare and contrast *Talet Şanlı* [Plenary], no. 2017/20526, 23 January 2023, § 54).

41. In criminal proceedings, where the primary objective is to ascertain the material truth, the principle of oral proceedings (*sözlülük*

ilkesi) prevails. Accordingly, it is vital that the judge establishes direct contact with the evidence and forms a personal impression and conviction about those who testify during the hearing by observing their reactions as they make their statements. In addition, all materials that contribute to establishing the material truth of the incident or forming the essence of the criminal dispute in question may qualify as admissible evidence. The reasoning of the judgment is essentially formed as a result of the conviction of the judges reached on the basis of the evidence presented during the hearing. The events underlying the charges are examined and debated together at the hearing, with the participation of the judge and other parties, enabling them to be tested directly without the intervention of any intermediary. Therefore, *hearing* is not a formality but it is the very essence of the criminal proceedings. Furthermore, the right to adversarial proceedings (*çelişme ilkesi*) and the right to defence further underscore the necessity for the defendant to confront in person the witnesses giving the incriminating evidence against him; to challenge it before the judge tasked with delivering the final judgment and to had the opportunity to put these statements into a test. However, the composition of the court bench must remain the same to formalise a proper conviction during the trials except for compelling circumstances.

42. The principle of oral proceedings, which gives practical effect to the right to an oral hearing, is intertwined with *the principle of immediacy,* one of the fundamental principles of criminal procedure law. The principle of oral proceedings serves as an instrument of implementing the principle of immediacy. At its core, *the principle of immediacy*, which mandates that judges base their rulings on evidence introduced orally and tested during the hearing, is closely linked to the principle of oral proceedings and serves to ensure the fairness of criminal proceedings.

43. The principle of immediacy entails that the judge come into direct contact with the evidence alleged to uncover the facts of the case, without any intermediary. This requirement is particularly important for witness testimonies since a witness's attitudes and reactions can offer critical insights into their credibility. Accordingly, observation of the courts in this regard are vital for uncovering the material truth (see

Yusuf Deniz Dilsizoğlu and Aral Ali Ersin, no. 2013/4711, 16 December 2015, § 47). The principle of immediacy requires the judge who will order the defendant's conviction to hear the relevant individuals in person and to obtain reliable evidence based on those interactions for the purpose of ensuring a fair (equitable) trial.

44. In this context, *the principle of immediacy*, a specific manifestation of the right to a fair hearing, prescribes that the judge must base his/her judgment solely on evidence presented and contested before the court. Such evidence must be assessed independently in accordance with the judge's own conscience. Accordingly, the principle, in essence, concerns the formation of the judge's personal conscientiously conviction regarding the events underlying the imputed offences. In this context, it is a fundamental requirement of criminal procedure that especially witness statements must be received and evaluated by the judge or bench of judges who will render the final judgment due to their direct influence on the determination of conviction. Otherwise, a judge who was not present during the hearings where witnesses were examined may find it difficult to develop an impression merely by reading minutes of prior proceedings.

45. For these reasons, the trial judge must hear, in person, those witnesses whose testimony may *substantially* affect the legal outcome concerning the defendant in order to make a sound determination of the defendant's guilt. Accordingly, the judge must assess not only the prosecution's interpretation of the events but also take into account the claims and objections put forward by the defendant to form reliable observations and to reach a conviction with his/her own conscience. In this manner, the judge will personally be able to form an impression regarding the credibility of these witnesses through his/her observations and assessments. In contrast, reading out minutes or written statements obtained from witnesses prior to the trial cannot be considered equivalent to testimony given in person before the court.

46. The principle of immediacy is a constitutional principle which refers to the requirement that evidence used as the basis for a ruling must be presented before the judge. In determining the scope and

content of the right to a fair trial enshrined under the Constitution, the Court draws extensively from Article 6 of the European Convention on Human Rights ("Convention"), titled "*Right to a fair trial*", and the case-law of the European Court of Human Rights (ECHR) (see *Onurhan Solmaz,* no. 2012/1049, 26 March 2013, § 22; *Emre Kunt* [Plenary], no: 2019/5577, 8 March 2023, § 52; and *Yusuf Karakuş and Others,* no. 2014/12002, 8 December 2016, § 73). In the legislative intent of the amendment by Article 14 of Law no. 4709 of 3 October 2001, adding "*the right to a fair trial*" to Article 36 § 1 of the Constitution, it stated "*the right to a fair trial, which is also safeguarded by the international conventions to which Türkiye is a party, was incorporated into the text by this amendment.*" Therefore, it has been understood that the purpose of the amendment to Article 36 of the Constitution, is to afford constitutional protection to the right to a fair trial regulated under the Convention (see *Yaşar Çoban* [Plenary], no. 2014/ 6673, 25 July 2017, § 54). As a matter of fact, *the right to a fair hearing* is set forth in Article 6 § 1 of the Convention. Thus, the right to a fair trial safeguarded by Article 36 of the Constitution also encompasses *the right to a fair hearing*. In the judgments of the ECHR, the principle of immediacy is considered as a special manifestation of *the right to a fair hearing* within the scope of the right to a fair trial, despite its limited scope relative to the one enshrined in the criminal procedure law.

47. The principle of immediacy is inherently linked with several safeguards within the framework of the right to a fair trial. These include, in particular, the right to have adequate time and facilities for the preparation of the defence, the right to be present at trial, the right to examine or have examined witnesses, and the right to adversarial proceedings. At this point, it must be highlighted that the principle of adversarial proceedings requires the trial judge to *disregard any evidence that has not been presented or discussed before the court during a trial.* The right to be present at the hearing, as one of the core components of the right to a fair trial, enables judge to compare the defendant's defence and statements of the victim and other witnesses. The aforementioned right ensures the direct and personal presentation of the facts underlying the alleged offence before the judge. Similarly, the right to

examine witnesses, another safeguard within the scope of the right to a fair trial, enables the defendant to confront and question the witness before the judge who is competent to rule the final decision.

ii. The Legal Foundations of the Principle of Immediacy

48. The above-cited constitutional requirements are, in essence, set forth in the relevant procedural laws. As a matter of fact, Article 7 of Law no. 5271 prescribes that except those that cannot be renewed, acts/procedures conducted by a judge or a court that has no jurisdiction (as to subject-matter) shall be considered as null and void. This requirement reinforces the necessity for judgments to be rendered by properly formed conclusions during the trial at the discretion of the conscience of judges to uncover the material truth. In the Law, the principle of immediacy is based on the requirement of judges of competent jurisdiction to directly assess the evidence in order to make a final decision on the defendants.

49. Under Article 188 of the same Law, judges issuing the ruling must be present at the hearing. Accordingly, substitute member may be appointed for the proceedings with multiple sessions or for a judge who is unable to attend the hearing for any reason, vote on behalf of that member. Pursuant to the aforementioned provision, the judge who will issue the ruling must attend the hearing. However, a substitute member may be appointed to replace a court member who is known to be retiring, being appointed, or unable to attend court after a certain date due to health reasons. In such instances, the substitute member is required to attend the hearing and personally hear and question the witnesses. This ensures that the substitution of judges does not result in a breach of the principle of immediacy.

50. The legislative intent of Article 188 of Law no. 5271 places explicit emphasis on the principle of immediacy. The relevant part of the legislative intent reads as follows:

"The last paragraph of the provision addresses an issue of fundamental importance to our legal system. According to the judgments of the European Court of Human Rights and the principle of fair trial, same judges that took part

in the prosecution stage should be also those who render the final judgment. This represents the ideal procedural standard. However, the protracted and segmented nature of many judicial proceedings often necessitates changes in the composition of court benches. In such cases, the renewal of all procedural proceedings before newly appointed judge is a requirement of the principle of fair trial. The draft law acknowledged that proceedings should be ideally concluded in a single-day hearing as a principle. Therefore, the practice to conduct several hearings will be eliminated gradually. However, the last paragraphs of the said provision enshrine that a substitute judge can be appointed in cases with multiple hearings or to vote in place of a judge who is unable to attend the proceedings for any reasons."

51. Article 190 of Law no. 5271 indicates that proceedings shall continue without any break or interruption in order to avoid any lapse between the presentation of the evidence and the issuance of the decision as a fundamental requirement of the principle of immediacy. Accordingly, in exceptional circumstances, any interruption shall be kept to brief as much as possible. There is no doubt that the said provision is intended to implement *the principle of immediacy*. In practice, one of the main reasons for extended interruptions in trials is to allow time sufficient for remedying various deficiencies. Once an investigation, in which all evidence has been thoroughly collected, has been conducted and the trial is adequately prepared and planned; it is then only possible for the judge to render a final decision in criminal proceedings by concluding it in a single hearing or a few hearings. This facilitates the judge's ability to rely on the evidence, with which the judge had direct contact, without forgetting the knowledge and opinions related to the evidence. Gathering evidence that will directly impact the establishment of imputed offences and preparing indictments that clearly link the alleged facts to the available evidence are critical in this context. Once all deficiencies have been remedied during the investigation phase, the indictment prepared can be used to select the witnesses to be heard at the trial.

52. Pursuant to Article 217 § (1) of Law no. 5271, *"The judge may base his/her decision only on the evidence presented and discussed at the hearing. This evidence is independently and conscientiously assessed by the judge*."

Accordingly, this provision highlighted that the decision must rely on evidence directly introduced or debated *in the presence of a judge*. In other words, according to the aforementioned provision, *the judge cannot ground his/her decision on evidence that hasn't been brought to the hearing or discussed in his/her presence*. It is evident that this provision is interconnected with the principle of immediacy.

53. Furthermore, according to Article 210 § (1) of Law no. 5271, if the incident is based solely on witness statements, the witness must be heard in court. Merely reading prior written statements or written minutes cannot substitute in-person statements. Thus, the law places strong emphasis on the principle of immediacy through the mandatory requirement that in cases where witness statements constitute the only evidence, witnesses must testify directly before the trial court (see *AZ. M*. no. 2013/560, 16 April 2015, § 58). Indeed, the legislative intent of the aforementioned provision states that "*The presentation, discussion, and examination of evidence before the court bench that will issue the judgment is one of the fundamental requirements of the principle of fair trial. In this respect, only in mandatory circumstances shall reading out previous statements of the defendant or witnesses during trial be deemed sufficient.*"

54. The violations of *the principle of immediacy*, as a constitutional safeguard, can be prevented to a great degree by complying with the aforementioned explicit procedural provisions and by taking necessary measures.

55. It must be highlighted that particular measures designed to reinforce the right to a fair trial were included under the Aim 2.1 of Action Plan on Human Rights (2021-2023) pronounced by the Presidential Circular no. 2021/9 of 29 April 2021. These measures include the following:

"a. The region-based appointment system of judges shall be revised with a view to preventing frequent change of judges during judicial processes.

b. *Guaranteeing that judges and prosecutors serving in regional courts of appeal or regional administrative courts are not reassigned, as a tenure guarantee, to first-instance courts, unless they request it and are not subjected*

to disciplinary proceedings.

c. *The provision allowing the Minister of Justice to temporarily assign judges to a different jurisdictional zone shall be repealed.*

d. *Geographical guarantee shall be provided for judges and prosecutors, and the security of tenure of judges shall be strengthened."*

iii. Non-Absolute Nature of the Principle of Immediacy (Exceptions)

56. The principle of immediacy is not *absolute*. It cannot be interpreted as entirely prohibiting the replacement of judges during the course of proceedings. Although it is a fundamental principle that witness statements should be heard by the judge/court ultimately responsible for rendering the final decision, as required by the principle of immediacy, there are exceptions to this rule.

57. There may be circumstances that make it impossible for a judge to continuously participate in a case due to justifiable reasons such as illness, resignation, retirement, appointment, or reassignment. In such cases, it must be assessed whether the substitutions of judges undermine the overall fairness of the proceedings and whether compensatory safeguards have been provided in this regard. Violations of the *principle of immediacy* can be remedied also by the higher courts. For instance, deficiencies stemming from a change in the composition of the first-instance court can be addressed during the appellate stage by rehearing defendants and witnesses.

iv. The compensatory safeguards (Measures)

58. The scope of the compensatory measures/safeguards taken in order to balance the fairness of the proceedings undermined by the replacement of judge who had heard the witnesses prior to the issuance of the judgement and to ensure the proper and appropriate assessment of evidence depends primarily on the evidentiary weight of the statements in question. The more decisive the witness testimony has been for the conviction, the greater the importance of counterbalancing measures or safeguards in the assessment of the fairness of the proceedings. In this respect, the compensatory measures/safeguards

should enable the proper and appropriate evaluation of the credibility of the witness statements despite the change in the court's composition.

59. The most important measure to be taken to prevent a violation of the principle of immediacy, as explicitly stipulated in the law and its legislative intent (see § 50), is to *have a substitute member present at trial* for any replacement of a member who is later unable to attend a hearing for any reason lasting more than a single session, and to participate in the vote. For instance, if a regular member of the court cannot continue to participate in proceedings due to retirement, appointment, health issues, or other reasons; the substitute judge, having attended the hearings and heard the witness statements first-hand, may participate in the hearings and replace the former, without the principle of immediacy being violated. Nevertheless, considering the number of the judges, the absence of a substitute judge may be justifiable by certain reasons. Indeed, Article 188 § (3) of Law no. 5271 addresses this issue, however, taking into account the number of judges, the application of substitute judge measure is not mandatory in all cases.

60. In cases where there is a compelling reason not to place a substitute judge, the use of audio and video recording equipment to document previous hearings may serve as a compensatory safeguard to enable newly assigned judges to fully and accurately assess the evidence obtained and the arguments presented throughout the proceedings. Indeed, Article 52 of Law no. 5271 stipulates that images or sounds may be recorded during the examination of witnesses. Article 180 § (5) of the same Law enables for the remote examination of a witness via audio and video communication technology, and such proceedings may also be recorded. Although a video recording cannot be considered equivalent to the physical presence of a witness in court, presenting a video recording in which all of the witness's behaviour and reactions can be observed in detail, to the parties in the specific circumstances of a case, prevent a violation of the principle of immediacy. This safeguard is particularly effective where the defence has been afforded the opportunity to question the witness.

61. Viewing previously obtained audio-visual testimony, rather than re-examining the witness, can be especially important in cases involving vulnerable witnesses such as children who are victims of sexual offences who may face a risk of psychological harm if required to relive the incident in the presence of the defendant. Additionally, such an approach balances the witness's right to privacy and mental well-being with the defendant's right to a fair trial. However, whether or not the defence had the opportunity to question the witness(es) in question beforehand is important in terms of the adequacy of this safeguard.

62. When the composition of the court changes, newly appointed judges may also review and examine the minutes of previous hearings to gain a complete understanding of the evidence presented and the arguments put forward by the parties. This review can be recorded in the minutes. Therefore, in certain circumstances, reading/examining the minutes recording the statements of witnesses heard in previous hearings and evaluating them may be considered a compensatory safeguard. In certain circumstances, reading the witness's statements from the minutes without re-examining the witness after a change in the composition of the judge or court may serve as a compensatory safeguard for deficiencies in the principle of immediacy. The applicability of such a measure depends on the specific circumstances of the case:

i. Where disputes arise concerning technical issues that are neither complex nor dependent on issues of credibility;

ii. The witness statement did not significantly affect the defendant's legal situation, in other words, the importance of the witness statement did not require renewed oral examination of the witness;

iii. Situations where a conviction has been quashed on purely procedural grounds at the higher/appeal court, without re-assessing the evidence, and the *witness statements remain undisputed* during the retrial;

iv. There is *no disagreement between the parties* regarding the witness statement (the parties did not contest to the witness statements);

v. Where the majority of the judges who heard the witnesses had not changed when the court renders the final decision;

vi. There are conditions that make it impossible (e.g., the death of the witness, the witness being in a vegetative state, the witness's whereabouts being unknown despite all efforts, etc.) or extremely difficult (e.g., the witness suffering from mental illness or being in a country without a mutual legal assistance agreement and no return date is foreseeable) to re-hear the witnesses,

vii. The witness's *credibility* is not disputed, for example, where the statement is supported by other substantial evidence that has been directly examined by the court.

63. However, in certain cases including but not limited to the above-mentioned ones, it is important to consider whether the evidence is clear enough not to require oral presentation even after a change of judge or panel, depending on the severity and nature of the penalty prescribed for the offence in question, as well as the opportunities afforded to the defence to make use of procedural safeguards during the course of the proceedings (for similar assessments regarding the right to oral proceedings, see the Court's decision no. E.2020/79, K.2023/113, 22 June 2023,§ 128). Therefore, court minutes must be drafted in a way that allows the content of witness' statements to be fully and accurately understood. Importantly, if the judge or panel rendering the final decision harbours doubts about the reliability of a previously heard witness statement or considers that a personal impression is essential, it remains always possible to summon and re-hear the witness.

64. Except in exceptional circumstances as outlined above, relying solely on the reading of the statements of witnesses whose testimony is decisive for the outcome without re-hearing them may constitute a violation of the principle of immediacy. In this case, the new judges assigned to the case must re-examine the witnesses who were previously heard. However, in some cases (especially if the defence has been given the opportunity to question the prosecution witnesses in the earlier stages of the trial), the court may require the defence to explain how reliance on transcripts by new judges would impair the

accurate understanding or credibility assessment of the statements. The defence's failure to raise such arguments may be taken into account when determining whether a violation of the principle of immediacy has occurred in the specific context of the case.

65. In this respect, the Court, finding manifestly ill-founded a case involving the alleged violation of the right to a fair trial on the grounds that a witness whose statements were not decisive or conclusive evidence had not been re-heard by the court bench rendering the final judgment, indicated that the applicants and their counsel had been afforded the opportunity to question the witness and raise objections to his statements (see *Yusuf Deniz Dilsizoğlu and Aral Ali Ersin*, §§ 45-50).

v. Application of Principles to the Present Case

66. In this present case, witness statements were relied on as the basis for the applicant's conviction. It is evident that these statements played a decisive role in ruling the applicant's conviction. It is also apparent that the parties disagree over the aforementioned statements of witnesses. Thus, both the defence and the intervening party have not accepted the statements of witnesses that were unfavourable to them. Additionally, the applicant indicated in its appeal petition that the court had explicitly distorted the witnesses' statements; the facts established by the statements had not been verified through the opinion of related institutions and investigated and that his requests in this regard had not been recorded in the Minutes of Hearing.

67. It can be observed that the majority of judges who had participated in the hearings where witnesses had been heard, were not the same as those who formed the court bench that issued the conviction. The conviction was delivered by a panel of judges that included the presiding judge and one member who had not attended any of the hearings at which the witnesses had been heard. Only one judge from the court bench issuing the decision participated in the hearings where the witnesses had been heard. The witnesses whose statements had a decisive effect on the defendant's (the applicant) conviction had not been heard by the whole or even the majority of the judges

who delivered the judgment. The majority of the deciding judges, therefore, could not form their own impressions as to the credibility of the witnesses, having relied solely on the minutes of the hearings when assessing the facts concerning the imputed offense. However, in order to determine whether the mere change in the composition of the bench, automatically constitute the violation of the right to a fair trial, it is necessary to assess whether the overall fairness of the proceedings was undermined, and in particular, whether adequate compensatory safeguards were implemented.

68. Under criminal procedure law, proceedings should, in principle, be completed without interruption and, if possible, in a single hearing, *except in compelling circumstances*. In present case, there were several hearings during the course of proceedings. Among the reasons for interruptions between the hearings include the procedural necessities such as questioning witnesses, and the parties' requests for an extension for various reasons. The reasons in question may be considered as compelling grounds for carrying out more than one hearing. In this case, the court rendering the final decision, must examine whether compensatory measures were in place to allow the statements of witnesses heard in previous hearings to be fully and accurately assessed.

69. No substitute judge was present to replace the judge known to be unable to attend the hearings. However, it can be argued that the absence of a substitute judge may be attributable to valid reasons, which is the limited number of judges serving at the respective court.

70. Reasoning of the court bench, of which majority had not participated in the hearing of witnesses, reveals that the court ruled the conviction of the defendant by stating: "*a full and conscientious conviction as to the impartiality of the prosecution witnesses has been formed and the statements of the defence witnesses were found to be unreliable for being contrary to the ordinary course of events and carrying the purpose of concealing the truth*". The reasons why the court attached greater weight to the statements of the witnesses are explained by these grounds. These conclusions clearly include assessments that could

only have been drawn from personal impressions of witnesses during hearings. The evidentiary value of the witnesses' statements has been determined by the court by referring to such impressions. However, in the present case, such impressions were made solely on the basis of written minutes. It is clear that the fact that these impressions were obtained solely on the basis of reading the minutes and that the decision was rendered accordingly is incompatible with the principle of immediacy. Furthermore, the decision contains no explanation as to why witnesses whose statements could have changed the outcome of the case were not re-examined, nor does it refer any circumstances making it impossible or excessively difficult to recall them.

71. It is also established that the defence explicitly raised objections regarding the evaluation of witness statements by 3-member court bench composing of newly appointed presiding judge and newly appointed judge. The defence explained that such evaluation would prevent the statements from being fully understood and their reliability properly being assessed. The defence made efforts to have these objections considered. In cases where the evidentiary value of witness statements must be based on impressions and findings that can be obtained through face-to-face hearing of the witnesses by the judges; the defence's consistent objections in this regard must be evaluated by the first instance court or by the appellate courts. In the present case, witnesses whose statements had played a decisive role in issuing the conviction decision and whose credibility was subject to repeated challenges of the defence, as well as the credibility of the witness him/herself, were not re-examined. The Criminal Chamber did not remedy this deficiency by holding a new hearing or by quashing the judgment on this ground.

72. In the light of the foregoing, it must be held that there was a violation the right to a fair hearing within the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution.

Mr. Kadir ÖZKAYA, Mr. Basri BAĞCI, Mr. İrfan FİDAN and Mr. Yılmaz AKÇİL dissented from this conclusion.

VI. REDRESS

73. The applicant requested the Court to find a violation and to award him compensation for his non-pecuniary damages.

74. There has been a legal interest in conducting a retrial in order to remedy the consequences of the violation. In this regard, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (for detailed information on the retrial procedure specific to the individual application mechanism set out in the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011, see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others*, no.: 2016/12506, 7 November 2019, §§ 53-60, 66; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

75. It must be underlined that a finding of a constitutional violation does not imply that the Constitutional Court has taken a stance on the merits of the case. It is not within the Court's mandate to determine the applicants' *guilt or innocence*, nor to *impose a more lenient or severe sentence*.

76. In principle, it is for the trial courts to assess the available evidence in a given case and to decide whether the evidence adduced relates to the case (see *Orhan Kılıç* [Plenary], no. 2014/4704, 1 February 2018, § 44). In this respect, it is not incumbent upon the Court to decide whether the applicant has committed the offence of usury. A violation judgment by the Court does not entail the defendant's acquittal, nor does it guarantee that the retrial conducted to remedy the violation will necessarily result in acquittal. The trial courts may reach similar or different conclusion at their own discretion by carrying out their own assessments after redressing the consequences of the violation.

77. The right to a fair trial does not entail a requirement to rank or prioritise the probative value of witness testimony. That is to say, it

does not guarantee that statements made before the trial judge must be afforded superior weight in the assessment of evidence. It is at the discretion of the court delivering the final judgment to give priority to certain statements, provided that the judge(s) hearing the case personally examined the witnesses whose testimonies are decisive for the outcome and ensured the protection of the defendants' rights.

78. Furthermore, the applicant's claim for non-pecuniary compensation must be rejected as the Court considers that a retrial would constitute sufficient redress in view of the nature of the violation.

VII. JUDGMENT

For these reasons, the Constitutional Court held on 15 February 2024:

A. That the request for legal aid be GRANTED;

B. UNANIMOUSLY, that the alleged violation of the right to a fair hearing be DECLARED ADMISSIBLE;

C. BY MAJORITY and by the DISSENTING OPINION of Mr. Kadir ÖZKAYA, Mr. Basri BAĞCI, Mr. İrfan FİDAN and Mr. Yılmaz AKÇİL, that the right to a fair hearing under the right to a fair trial, safeguarded by Article 36 of the Constitution, WAS VIOLATED;

D. That a copy of the judgment be REMITTED to the 4th Chamber of the Bursa Assize Court (E.2016/306, K.2018/59) for retrial to redress the consequences of the violation of the right to a fair hearing;

E. That the applicant's compensation claim be REJECTED;

F. That the counsel fee of 18,800 Turkish liras be REIMBURSED to the applicant;

G. That the payments be made within four months from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the case of a default in payment, legal INTEREST ACCRUE for the period elapsing from the expiry of the four-month time-limit to the payment date; and

H. That copy of the judgment be SENT to the Ministry of Justice.

DISSENTING OPINION OF VICE-PRESIDENT KADİR ÖZKAYA, AND JUSTICES BASRİ BAĞCI, İRFAN FİDAN AND YILMAZ AKÇİL

1. The majority of the Court has ruled that the right to a fair hearing, which is one of the guarantees of the right to a fair trial, was violated in connection with the principle of immediacy, due to the applicant's conviction for the offence of usury by an Assize Court whose bench included the presiding judge and a member who had not been present at the hearings where the witnesses had been heard.

A. Admissibility

2. The individual application to the Court is of the subsidiary nature and it can be resorted to after all administrative and judicial remedies have been exhausted.

3. Pursuant to Article 148 § 3 of the Constitution and Article 45 § 2 of Code no. 6216 on the Establishment and Rules of Procedure of the Constitutional Court of 30 March 2011, ordinary legal remedies must have been exhausted for an individual application to be filed with the Court (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 16). The individual application is a subsidiary remedy which can be availed of in cases that the alleged violations of rights were not remedied by domestic authorities. As a requirement of this subsidiary nature of the individual application, ordinary legal remedies must be exhausted before lodging an application with the Court. In accordance with the subsidiary principle, before filing an individual application, the applicant must first submit his complaint in a timely manner and duly to the competent administrative and judicial authorities, provide the relevant information and evidence to these authorities within the statutory time limits, and at the same time show the necessary diligence to follow up his case and application. (see *İsmail Buğra İşlek*, no. 2013/1177, 26 March 2013, § 17; and *Bayram Gök*, no. 2012/946, 26 March 2013, § 19).

4. The proceedings in the present case were completed in 10 sessions. The presiding judge, K.Ü., who also prepared the preliminary proceedings report of the first eight hearings, was replaced by L.D. for

the ninth and tenth hearings. Member F.Ö. attended all sessions except for the first session. In the ninth hearing, Presiding Judge L.D. noted in the minutes that the case file and its attachments had been read due to a change in the composition of the bench. The defence raised no objection to this record at any stage of the proceedings.

5. The applicant's counsel requested additional time to respond to the opinion on the merits, which was granted. All evidence and witness statements were discussed in the opinion on the merits. The applicant's counsel submitted a written defence and appeared at the hearing, where he also presented oral submissions.

6. At no stage of the proceedings did the applicant's counsel raise the complaint forming the basis of the present individual application, nor did he voice any argument relating to the principle of immediacy. Neither the applicant nor his counsel requested the re-examination of witnesses. Indeed, as noted by the majority, the applicant's counsel was present at the hearings in which the witnesses were heard and stated only that he did not accept the witness statements unfavourable to the applicant. The applicant's counsel did not allege that the right to examine witnesses had been infringed or that he had been unable to question them. In his appeal petition, the applicant's counsel merely stated, in abstract and general terms, that the court had convicted the applicant without directly hearing the witnesses.

7. Accordingly, it cannot be concluded that ordinary legal remedies were exhausted in respect of an alleged violation that had never been raised during the proceedings. For these reasons, the application should have been declared inadmissible for "*non-exhaustion of available legal remedies*".

8. Furthermore, the appeal reviews of the 6-year-and-8-month prison sentence imposed for the offence of plundering, which was tried in the first instance within the scope of the same case file and related to the offence forming the subject of the individual application, are still pending. It should also be borne in mind that delivering a judgment finding a violation at this stage, which may affect the outcome of another case that is still under appellate review, could have controversial implications for the ongoing proceedings.

B. Merits

9. In the present case, the defence had the opportunity to participate in all stages of the proceedings and to question the witnesses. The proceedings were concluded within 4 years, which may be regarded as reasonable in light of the Court's jurisprudence.

10. First of all, Article 7 of Law no. 5271, which was referred to by the majority in their reasoning, is not relevant to the facts of the present case. According to the aforementioned provision, it is clear that the provision prescribing that acts carried out by non-competent judges and court bench shall be considered null and void does not concern the facts of the present case, as the proceedings were conducted by competent judges and a duly constituted court bench. Nor did the applicant's counsel allege otherwise.

11. Furthermore, Article 210 § (1) of Law no. 5271 enshrines as follows: "*If the evidence in the incident was only based on a witness's statement, this witness must be heard in the court. Merely reading prior written minutes or written transcripts cannot substitute in-person statement*s." In addition, Article 211 § (1) of the same Law provides: "*the judge may base his/her decision only on the evidence presented and discussed at the hearing before him/her*." As can be inferred from the judgment of the Court of Cassation cited in the decision, these provisions are interpreted that as the other evidence, the witness statements should be heard/discussed during the trial. However, they are not interpreted to mean that the judge before whom the evidence was presented must necessarily be the same judge who delivers the final judgment. It is clear that construing the relevant provisions in a way that departs from their settled interpretation in practice, and relying on such construction to justify a finding of a rights violation, would raise legal concerns.

12. The majority acknowledges that the *principle of immediacy* is not an absolute principle but it is subject to certain exceptions. Nevertheless, no explanation has been provided as to the applicable procedure when witness statements are obtained under letters rogatory. Likewise, there is no assessment of whether a witness whose statement was taken

during an on-site inspection prior to trial must testify again or a new on-site inspection must be conducted.

13. In criminal cases, the construction of events is based on the completion of all evidence during the investigation phase. The trial court's role is to evaluate all evidence and witness statements, discuss them during the hearing, and reach a conclusion. Requiring that the court bench delivering the final decision hear all witnesses in person risks prolonging the trial unnecessarily, thereby infringing other rights of the defendant, notably the right to be tried within a reasonable time. It must also be considered that requiring witnesses to testify once more before a changed panel composing of judges, who had not participated prior hearings, could lead to blurring of the memories over the intervening period. This, in turn, might interpreted as "contradictions" found in statements, thereby undermining the correct assessment of evidence.

14. In addition, judges and prosecutors serving in the Turkish Judiciary are regularly assigned to new regions determined by the Council of Judges and Prosecutors, either *ex officio* or upon their own request, considering geographical and economic conditions, social, health, and cultural opportunities, degree of hardship, transportation, and other relevant factors. In the present case, changes in the presiding judge and a member of the court bench between the first hearing on 11 October 2016 and the final hearing on 22 March 2018 occurred due to such assignments and other reasons. Significantly, Judge F.Ö., a member of the court bench, participated in all hearings except the first at which the witnesses forming the basis of the conviction were heard, and was also present at the hearing when the final judgment was delivered. In other words, it cannot be said that the court bench which heard the witness was entirely different from the bench rendering the judgment. Indeed, in its judgment *Cutean v. Romania*, which examined the principle of immediacy in a similar case, the ECHR pointed out that a complete change in the composition of the trial court during the hearing of witnesses may raise issues (see *Cutean v. Romania*, no. 53150/12, 2 December 2014, § 64).

15. Furthermore, the conviction in the present case was essentially based on witness statements. Each witness was brought before the court and heard during the hearings, and their statements were duly recorded in the hearing minutes. Subsequently, both parties were invited to state any objections regarding the recorded statements. During this process, neither party raised any objections regarding the incomplete recording of witness statements in the trial minutes. There is likewise no indication in the case file that the presiding judge and one member of the bench, who participated in the subsequent hearings and rendered the final judgment, failed to examine and assess the detailed court minutes concerning the witness statements. The reasoned judgment clearly demonstrates that such evidence was examined in detail.

16. Indeed, it can be observed that the Assize Court have discussed witness statements in detail in the reasoning of its judgment, explicitly identifying which statements it found credible and which it did not. The Regional Court of Appeal also found the evidence to be sufficient by stating: "*there was no unlawfulness that would affect the decision on procedure and merits, there were no deficiencies in the evidence or proceedings, and the assessment was appropriate in terms of proof.*" It then decided to reject the appeal on the merits.

17. In addition, in the present case, the applicant and his counsel were entitled to examine witnesses and question them, the principles of equality of arms and adversarial proceedings were duly observed; the oral and face-to-face nature of the trial was ensured; the defence was granted adequate time and facilities; and the proceedings were concluded within a reasonable time. In view of the foregoing, it thus appears that there were no circumstances capable of undermining the overall fairness of the proceedings.

18. Therefore, in the light of the foregoing,

We have dissented from the majority's conclusion finding of a violation of the right to a fair hearing under the right to a fair trial. Considering the structure of the Turkish judiciary on a regional basis and the established practice of assigning judges within pre-determined

regions; we are of the opinion that the continued presence of one member from the three-member bench during the hearings examining the witnesses, whose statements were relied upon in the conviction, and that the final judgment was delivered by the court bench consisting of that same member, along with the presiding judge and another member who participated in the subsequent hearings, did not in itself undermine the fairness of the proceedings as a whole.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

BAYRAM ALTIN

(Application no. 2021/32528)

29 May 2024

On 29 May 2024, the Plenary of the Constitutional Court found a violation of the right to a reasoned decision under the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Bayram Altın* (no. 2021/32528).

(I-IV) SUMMARY OF THE FACTS

[1-18] The applicant, having successfully passed the examination for watchman's duty, was not appointed because the results of the security clearance investigation and archive research were negative. The action for annulment brought by the applicant was dismissed by the incumbent court on the grounds that his brother had been given a suspended sentence for theft of items kept in a building and had also been convicted of offences including sexual abuse of a child, aggravated robbery, and violation of the inviolability of domicile.

The incumbent court emphasised that, by its very nature, the profession of watchman entails the possibility of conducting a more extensive security investigation into candidates, and that, within this scope, the actions of family members may also be taken into consideration. Having regard to the fact that the said profession plays an important role in combating the offences for which the applicant's brother had been convicted, the Court held that there was no unlawfulness in the impugned administrative act.

The applicant's subsequent appeals against the relevant decision were dismissed.

V. EXAMINATION AND GROUNDS

19. The Court, at its session of 29 May 2024, examined the application and decided as follows:

A. Request for Legal Aid

20. The applicant applied for legal aid, stating that he could not afford to pay the litigation costs.

21. In accordance with the principles set out by the Court in the

case of *Mehmet Şerif Ay* (no. 2012/1181, 17 September 2013), the Court should accept the applicant's request for legal aid, on the ground that it is not manifestly ill-founded, since it has been established that the applicant is unable to afford the litigation costs without suffering a significant burden.

B. Alleged Violation of the Right to a Reasoned Decision

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

22. The applicant asserted that he was unable to commence his duties as a watchman due to an act committed by his brother, and therefore claimed violations of his right to a fair trial, the principle of individual criminal responsibility, the right to work, the right to enter public service, and the principle of equality. He further asserted that his right of access to a court was violated because no appellate review had been conducted, and that his right to a reasoned decision was breached due to the trial courts' failure to adequately address all of the issues he raised.

23. The Ministry, in its observations, noted that the applicant had been informed of the allegations underlying the said security clearance investigation and archive research, as well as the acts attributed to him. It further specified that the applicant had had the opportunity to challenge the decision by bringing an administrative action, to adduce evidence, and to submit his claims and defence before the judicial authorities. The Ministry asserted that there had been no breach of the principles of equality of arms or adversarial proceedings, and that the judicial authorities had reached their conclusion by evaluating the evidence obtained through the security clearance investigation and archive research in accordance with the relevant legislation.

2. The Court's Assessment

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

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

25. The Court is not bound by the legal qualification of the facts by the applicant and it makes such an assessment itself. The applicant's allegations, given their nature, have been examined under the right to a reasoned decision inherent in the right to a fair trial.

a. Admissibility

26. The alleged violation of the right to a reasoned decision must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

27. The right to a fair trial, safeguarded under Article 36 of the Constitution, provides guarantees aimed at securing procedural, rather than substantive, justice. In this regard, the right to a fair trial does not ensure that the outcome of the proceedings will be in favour of one of the parties. Instead, it fundamentally guarantees that the judicial process and procedure will be conducted in a fair manner (see *M.B.* [Plenary], no. 2018/37392, 23 July 2020, § 80).

28. While it is set forth in Article 36 § 1 of the Constitution that everyone has the right to a fair trial, it does not explicitly specify the right to a reasoned decision. However, the rationale behind the inclusion of the phrase "*fair trial*" in Article 36 indicates that the right to a fair trial, also protected under international treaties to which Türkiye is a party, has been incorporated into the constitutional text. Indeed, the European Court of Human Rights has emphasized in numerous judgments that the right to a reasoned decision is part of the right to a fair hearing under Article 6 § 1 of the European Convention on Human Rights. Therefore, it must be accepted that the right to a fair trial under Article 36 of the Constitution also encompasses the right to a reasoned decision (see *Abdullah Topçu*, no. 2014/8868, 19 April 2017, § 75).

29. Article 141 § 3 of the Constitution stipulates that "*The decisions of all courts shall be written with a justification*," thus imposing an obligation on courts to deliver reasoned decisions. In line with the principle of

constitutional integrity, this provision should also be taken into consideration when assessing compliance with the right to a reasoned decision (see *Abdullah Topçu*, § 76).

30. The right to a reasoned decision aims to ensure the fair trial of individuals as well as enabling the review of whether they had been tried fairly. This right is essential for parties to understand whether their claims have been duly examined during the proceedings and for the public to be informed of the reasons for judicial decisions made on their behalf in a democratic society (see *Sencer Başat and Others* [Plenary], no. 2013/7800, 18 June 2014, §§ 31, 34).

31. The said obligation incumbent on the courts should not be interpreted in a way necessitating a detailed response to every claim and argument raised in the course of the proceedings (see *Yasemin Ekşi*, no. 2013/5486, 4 December 2013, § 56). Which elements should be included in a decision depends on the nature and circumstances of the case. If the arguments and defences raised during the proceedings are clear, specific, and likely to affect the outcome of the proceedings—that is, if they are of a nature that could alter the result—then the trial courts must provide adequate reasoning in response to these issues. Otherwise, especially where the court itself has deemed the issue relevant to the outcome, a violation may occur (see, *mutatis mutandis*, *Sencer Başat and Others*, §§ 35, 39).

ii. Application of Principles to the Present Case

32. In the present case, the applicant, who had successfully passed the examination for watchman's duty, was not appointed because of the negative results of the security clearance investigation and archive research. The trial court considered the impugned act lawful by referring to the findings concerning the applicant's brother.

33. It is clear that the subparagraph "*to have undergone a security clearance investigation and/or archive research*" added to Article 48 of Law no. 657 introduces a requirement for a security clearance investigation and/or archive research for appointment to all civil service positions. Upon conducting the necessary inquiries regarding the matters to be

examined in the security clearance investigation, the collected data shall be assessed, and the result of the investigation must be in favour of the candidate.

34. The reasoning of the impugned decision reveals that the trial courts interpreted Article 48 of Law no. 657 in a way meaning that *the outcome of the security clearance investigation and/or archive research must be in favour of the candidate*.

35. It must be reiterated that the primary authority for interpreting the legal provisions applicable to a dispute lies with the courts resolving the dispute and the courts of appeal. The Constitutional Court is not in a position to substitute its interpretation for that of these courts. However, it is within the jurisdiction of the Court to examine whether the effects of such interpretations are compatible with the right to a fair trial. In this regard, for the purposes of the individual application, the interpretation by the judicial authorities that the provision in question requires a positive outcome in the security clearance investigation will be accepted as given (see, *mutatis mutandis*, *Sebiha Kaya* [Plenary], no. 2018/34124, 20 May 2021, § 48).

36. It may be argued that the requirement of a positive outcome in the security clearance investigation and archive research introduces a degree of ambiguity into the provision. This is because the determination of whether the investigation results are favourable may vary depending on the discretion of the appointing authority. This poses a risk of arbitrary and discriminatory practices, which as a result may undermine individuals' confidence in the state (see *Sebiha Kaya*, § 49).

37. The principle of legal certainty, which aims to ensure individuals' legal security, requires that legal norms be foreseeable and that individuals can place confidence in the state in all actions and decisions. The state, in turn, must avoid methods that may undermine this confidence in its legal regulations. The principle of clarity entails that legal regulations must be clear, explicit, understandable, and applicable in a way that leaves no room for doubt or hesitation for either individuals or the administration, and must contain safeguards

against arbitrary actions by public authorities (see the Court's decision no. E.2013/39, K.2013/65, 22 May 2013). In this regard, the right to a reasoned decision may be considered a key instrument in establishing legal certainty and clarity. Through a reasoned decision, individuals are able to understand how their specific case is assessed under the legal rules and are thus afforded the opportunity to make an effective defence (see *Eren Turğut*, no. 2018/36716, 2 May 2023, § 34).

38. The findings established as a result of the investigations and examinations conducted by the trial courts must be presented in the reasoned decision with due regard to the particular circumstances of the case, in a manner that ensures the principles of legal certainty and clarity and prevents arbitrary practices (see *Eren Turğut*, § 35).

39. Accordingly, in an action brought against an administrative decision of non-appointment based on the negative outcome of a security clearance investigation, it is crucial that the reasons for the negative result of the applicant's security clearance investigation and how the data obtained through the investigation negatively impacts the applicant's ability to perform the intended duty be explicitly set out. In this regard, what is expected from judicial authorities is to specify the nature of the information obtained as a result of the security clearance investigation in their decisions and to assess the relevant information in consideration of the institution to which the applicant was assigned and the position to be held. The key point is whether the findings leading to the negative outcome of the security clearance investigation stem from the applicant personally or indicate a specific and direct connection to the applicant. At this juncture, it is also of significance that the courts provide a sufficient reasoning as to how this connection is established, in order to avoid arbitrariness (see *Eren Turğut*, § 36).

40. In addition, it is a universally accepted principle of the rule of law that individuals cannot be held responsible for the acts committed by their relatives. Holding someone accountable for another person's acts would mean denying that individual's status as a free and autonomous human. In a state governed by the rule of law, assigning responsibility to a person for acts committed by others—except in narrowly defined

exceptional circumstances prescribed by law—is unacceptable. Modern legal systems are based on the autonomy of the individual, granting rights and imposing responsibilities accordingly. Subjecting someone to sanctions by public authorities for actions committed by another person over whom they have neither legal nor factual control is incompatible with the notion of personal autonomy (see *Sebiha Kaya*, § 54).

41. In other words, merely making factual references to the acts committed by the applicant's relatives does not fulfil the guarantees of the right to a reasoned decision. Otherwise, this would lead to an unfair situation in which a person's eligibility for public office would be *categorically* and negatively affected by unlawful acts committed by their relatives.

42. In the present case, while dismissing the action brought against the administrative decision refusing the applicant's appointment as a watchman, the court relied on the criminal convictions of the applicant's brother. However, the court merely stated this information without conducting any assessment. It failed to evaluate how the acts of the applicant's brother could negatively impact the applicant's ability to fulfil the duties of a watchman, despite being expected to do so.

43. As a rule, if the court's decision contains sufficient reasoning on the merits, it may be deemed acceptable for the appellate authority to refer to that decision in its own reasoning. However, in cases where the original decision lacks reasoning, the appellate court must respond to the parties' substantive objections with its own adequate reasoning. In the present case, it is evident that the trial court's decision lacked the necessary reasoning in this respect, and the regional administrative court made no assessment but merely referred to the first instance court's decision. Accordingly, when the judicial proceedings are assessed as a whole, it has been concluded that the applicant's right to a reasoned decision was violated.

44. In the light of the foregoing, it must be held that there was a

violation of the right to a reasoned decision within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

VI. REDRESS

45. The applicant requested the Court to find a violation, to order a retrial and to award him non-pecuniary compensation of 500,000 Turkish liras (TRY).

46. There is a legal interest in conducting a retrial in order to redress the consequences of the violation found. In this regard, the procedure to be followed by the judicial authorities is to initiate the retrial proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (for exhaustive explanations regarding retrial in terms of individual application, as specified in Article 50 § 2 of the Code no 6216 on the Establishment and the Rules of Procedure of the Constitutional Court, dated 30 March 2011, see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

47. As it has been concluded that a retrial to be conducted in order to eliminate the violation and its consequences would constitute sufficient redress, the claims for compensation must be dismissed.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 29 May 2024 that

A. The request for legal aid be GRANTED;

B. The alleged violation of the right to a reasoned decision be declared ADMISSIBLE;

C. The right to a reasoned decision under the right to a fair trial safeguarded by Article 36 of the Constitution was VIOLATED;

D. A copy of the judgment be REMITTED to the Denizli Administrative Court (E.2019/106, K.2019/579) for retrial to be conducted to redress the consequences of the violation of the right to a reasoned decision;

E. The applicant's claims for compensation be REJECTED; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

EŞREF BİNGÖL

(Application no. 2021/10332)

18 July 2024

On 18 July 2024, the Second Section of the Constitutional Court found violations of the principles of equality of arms and adversarial proceedings, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Eşref Bingöl* (no. 2021/10332).

(I) SUMMARY OF THE FACTS

[1-9] The application concerns the alleged violations of the principles of equality of arms and adversarial proceedings, on the grounds that the trial court rejected the applicant's request to investigate a fact which could potentially mitigate or eliminate the sentence in a criminal case.

The Istanbul Anatolian Chief Public Prosecutor's Office initiated a criminal investigation against the applicant on the allegation of obtaining undue benefit through fraudulent means. At the end of the investigation, the applicant was indicted for aggravated fraud.

In his defence during the first hearing, the applicant denied knowing the complainant. He stated that an acquaintance from his neighbourhood, F.S., who was unable to use his own bank account due to credit debt, had asked to use his account to withdraw money sent by his uncle. He withdrew the amount credited to his account and handed it over to F.S., claiming that he had not been involved in the fraudulent act and had been deceived by F.S. He further noted that, although he had submitted evidence to the police, such as F.S.'s social media profile and photographs, no steps had been taken to investigate these matters, to obtain the relevant bank CCTV footage, or to summon F.S. to be heard before the court. During the same hearing, a court officer reported that the phone number allegedly used by F.S. was not registered with the GSM operator. This finding was recorded in the minutes of hearing.

In a written submission between hearings, the applicant's counsel reiterated that the money in question was deposited into the applicant's account solely because of F.S.'s request, emphasising that the applicant derived no financial benefit therefrom.

He also requested that F.S. be summoned and heard as a witness

and that the relevant bank's CCTV footages be obtained. The trial court, however, dismissed these requests on the ground that, in light of the evidence in the case file, the relevant steps requested to be taken would not contribute to the proceedings, and sentenced the applicant to imprisonment.

In his appeal, the applicant argued, inter alia, that the trial court had unlawfully rejected his specific requests for the identification and questioning of F.S. and for the collection of relevant evidence, despite his having provided tangible information. The judgment was upheld upon appeal and became final on 26 January 2021.

Afterwards, the applicant lodged an individual application with the Court on 4 March 2021.

II. THE COURT'S ASSESSMENT

10. The applicant stated that F.S., whom he knew from the neighbourhood, told him he could not use his own bank account due to outstanding loan debts and therefore asked for the applicant's help in using his bank account to withdraw money that would be sent by his uncle. The applicant asserted that he withdrew the money transferred to his account and handed it over to F.S., and that he was not the one who committed the fraudulent act, but rather that he himself had been defrauded by F.S. He added that he did not know F.S.'s exact address, but he had provided law enforcement officers with his social media account and photographs. He argued that no investigation had been conducted to identify the owner of the phone number that had contacted the complainant, no footage had been obtained showing the moment he withdrew the money from the bank and handed it over to F.S., and F.S. was not summoned or heard in court. He claimed that his requests for the extension of the investigation were rejected during the second hearing held on 26 December 2018. On these grounds, he claimed that his right to a fair trial and the principle of equality had been violated. The Ministry of Justice, in its observations, noted that the applicant had been able to present arguments in his favour during the hearing, object to the evidence against him, and explain the incident from his perspective before the trial court.

11. It has been considered that the essence of the applicant's allegations relates to the principles of equality of arms and adversarial proceedings, which are inherent in the right to a fair trial, and thus the application should be examined within this scope.

12. The alleged violations of the principles of equality of arms and adversarial proceedings must be declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

13. It is set forth in Article 36 of the Constitution that everyone has the right to litigation either as plaintiff or defendant and the right to a fair trial. The implication of both the right to claim and the right to defend in the same article points out that parties must be given the opportunity to submit their claims and defences before the court (see *Mehmet Fidan*, no. 2014/14673, 20 September 2017, § 37).

14. In addition, the legislative intent in including the phrase *"...and right to a fair trial"* in Article 36 emphasises that the right to a fair trial, as guaranteed by international treaties to which Türkiye is a party, has been incorporated into the text of the Constitution. Indeed, in many of its judgments rendered under Article 36 of the Constitution, the Court has indicated that the principles of *equality of arms and adversarial proceedings* falling within the scope of the right to a fair trial in accordance with the case-law of the European Court of Human Rights would be interpreted under Article 36. Therefore, it is evident that the relevant principles are inherent to the content and scope of the right to a fair trial. A trial conducted in violation of these principles cannot be considered fair (see *Ruhşen Mahmutoğlu*, no. 2015/22, 15 January 2020, § 56).

15. The main objective sought to be achieved in a criminal case is to establish the material truth in a manner consistent with the right to a fair trial. The principle of adversarial proceedings is one of the most crucial elements in achieving this objective. This principle requires that the parties be given the opportunity to be informed of and comment on the case file. Accordingly, in criminal proceedings, the defendant must be made aware of the submissions and evidence presented to influence

the court's decision and must be given the opportunity to effectively contest them (see *Tahir Gökatalay*, no. 2013/1780, 20 March 2014, § 25; and *Cezair Akgül*, no. 2014/10634, 26 October 2016, §§ 27-31).

16. One of the purposes of adversarial proceedings is not merely to ensure that a submission or request is included in the case file, but also to ensure that it is taken into account by the court and leads to a conclusion. The principle of adversarial proceedings requires that evidence against the accused be submitted through a process allowing for challenge and discussion not only of witness statements, but of all relevant evidence. In this way, defendants are able to assess the relevance and weight of the evidence in relation to the case and raise objections or arguments regarding its reliability (see *Cezair Akgül*, § 28).

17. The principle of equality of arms, which aims to ensure a fair balance between the parties, entails that both parties to the proceedings must be placed on an equal footing with respect to procedural rights. It means that neither party should be placed at a disadvantage vis-à-vis the other, and that both should have a reasonable opportunity to present their claims and defences before the court under the same conditions (see *Yaşasın Aslan*, no. 2013/1134, 16 May 2013, § 32).

18. As a rule, the assessment of evidence in a given case and the decision as to whether such evidence is relevant to the case fall within the jurisdiction of the trial court. It is not for the Constitutional Court to conduct such assessments. However, whether the principles of equality of arms and adversarial proceedings—both falling within the scope of the right to a fair trial—were duly respected during the proceedings is subject to review by the Court. In this context, any allegations of imbalance between the prosecution and the defence in terms of access to or use of evidence must be evaluated in light of the proceedings as a whole. In particular, when it comes to evidence that is not reasonably accessible to the defendant, the defence must be afforded a fair opportunity to challenge it or to present evidence to the contrary (see *Ruhşen Mahmutoğlu*, § 60).

19. In the present case, the court convicted the applicant on the grounds that "*the defendant's statements were not consistent with the*

ordinary course of life and were aimed at evading criminal responsibility", in response to the applicant's defence that the account information to which the complainant had transferred money had been provided to his friend F.S.

20. During both the investigation and prosecution phases, the applicant consistently stated that he withdrew the money to help F.S., whom he knew from the neighbourhood. In his statement before the police, the applicant described F.S.'s appearance, mentioned that F.S. worked with his uncle in the car rental business, and provided photographs that he claimed depicted F.S. However, the investigation file contains no information indicating that any steps were taken to determine F.S.'s identity or address through the submitted social media account or photos. During the prosecution phase, the applicant also provided a mobile phone number which he claimed belonged to F.S. A court officer called this number during the hearing, and the operator responded that no such number was registered with the GSM operator. Apart from having this number called, the court did not take any further action to determine F.S.'s identity or address based on the information provided by the applicant. The applicant's requests in this sense were rejected by the court on the ground that "*in light of the evidence in the case file, the request for extension of the investigation would not contribute to the proceedings*".

21. Given that the applicant insisted on his claims at every stage that the impugned act had been committed by F.S., who had also defrauded him; that he submitted the alleged social media account and photographs of F.S. to the police; and that he requested the footages to be obtained, it is clear that under the principle entailing the *uninterrupted conduct of the proceedings* set out in the Code of Criminal Procedure no. 5271 of 4 December 2004, which aims to conclude all criminal proceedings in a single hearing, evidence to determine F.S.'s identity and address should have been collected during the investigation phase. However, the relevant chief public prosecutor's office failed to carry out sufficient investigation in this regard. Furthermore, the court's rejection of the applicant's requests with abstract reasoning placed him at a disadvantage vis-à-vis the prosecution. Under these

circumstances, it is evident that the court's approach did not comply with the principles of equality of arms and adversarial proceedings and lacked the procedural safeguards necessary to protect the applicant's interests. This rendered the proceedings, when considered as a whole, unfair.

22. For the reasons explained above, it must be held that there was a violation of the principles of equality of arms and adversarial proceedings, which fall within the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.

23. The applicant also claimed that there had been violations of the principle of equality and the right to a reasoned decision. In light of the conclusion reached with respect to the violation of the principles of equality of arms and adversarial proceedings, it has been found unnecessary to examine these additional allegations of the applicant.

24. As a rule, the authority to assess the evidence in a given case and to determine whether the evidence is relevant lies with the trial courts (see *Orhan Kılıç* [Plenary], no. 2014/4704, 1 February 2018, § 44). Accordingly, it is not for the Constitutional Court to determine whether the applicant committed the offence of fraud in the present case. A finding of a violation by the Court does not imply the applicant's acquittal, nor does it mean that the applicant must necessarily be acquitted as a result of the retrial to be conducted for the purpose of redressing the violation. Following the measures taken in order to redress the consequences of the violation, the trial court may reach the same or a different conclusion depending on its evaluation of the evidence.

III. REDRESS

25. The applicant requested the Court to find a violation and to order a retrial.

26. There is a legal interest in conducting a retrial in order to redress the consequences of the violation found. In this regard, the procedure to be followed by the judicial authorities is to initiate the retrial

proceedings and to issue a new decision eliminating the reasons that led the Court to find a violation in accordance with the principles specified therein (see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60; *Aligül Alkaya and Others (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

IV. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 18 July 2024 that

A. 1. The alleged violation of the principles of the equality of arms and adversarial proceedings be declared ADMISSIBLE;

2. It has been found UNNECESSARY to examine other claims of violation;

B. The principles of the equality of arms and adversarial proceedings safeguarded by Article 36 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the 9th Chamber of the İstanbul Anatolian Assize Court (E.2018/276, K.2018/490) for retrial to be conducted to redress the consequences of the violation of the principles of the equality of arms and adversarial proceedings;

D. The total litigation costs of 19,287.60 Turkish liras (TRY), including the court fee of TRY 487.60 and counsel fee of TRY 18,800, be REIMBURSED to the applicant;

E. The payments be made within four months as from the date when the applicant applies to the Ministry of Treasury and Finance following the notification of the judgment. In the 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.

RIGHT TO TRADE-UNION FREEDOM (ARTICLE 51)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

TÜRKİYE DEVRİMCİ KARA, HAVA VE DEMİRYOLU TAŞIMACILIĞI İŞÇİLERİ SENDİKASI

(Application no. 2020/34550)

15 February 2024

On 15 February 2024, the Plenary of the Constitutional Court found a violation of the right to trade union freedom, safeguarded by Article 51 of the Constitution, in the individual application lodged by *Türkiye Devrimci Kara, Hava ve Demiryolu Taşımacılığı İşçileri Sendikası* (no. 2020/34550).

(I-IV) SUMMARY OF THE FACTS

[1-28] The applicant, *Türkiye Devrimci Kara, Hava ve Demiryolu Taşımacılığı İşçileri Sendikası* ("the Union"), requested authorisation from the Ministry of Labour and Social Security ("the Ministry"), asserting that it had reached the required number of members to conclude a collective labour agreement (CLA) at the workplace. The Ministry determined that the applicant union had not met the necessary threshold within the relevant sector; therefore, issued a negative order, and notified the Union accordingly. The applicant challenged the negative order before the İstanbul Labour Court ("the labour court"). Thereupon, pursuant to Article 43 of the Law no. 6356 on Trade Unions and Collective Labour Agreements, the CLA process was suspended until the conclusion of the appeal proceedings.

The labour court dismissed the case, and the subsequent appeal was also rejected on the merits. Upon further appeal, the Court of Cassation quashed the decision, holding that the Union had timely objected to the most recently published statistics used in determining the sectoral threshold, that those statistics were subject to ongoing proceedings before another labour court, and that the matter should have been treated as a preliminary issue.

Following the Court of Cassation's quashing decision, while the case was still pending before the labour court, the applicant Union lodged an individual application with the Constitutional Court. In the meantime, the first-instance court accepted the case. The court held that the Ministry's negative determination should have been suspended by way of interim injunction and that the previous, unchallenged and finalised statistics should have been applied, ultimately concluding that the applicant Union was authorised.

Following an appeal by the Ministry, the Court of Cassation reiterated its previous reasoning and again quashed the impugned decision. As of the date of review, the judicial proceedings are still pending.

V. EXAMINATION AND GROUNDS

29. The Court, at its session of 15 February 2024, examined the application and decided as follows:

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

30. The applicant raised the following allegations:

- The sectoral threshold requirement stipulated in Law no. 6356 obstructed the ability of trade unions to organise;

- Since the statistics published after 2009 had been challenged, the 2009 statistics should have been taken as the basis;

- Despite the short time limits prescribed in Law no. 6356, the proceedings subject to the application were not concluded within a reasonable time, which prevented the applicant from concluding a CLA on behalf of its members, resulting in the victimisation of thousands of unionised employees and the ineffectiveness of the right to trade union freedom; and

- There was no effective remedy available in respect of the proceedings that were not concluded within a reasonable time.

On these grounds, the applicant alleged a violation of Articles 36, 40, 51 and 53 of the Constitution.

31. The Ministry, in its observations, stated that whether the State had fulfilled its positive obligations regarding the length of the proceedings should be examined. It emphasised that such an examination must take into account the applicant's conduct, the complexity of the case, and the variety, scope, and content of the evidence to be collected and evaluated. The Ministry further stated that, within the scope of the State's positive obligations, the extraordinary circumstances such as

the state of emergency and the COVID-19 pandemic, as well as the specific circumstances of the case, must be duly considered.

B. The Court's Assessment

32. The first three paragraph of Article 51 of the Constitution titled "*Right to organise unions*", reads 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 46 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."

33. Article 53 of the Constitution titled "*Rights of collective labour agreement and collective agreement*", reads, insofar as relevant, as follows:

"*Workers and employers have the right to conclude collective labour agreements in order to regulate reciprocally their economic and social position and conditions of work.*

The procedure to be followed in concluding collective labour agreements shall be regulated by law."

34. The applicant was unable to conclude a CLA due to the failure to conclude the action challenging the negative order regarding authorisation within a reasonable time. Article 51 of the Constitution provides that employees and employers have the right to form trade unions in order to protect and improve their economic and social rights and interests in their labour relations. The right to union is inherent in the freedom of association. This right also requires that trade union activities carried out to protect the interests of their members be

permitted. In this context, although they do not constitute a separate category of rights, the right to strike and the right to collective bargaining are among the most significant means available to trade unions to protect the interests of their members (see, in the same vein, *Kristal-İş Sendikası* [Plenary], no. 2014/12166, 2 July 2015, § 27; and *Birleşik Metal İşçileri Sendikası*, no. 2015/14862, 9 May 2018, § 21). Furthermore, Article 53 of the Constitution stipulates that employees and employers have the right to conclude collective agreements to regulate their mutual economic and social conditions as well as working conditions. Therefore, the matter should be examined within the scope of Article 53 titled "*Rights of collective labour agreement and collective agreement*" in conjunction with Article 51 titled "*Right to organise unions*" of the Constitution.

1. Admissibility

35. The alleged violation of the right to trade union freedom must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

2. Merits

a. General Principles

36. The right to trade union freedom set out in Article 51 of the Constitution is a component of the freedom of association underlying a democratic society. Freedom of association is the liberty of individuals to come together through collective formations in order to protect their interests. This freedom enables individuals to realise their political, cultural, social, and economic goals as a community (see the Court's decision no. E.2014/177, K.2015/49, 14 May 2015).

37. Freedom of association encompasses two fundamental rights: one is the protection of the existence and functioning of the association, and the other is the individual's freedom to engage in activities within the association and to establish a relationship with it. Trade unions, which are associations formed to protect the interests of their members in the field of employment, constitute an essential part of the freedom

of association. Therefore, the right to form a trade union requires the freedom of employees to come together and organise in order to protect their individual and collective interests. In this respect, it is not regarded as an independent right, but rather as a form or specific aspect of freedom of association. In democracies, such associations are entitled to fundamental rights that must be respected and protected by the state (see *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, § 31).

38. The right to trade union freedom, as laid down in Article 51 of the Constitution, imposes certain positive obligations on the state in terms of ensuring the effective exercise of the right. These positive obligations concern the effectiveness and adequacy of the decisions rendered by public authorities in cases related to this right, and they are closely linked to the requirement that such decisions be delivered as promptly as possible (see, in the same vein, *M.M.E. and T.E.*, no. 2013/2910, 5 November 2015, § 125; and *İlknur Kızıltoprak*, no. 2015/11579, 18 April 2019, § 76).

39. In this regard, judicial authorities are expected to act expeditiously—in other words, to conduct proceedings swiftly and not allow the case to remain pending—and to issue decisions with relevant and sufficient reasoning. Fulfilling this expectation is part of the state's positive obligations with respect to the right to trade union freedom. Failure to fulfil this obligation may lead to irreparable harm for individuals who are unable to benefit from CLA protection and may give rise to serious problems concerning the right to trade union freedom (see, in the same vein, *Murat Demir* [Plenary], no. 2015/7216, 27 March 2019, § 82; *İlknur Kızıltoprak*, § 77; *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, no. 2016/13328, 19 November 2020, § 34; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, no. 2016/13531, 15 December 2020, § 34).

b. Observations Regarding the Authority to Conclude a CLA

40. A CLA is a labour agreement concluded between a labour union and an employers' union or an employer who is not a member of any union. This agreement determines how individual employment contracts will be made, their content, and the conditions for their

termination. In this respect, a CLA has a normative nature and, within legal boundaries and limited to its scope of application, it can constitute general and objective legal rules. It is also concluded to regulate the mutual rights and obligations of the parties, the implementation and supervision of the agreement, and the means for resolving disputes. From another perspective, a CLA is one of the most significant means for trade unions in their struggle to protect and promote the rights and interests of their members. Therefore, the CLA and the freedom of trade union activities are two closely intertwined concepts. With the authority to conclude a CLA, trade unions are empowered to act collectively and express their demands more effectively. In this respect, the CLA is one of the most important means for trade unions to have their voices heard (see *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 35; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, § 35).

41. For labour unions, a prerequisite for concluding a CLA is to certify that they are the authorised union. The relevant provisions of Law no. 6356 set out how this authorisation requirement is to be fulfilled. The requirement stipulated by law is directly related to the objective of ensuring that collective bargaining processes, which concern large groups of employees, are conducted by unions with sufficient representative power. This is because strong unions can exert significant pressure on employers and secure the most favourable conditions for workers. The authority to conclude a CLA provides mutual guarantees for both unions and employees. The number of a union's members reflects that it has an increased bargaining power during CLA negotiations and a stronger capacity to protect employees against employers. On the other hand, the financial power of the union depends on the number of organised employees. As a matter of fact, as the union's financial resources are reinforced through solidarity contributions collected from employees, its organizational performance improves, and it gains the opportunity to reach more employees (see, in the same vein, *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 36; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, § 36).

42. In this regard, the authority to conclude a CLA emerges as a situation that enables collective bargaining, wherein both the

employee and the union are bilaterally affected, and subjective and organisational rights are intertwined with an objective institutional content. Not only restrictive interferences with the authorisation process but also the State's failure to resolve disputes concerning authorisation within a reasonable time may cause irreparable harm to the right to trade union freedom. In order to strengthen the function of CLAs as a key bargaining instrument for both authorised trade unions and employees, it is necessary to ensure protection against obstacles to collective bargaining negotiations (see *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 38; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, § 38).

43. As explained, the determination of the authorised trade union is a legal dispute that directly concerns trade unions, employees, and employers. The mere prolongation of a case filed to resolve such a dispute may in itself amount to a breach of the State's positive obligations. The obligation requiring a prompt resolution of the dispute relates not to the outcome but to the procedural aspect of the case. Therefore, what is at stake here is not an obligation of result but of means. At this point, the State's primary duty is to reach a decision—whether in favour of or against the relevant parties—to determine the authorised union without undue delay (see, in the same vein, *Murat Demir*, § 83; *İlknur Kızıltoprak*, § 78; *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 39; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, § 39).

44. Lastly, resolving issues arising from the interpretation of legislation primarily falls within the jurisdiction and responsibility of the inferior courts. In such cases, the determination of the authorised union is the most critical element, and it is beyond dispute that the inferior courts—which are in direct contact with all parties to the case—are better equipped to assess the specific circumstances of the case. The Constitutional Court's role is limited to examining whether the interpretation of these rules complies with the Constitution. Therefore, the Court reviews the procedures followed by the inferior courts, particularly whether they have upheld the safeguards set forth in Article 51 of the Constitution. In this scope, the Court does not substitute itself for the inferior courts but assesses the conduct of

public authorities throughout the process in terms of the procedural safeguards concerning the right to trade union freedom (see, in the same vein, *Murat Demir*, § 85; *İlknur Kızıltoprak*, § 80; *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 40; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, § 40).

c. Assessment

45. In the present case, the applicant Union requested authorisation in 2016, but as of the date of examination, the proceedings regarding the action challenging the authorisation process have not yet been concluded. In accordance with Article 43 § 5 of Law no. 6356, which stipulates that "*Objection shall suspend the authorisation process until a final decision is rendered*," the applicant was unable to act as the authorised trade union. Consequently, the employees working at the workplace concerned have been deprived of one of the most fundamental trade union rights, namely the right to conclude a collective labour agreement, for nearly eight years.

46. The Court has previously examined the alleged violations of the right to trade union freedom due to the failure to conclude actions challenging authorisation process within a reasonable time, in the cases of *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası* and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*. In these judgments, the Court assessed whether the State had fulfilled its positive obligations regarding the statutory time-limits prescribed to ensure the swift conclusion of such proceedings. Within this framework, it found that the legal uncertainty as to whether the applicants could unionise at the workplaces concerned was not resolved promptly. The Court held that the attitude of the judicial authorities had rendered it impossible for the applicants and the employees working at the workplaces concerned to engage in trade union activities under a collective agreement or to access the trade union rights provided therein in the course of the proceedings. Consequently, it found a violation of the applicants' right to trade union freedom and awarded compensation. The Court also emphasised that the legislature's imposition of short time-limits for the objection and judicial review stages in cases regarding authorisation

under Law no. 6356 aimed to ensure the prompt and effective exercise of this right (see *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, §§ 41-50; *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, §§ 41-50).

47. Furthermore, as underlined by the 22nd Civil Chamber of the Court of Cassation, the legislature, departing from the previous law, has eliminated the distinction between objections to positive and negative decisions on authorisation under Law no. 6356. It is thus evident that the legislature aimed to afford protection also to trade unions facing negative decision on authorisation, and to ensure the identification of the authorised union accurately prior to the conclusion of a CLA. However, this legislative sensitivity can only be preserved if the judicial authorities resolves disputes brought before it in a timely manner, without exceeding the statutory time-limits.

48. In the present case, it has been understood that over the course of nearly eight years since the request of authorisation filed in 2016, the applicant Union has been deprived of its rights to represent the employees working at the workplace concerned, to act as an intermediary between employees and the employer, to persuade the employer on matters related to employees when necessary, and to enhance its social and financial resources by increasing the number of its members. It has also been observed that the applicant has been unable to exercise its trade union rights in the course of the ongoing proceedings, and that the authorities failed to fulfil their obligation to act with due diligence and expedition in protecting the said right.

49. Accordingly, it must be accepted that the impugned proceedings were not concluded within a reasonable time. The legal uncertainty as to the applicant's ability to unionise within the said workplace was not resolved through a prompt judicial process. In other words, the State failed to fulfil its obligations to enable the applicant union to convince the employer on behalf of its members to listen to them, and in principle, to effectively enjoy the right to enter into a collective agreement with the employer (see, in the same vein, *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 47; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, § 47).

50. Another important matter to be considered in the present case is the trade union rights of the employees working at the relevant workplace during the authorisation process. One of the main purposes of joining a trade union is to improve and protect social and economic rights and working conditions through a CLA concluded at the workplace. A CLA also brings along the right to strike. Therefore, the employees' inability to benefit from a CLA implies that they are also unable to enjoy trade union rights as a whole. In the present case, the employees working at the relevant workplace have been deprived of the trade union rights and protective framework provided by CLAs for nearly eight years (see, in the same vein, *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 48; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, § 48).

51. In light of the foregoing, it is obvious that the proceedings, which were statutorily required to be concluded swiftly, were unduly prolonged. Thus, the attitude of the judicial authorities rendered it impossible for the applicant and the employees working at the relevant workplace to engage in trade union activities within the scope of a CLA and to access the trade union rights provided therein throughout the proceedings.

52. For these reasons, it must be held that there was a violation of the right to trade union freedom safeguarded by Article 51 of the Constitution.

VI. REDRESS

53. The applicant requested the Court to find a violation.

54. The procedures and principles regarding the redress of the violation and its consequences are laid down in Article 50 of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court, dated 30 March 2011. For principles regarding the application of Article 50 of Code no. 6216, see *Mehmet Doğan* [Plenary], no. 2014/8875, 7 June 2018, §§ 54-60.

55. Before deciding on the measures to be taken in order to redress the violation and its consequences, the source of the violation must be

identified. Accordingly, the violation may stem from administrative acts or actions, judicial decisions, or legislative acts. Determining the source of the violation is crucial for identifying the appropriate remedy (see *Mehmet Doğan*, § 57). As with other acts of the public authorities, legislative acts may also be subject to individual application under the Article 148 § 3 of the Constitution, provided they are applied. In this context, the Court has clarified in its previous judgments how violations arising from laws and their consequences may be redressed (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 76; *Süleyman Başmeydan* [Plenary], no. 2015/6164, 20 June 2019, § 70; *Bedrettin Morina* [Plenary], no. 2017/40089, 5 March 2020, § 60; *Süleyman Kurtel* [Plenary], no. 2016/1808, 22 January 2021, § 66; *Hamit Yakut* [Plenary], no. 2014/6548, 10 June 2021, § 132; *Malaklar İnşaat Taahhüt Gıda Maden Sanayi ve Ticaret A.Ş. (2)*, no. 2018/3296, 30 June 2021, § 75; *Keskin Kalem Yayıncılık ve Ticaret A.Ş. and Others* [Plenary], no. 2018/14884, 27 October 2021, § 159; *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş. and Others* [Plenary], no. 2016/5903, 10 March 2022, § 124; *Atilla Yazar and Others* [Plenary], no. 2016/1635, 5 July 2022, § 196; and *Nevriye Kuruç* [Plenary], no. 2021/58970, 5 July 2022, § 113).

A. Existence of a Structural Problem

56. The Court set out the fundamental principles regarding the requirement that proceedings concerning the authorisation process be concluded within a reasonable time in its judgments in the cases of *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası* and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*. However, it has been observed that the cases concerning similar complaints have not been concluded within a reasonable time in practice, and the complaints in this respect have become widespread.

57. At this point, it should be reiterated that in accordance with Article 43 of Law no. 6356, in case of an objection raised against authorisation decision, the process shall be suspended until a final judgment is rendered. In other words, lodging an objection to the Ministry's positive or negative decision on authorisation regarding trade unions suspends the process, and a CLA cannot be concluded at the relevant workplace until the relevant proceedings are completed.

58. Indeed, the problems caused by disputes regarding authorisation have also been brought before the Court through individual applications. In several cases, the Court has found a violation of the right to trade union freedom due to the failure to conclude the proceedings concerning objections to decisions on authorisation within a reasonable time (see, among other authorities, *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*, no. 2016/13531, 15 December 2020; and *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası (Şeker İş)*, no. 2016/13328, 19 November 2020).

59. In addition, the statistical data on sectors issued by the Ministry, which was relied on in determination of the authorised trade union, may also be challenged. Such cases are exclusively heard by labour courts in Ankara, and in accordance with the legislative arrangements, other courts are required to stay proceedings pending the outcome of these cases.

60. Within this framework, it has been observed that all these judicial proceedings have led to a deadlock lasting for years in the determination of the authorised trade union. This deadlock prevents the trade unions party to the proceedings and other trade unions from concluding CLAs due to the suspension of the authorisation process during the said proceedings. A considerable number of cases have also been brought before courts lacking jurisdiction. As a result, thousands of unionised employees have been deprived of the trade union rights granted through CLAs. Even if the proceedings are ultimately concluded in favour of the trade unions claiming authorisation, these unions suffer significant losses in membership during the proceedings and may subsequently fail to meet the required majority to conclude a CLA. Consequently, the short periods envisaged by the legislator to facilitate swift unionisation have not been complied with in practice, and these proceedings have instead become instruments of de-unionisation.

61. The delays in the judicial proceedings may result from the failure of the competent authorities to act with due diligence or may stem from structural problems and deficiencies in institutional organisation.

Articles 36 and 141 of the Constitution impose on the State the responsibility to regulate the legal system—including ensuring that the judicial authorities adjudicate cases within a reasonable time—in a manner that guarantees the right to trade union freedom. The State is obliged to take all necessary measures to ensure that disputes pending before the judiciary are resolved within a reasonable time. This obligation reflects the responsibility to regulate the legal system in a way ensuring the fundamental guarantees of the right to trade union freedom (for similar assessments, see *Nevriye Kuruç*, § 68).

62. The accumulation and increase of such disputes over time due to structural problems and organisational shortcomings, leading to the failure to conclude the proceedings within a reasonable time, constitute a violation of Article 51 of the Constitution. Pursuant to Article 51, the judicial system must be arranged in a way enabling the courts to fulfil their obligation to adjudicate cases within a reasonable time. It is evident that structural and organisational deficiencies in the legal system cannot justify the failure to deliver judgments within a reasonable time (for similar assessments, see *Nevriye Kuruç*, § 69).

63. In this regard, in order to safeguard the right to trade union freedom enshrined in Article 51 of the Constitution and to prevent public authorities from violating this right, the State must provide solutions to redress the harm caused by the excessive length of the judicial proceedings.

B. Source of the Structural Problem

64. The first step is to determine whether the structural problem stems from the legislative framework itself or from its implementation in practice. To this end, it must be assessed whether the system envisaged by the law for the conclusion of a CLA renders such agreements impossible or excessively difficult to conclude. If the system does not make it impossible or excessively difficult to conclude CLAs, then the problem may be considered as stemming from the implementation of the law. In that case, it would be necessary to identify the situations in which the implementing authorities systematically apply the law incorrectly. Within this scope, the procedure prescribed by the law for

conclusion of a CLA must first be presented in its entirety.

65. Pursuant to Article 35 of Law no. 6356, an application for authorisation to conclude a new CLA may be submitted *within the 120-day period preceding the expiration of the existing one*. However, the new CLA cannot enter into force until the expiry of the previous one. Thus, the law allows for the initiation of the authorisation process for a subsequent CLA before the expiry of the current agreement. The maximum period granted for this purpose is 120 days. As the law specifies "*within 120 days*", the authorised parties may submit their applications later or within a shorter period. On the other hand, in order to ensure the effective exercise of the right to conclude CLAs—recognised as a fundamental right for both *employees and employers* under Article 53 of the Constitution—a system must be established that enables the new CLA to enter into force immediately after the termination of the previous one. As set forth in Article 53 § 2, which provides "*The procedure to be followed in concluding collective labour agreements shall be regulated by law.*", such a task falls to the legislator. Therefore, in order to effectively secure the right to conclude CLAs under Article 53 of the Constitution, the system prescribed by the legislator must allow for the conclusion of a new agreement within the 120-day period preceding the expiry of the existing one. As already established above, there is a failure in terms of fulfilling this requirement in practice. The assessment below will determine whether this shortcoming stems from the system put forward by the legislator.

66. It should first be reiterated that CLAs on behalf of the employees are concluded by trade unions, which must be granted authorisation. One of the conditions for a trade union to obtain authorisation is that *it must have at least 1% of the employees working in its respective sector as members*. Whether this condition is fulfilled can be the subject of an objection to the authorisation. In determining whether the threshold has been met, it is mandatory to rely on the statistics published twice annually by the Ministry. These statistics may also be challenged through legal action, and where such a case is pending, it is treated as a preliminary issue in the authorisation proceedings.

67. If the most recently published statistics are contested, the litigation process must be completed, and the statistics must become final. Only then the authorisation is determined and finalised, followed by collective bargaining and the signing of a CLA. It must therefore be determined whether it is possible to complete the entire process within the 120-day period preceding the expiration of the existing CLA, as envisaged by the system.

68. According to Article 41 §§ 5 and 6 of Law no. 6356:

- The *statistics* to be taken as the basis in determining the membership threshold of a given sector, which is among the requirements for acquiring the authority to conclude a CLA, shall be published by the Ministry *in January and July each year*.

- These statistics may be challenged before the Ankara Labour Court *within fifteen days after their publication*. The court shall *conclude the case within fifteen days*.

- The decision rendered shall not be final, and the parties concerned or the Ministry may appeal on points of facts and law, and subsequently on points of law. *The regional court of appeal shall render a decision within one month, and the Court of Cassation shall render a judgment within another one-month period*.

69. The time limits prescribed for the inferior courts and the Court of Cassation are of a regulatory nature, and non-compliance with these periods does not bear any legal consequence. Moreover, even if the judicial authorities strictly adhere to the said time limits, these periods do not include the time required for communicating the court decisions to the parties (where necessary), the time allowed for appeal, and the time required for referral of the case to another court and its subsequent distribution to the relevant chamber. In other words, assuming full compliance with the prescribed time limits—namely, fifteen days from the date of publication of the statistics, fifteen days for the first-instance court proceedings, one month for the proceedings before the regional court of appeal, and one month for the proceedings before the Court of Cassation—the total duration required for the finalisation

of the statistics is not merely 2 months and 30 days (approximately three months or ninety days). The aforementioned time-limits must be added to the period that will elapse until the finalisation of the objection to the authorisation process.

70. In addition, pursuant to Article 79 of Law no. 6356, disputes arising from the implementation of this Law shall be examined by the courts competent to hear labour disputes. It is laid down in Article 7 of Law no. 7036 that *the simplified trial procedure* shall be applied before the labour courts, and the time limits for appeal begin to run from the communication of the final decision to the parties. The simplified trial procedure is regulated under Articles 316 et seq. of the Code of Civil Procedure no. 6100 of 12 January 2011. According to this procedure, the trial is composed of three stages: the submission of statements, preliminary examination, and the trial stage.

71. The case is deemed to have been initiated with the registration of the petition of complaint, and the first stage—submission of statements—begins. During this stage, the petition is served on the defendant in accordance with the provisions of the Notification Law no. 7201 of 11 February 1959. Pursuant to Article 317 § 2 of Code no. 6100, "*The time" limit for submitting a statement of defence is two weeks from the date the petition of complaint is served on the defendant. However, in cases where it is very difficult or impossible, in the particular circumstances of the case, to prepare a defence within this period, and where the defendant applies to the court within the same period, the court may grant an extension of no more than two weeks, starting from the end of the initial time-limit and on a one-time basis.*" Accordingly, the period granted to the defendant to submit a statement of defence is two weeks, with a two-week extension possibility. After the statement of defence is submitted, at the latest within four weeks, the court proceeds to the preliminary examination stage.

72. The preliminary examination stage is regulated under Article 320 of Code no. 6100. It is stipulated in Paragraph 1 thereof that "*The court shall render its decision, where possible, on the basis of the case file without summoning the parties to a hearing.*" However, Paragraph 2 provides that

"*In cases where a decision cannot be rendered at this stage, the court shall, at the first hearing, hear the parties on procedural requirements and preliminary objections, as well as issues concerning time limits and statutes of limitation; it shall then determine, item by item, the matters on which the parties agree or disagree within the framework of their claims and defences.*" Therefore, if the court concludes that it is not possible to render a decision based solely on the case file, a hearing will be required to be held with the attendance of the parties. Given that this stage includes the service of notices to the parties, it is anticipated that this process will take no less than two weeks. Following the preliminary examination stage, the final stage—namely the trial phase (*tahkikat*)—will begin.

73. The trial stage is regulated under Article 320 § 3 of Code no. 6100, which provides that "*Except for the hearing mentioned in the preceding paragraph (i.e. the preliminary examination hearing), the court shall complete the hearing of the parties, examination of evidence, and other investigative acts within two hearings. The interval between these hearings shall not exceed one month. In cases where the nature of the dispute necessitates an extended period for expert examination or the conduct of investigative acts through letters rogatory, the judge may, by providing justification, set a hearing date beyond one month and hold more than two hearings.*" It is therefore envisaged that more than two hearings may be held in the trial phase if, for instance, expert examination is required or if investigative acts must be carried out through letters rogatory. The interval between hearings shall not exceed one month. Although in some cases the court may be able to resolve the matter based on a simple mathematical assessment of statistical data, in other cases such as those involving changes in sector classifications or uncertainties regarding the relevant sector, expert examination may become necessary. Additionally, some investigative acts may be carried out by way of letters rogatory, further prolonging the trial phase. In cases of prolonged proceedings, Code no. 6100 does not prescribe a maximum time limit for the conclusion of the trial. Even where the proceedings are not prolonged, the relevant law requires that the trial phase should be concluded within two months. It should also be noted that the procedural time limits prescribed for judicial proceedings are indicative rather than mandatory, and failure

to comply with them does not bear any legal consequences in terms of the proceedings.

74. Under the simplified trial procedure, the earliest period for completion of the proceedings before a labour court—assuming that no additional time is granted during the stage of submission of statements, that the preliminary examination is held without a hearing, and that the trial phase is not prolonged—shall be two months and four weeks (approximately three months), as stipulated by Code no. 6100. In this regard, it appears unlikely for a labour court applying the simplified trial procedure to be able to conclude a case concerning the statistics within the fifteen-day as set forth in Article 41 of Law no. 6356, on procedural grounds. Moreover, the communication of the labour court's decision to the parties, the two-week appeal period, and the referral of the case to the regional court of appeal, if appealed, will take no less than two months. Even if the appellate review (on points of facts and law) is concluded within the one-month time limit as envisaged in Article 41 of Law no. 6356, the appeal process will still take a minimum of three months. The same considerations apply to the process of appeal on points of law, which will likewise require an additional three-month period.

75. In conclusion, even in the absence of additional procedures during the judicial proceedings, it takes at least nine months for an objection to the statistics to be resolved through all judicial processes (first instance, appeal on points of facts and law, and appeal on points of law—three months each). In this regard, it has been observed that the duration of the proceedings is nearly three times longer than the 120-day period required for concluding the next CLA. When the court of first instance appoints an expert or necessitates additional investigation procedures, this nine-month period will inevitably be exceeded. Furthermore, if objections have also been raised against previous statistics, then by the very nature of the matter and in accordance with the established case-law of the Court of Cassation, such cases regarding previous statistics, along with disputes related to the sector, are treated as preliminary issues. Even where cases concerning the disputes related to the sector affect the outcome of the proceedings, there is no regulation preventing

such cases from being treated as preliminary issues. Consequently, where there is a pending case, this nine-month period may extend over several years. Indeed, in the present case, it has been observed that all objections to the statistics and authorisation process, which were raised by the same trade union since 2013, have been pending due to the ongoing dispute over the statistics of January 2013. Moreover, given that the statutory time limits prescribed for judicial authorities are regulatory, their existence cannot be regarded as guarantees that effectively safeguard individuals' fundamental rights and freedoms.

76. Article 43 of Law no. 6356 regulates time limits for judicial proceedings in the event of an objection to authorisation. In practice, these regulatory time limits apply equally to actions challenging the positive and negative orders regarding authorisation, without distinction. Pursuant to Article 43, an action for authorisation must be brought within six days and concluded within two months at first instance, and within one month each at the stages of appeal on points of facts and law, and appeal on points of law. However, the time-limits prescribed for communication of the inferior courts' decision, for appeal, and for referral of the case to a higher court are not separately regulated in the Law. Moreover, objections to authorisation shall be heard by labour courts in accordance with Article 79 § 1 of Law no. 6356. It has been mentioned above that the simplified trial procedure shall be applied by the labour courts and that there are time-limits prescribed for each stage of the proceedings, in the context of objections to the statistics. The same procedural stages also apply to the cases of authorisation, there is no need to depart from the findings above. Accordingly, a case of authorisation can be concluded by a first-instance court in no less than three months at the earliest. Therefore, given the procedural rules, it appears unrealistic for a first-instance court to conclude the proceedings within the two-month period stipulated in Article 43. Considering that the stages of appeal on points of facts and law, and appeal on points of law also take at least three months each, even in the absence of any delays, the objection to authorisation will be finalised in no less than nine months. More importantly, if an objection has also been lodged against the statistics to be relied on in

the action challenging the authorisation process, this objection must, as a matter of necessity, be treated as a preliminary issue in the action for authorisation. As noted above, proceedings related to statistical objections take no less than nine months. Therefore, even in the smoothest judicial process, an objection to the statistics will prolong the action for challenging authorisation for additional nine months. It is thus clear that even an entirely smooth judicial process may extend beyond multiple times the 120-day period required for the conclusion of the next CLA.

77. Secondly, the situation in which no objection is raised against the most recently published statistics must also be examined. If the latest published statistics have become final and there is no dispute regarding the relevant sector—which, as per the established case-law, would otherwise be treated as a preliminary issue—it is necessary to consider whether the objection proceedings concerning the request for authorisation as prescribed by the Law, can be completed within the 120-day period prior to the expiration of the current CLA.

78. Since the actions for authorisation are heard by labour courts and the simplified trial procedure is applied, such cases can be concluded and become final in no less than nine months. Therefore, even where no objection is raised against the statistics, an objection to authorisation cannot be concluded within the 120-day period required for the conclusion of the next CLA.

79. Although it has been established that the authorisation cannot be made within the 120-day period, it must be noted that this is only the first step in the process of concluding a CLA, and other stages also follow. In this regard, the period for issuing the certificate of authorisation is regulated in Article 44 of the Law: "*Within six working days from the date the final court decision is served, the Ministry shall issue a certificate of authorisation to the relevant trade union.*" Subsequently, Article 46 of the Law lays down the procedure for initiating collective bargaining by the trade union that has obtained the certificate. According to Paragraph 1 thereof, "*Within fifteen days from the date of receiving the certificate, either party shall invite the other party to commence collective bargaining. The date*

of the invitation shall immediately be notified to the competent authority by the inviting party." As per Article 47 § 1, governing the commencement and duration of collective bargaining, "*Within six working days from the date the invitation is served, the parties shall determine the venue, date and time of the collective bargaining through mutual agreement and notify the competent authority in writing. If no agreement is reached, the venue, date and time of the first meeting shall be determined and notified to the parties by the competent authority upon application by either party.*" Paragraph 3 thereof sets the maximum duration of the bargaining process. Accordingly, "*The collective bargaining process shall be completed within sixty days from the date of the first meeting.*"

80. A trade union that receives a certificate of authorisation within *six working days* from the communication of the court's decision may invite the opposing party to collective bargaining within *fifteen days.* If a meeting date is determined within *six working days* from the notification of the invitation, the bargaining process shall be concluded within *sixty days* from the first meeting. Therefore, the period starting from the court's decision on authorisation to the conclusion of a CLA is approximately three to four months. In cases of positive or negative authorisation disputes, when this three to four-month bargaining period is added to the minimum nine-month duration of the judicial proceedings, it becomes clear that it is not possible to conclude a CLA within a period of less than one year. Thus, even where no objection is raised against the statistics, in the event of an objection to the authorisation, it is not possible to complete the process for the next CLA within the 120-day period preceding the expiration of the current CLA. Where objections are also raised against the statistics, the process of concluding a new CLA may take several years.

81. In conclusion, whether or not objections are raised against the statistics, the objection proceedings related to authorisation, as set forth in the Law, cannot be completed within the 120-day period prior to the expiration of the current CLA. Therefore, leaving aside the practical challenges, it is evident that there is no legal framework in place that would ensure the effective exercise of the right to conclude a CLA, which is enshrined in Article 53 of the Constitution as a fundamental

right of both employees and employers, by allowing a new CLA to come into force immediately after the expiration of the previous one.

C. Resolution of the Structural Problem

82. In the light of the considerations above, it is obvious that the system currently in force in our country needs to be reviewed in order to prevent similar future violations indicating the existence of a systematic structural problem concerning the failure to conclude the actions, challenging the authorisation process, before first instance courts and the Court of Cassation within a reasonable time. As previously stated, under the system established by law, trade unions may request an authorisation to conclude a CLA no earlier than 120 days before the expiry of the current CLA. However, in case of a dispute during the authorisation process, such a dispute cannot be resolved within the same period, thereby precluding the conclusion of a new CLA. Considering the subsequent collective bargaining process following the authorisation process, it has been found that this situation significantly impairs the right to conclude a CLA.

83. In order to ensure the effective exercise of trade union rights and safeguards enshrined in the Constitution through the completion of the authorisation process for concluding a CLA without delay, the current system must be amended. Therefore, in the context of safeguarding the fundamental rights and freedoms enshrined in the Constitution, the issue must be brought before the Grand National Assembly of Türkiye for resolution of the structural problem identified.

84. In addition to the foregoing, it has also been considered that the Council of Judges and Prosecutors (CJP) may undertake certain initiatives to shorten the length of the judicial proceedings. In this regard:

- Article 5 § 5 of Law no. 5235 on the Establishment, Duties and Jurisdiction of Courts of Original Jurisdiction and Regional Courts of Appeal of 26 September 2004, titled "*Establishment of civil courts*", provides that more than one chamber may be established for civil courts where workload so requires. Unless otherwise provided in

special laws, it is also stipulated that the distribution of work among chambers may be determined by the CJP with a view to ensuring specialisation, taking into account the volume and nature of incoming cases. In order to address the structural problem identified in the present application, assigning one or more labour courts exclusively to hear the cases challenging the authorisation process and promoting the specialisation of judges in this area may enable the quicker resolution of such cases.

- Another issue previously identified by the Constitutional Court in other applications (e.g. *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 47; and *Türkiye Petrol, Kimya ve Lastik Sanayii İşçileri Sendikası*) is the frequent reliance by courts on expert reports to determine whether the trade union has met the required majority under Law no. 6356. Due to the heavy workload of first-instance courts, expert reports are often requested in these cases. The preparation of such reports and the examination of objections thereto further prolong judicial proceedings. In order to overcome these problems, alongside the establishment of specialised courts granted jurisdiction in a given area, professional training, seminars and vocational trainings may be provided to judges to promote their specialisation in the relevant area. Moreover, with the exception of cases involving complex calculations, the appointment of an expert may also be avoided.

85. Accordingly, a copy of the judgment must be sent to the Council of Judges and Prosecutors for information.

86. Furthermore, since the proceedings giving rise to the present application were still pending at the time of the Court's examination, the judgment must also be sent to the relevant first-instance court to ensure the promptness and diligence required by the right to trade union freedom.

VII. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 15 February 2024 that

A. The alleged violation o the right to trade union freedom be declared ADMISSIBLE;

B. The right to trade union freedom, safeguarded by Article 51 of the Constitution, was VIOLATED;

C. The judgment be SENT to the Grand National Assembly of Türkiye, as the violation stemmed from the law;

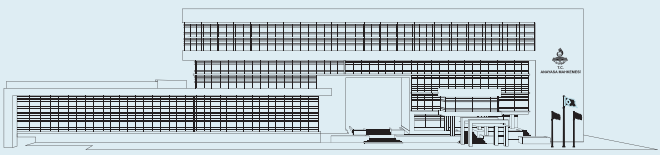
D. A copy of the judgment be SENT to the Council of Judges and Prosecutors for information;

E. A copy of the judgment be SENT to the 9th Chamber of the İstanbul Labour Court (E.2019/251, K.2021/305);

F. The total litigation costs of 19,246.90 Turkish liras (TRY), including the court fee of TRY 446.90 and counsel fee of TRY 18,800, 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 Treasury and Finance following the notification of the judgment. In the 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.



İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya / Ankara / TÜRKİYE
Phone: +90 312 463 73 00 • Fax: +90 312 463 74 00
E-mail: tcc@anayasa.gov.tr
x.com/aymconstcourt

www.anayasa.gov.tr/en

9 786256 318083