CONSTITUTIONAL COURT OF TÜRKİYE

2023

SELECTED JUDGMENTS

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(Individual Application)

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Selected Judgments 2023

Department of International Relations
Constitutional Court of the Republic of Türkiye

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FOREWORD

The individual application mechanism constitutes an extraordinary remedy, which aims to ensure the respect for the rights and freedoms by public authorities. Since its inception in 2012, this mechanism has provided individuals -whose fundamental rights and freedoms have allegedly been infringed upon through acts or omissions attributable to those wielding public power- with direct access to the Turkish Constitutional Court, thereby significantly raising public awareness of the protection and promotion of human rights.

The Constitutional Court has so far set the standards and principles pertaining to a wide array of constitutional rights and freedoms within the scope of individual application, including but not limited to, the rights to life, to hold meetings and demonstration marches, the right to a fair trial, and the freedom of expression, thus addressing many legal issues in the context of human rights law. Through its jurisprudence, the Court has not only addressed longstanding violations but has also played a critical role in the development of interpretive doctrines concerning constitutional rights, thereby contributing to the further enhancement of the principles of justice, liberty, and human dignity.

The Constitutional Court has built considerable case-law through individual application mechanism. This volume includes selected judgments rendered by the Court in 2023 within the scope of individual application. These judgments come to the fore as reiterating the well-established case-law and representing the novel jurisprudence introduced by the Court. The book not only underscores the Court's pivotal role in shaping constitutional law but also reveals its increasing contribution to the protection and promotion of fundamental rights.

It is my sincere hope that this volume will serve as a valuable resource, providing 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 2023 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 their contribution to the development of the Court's case-law, their capacity to serve as a precedent judgment in similar cases, as well as the public interest that they attract are taken into consideration.

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 relying on the sequence of the Constitutional provisions where relevant fundamental rights and freedoms are enshrined. Subsequently, the judgments on each fundamental right or freedom are given chronologically.

The Constitutional Court has modified its methodology of delivering judgments to also include a novel procedure, which may be referred to as the simplified judgment procedure. This procedure applies to the cases that are related to the well-established case-law of the Court. It is intended to provide a succinct assessment as regards the case, with reference to the relevant previous judgments of the Court. In this sense, this book covers judgments formulated both in the conventional procedure, where the Constitutional Court delivers its judgments on the case in an extended and comprehensive fashion, and in the simplified procedure. This demonstrates the Court's commitment to both procedural efficiency and adherence to established legal principles, thereby enhancing the accessibility and clarity of its decisions.

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

and conclusions are laid down begins with the title "Examination and Grounds".

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

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

Besides, 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

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REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ABDULKERIM HAMMUD

(Application no. 2019/24388)

2 May 2023

On 2 May 2023, the Second Section of the Constitutional Court found violations of the right to life and the prohibition of ill-treatment, safeguarded by Article 17 of the Constitution, as well as of the right to an effective remedy, safeguarded by Article 40 of the Constitution in conjunction with the former right and prohibition, in the individual application lodged by *Abdulkerim Hammud* (no. 2019/24388).

(I-IV) SUMMARY OF THE FACTS

[1-32] It was decided that the applicant, a national of the Syrian Arab Republic, who had been in Türkiye under temporary protection, be deported to a safe third country, or his country of origin if he volunteered due to a brawl he had been involved in. In addition, it was also decided that the applicant be placed in administrative detention for six months, by virtue of the deportation order against him, for posing a threat to public order. The applicant's lawyer requested the quashing of the decision on administrative detention and brought an action before an administrative court, seeking the quashing of the deportation order. The applicant was deported to his country of origin based on the *voluntary repatriation request form* pending the proceedings before the administrative court.

In the proceedings concluded - following the applicant's departure from Türkiye- on behalf of the applicant to quash the deportation order, the incumbent court initially rendered a decision on the stay of execution and later quashed the deportation order with final effect.

V. EXAMINATION AND GROUNDS

33. The Constitutional Court ("the Court"), at its session of 2 May 2023, examined the application and decided as follows:

A. Request for Legal Aid

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

35. 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 is 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 Personal Liberty and Security

1. The Applicant's Allegations

36. The applicant alleged that there had been a violation of the right to personal liberty and security for his being placed in administrative custody.

2. The Court's Assessment

37. In its judgment in the case of *B.T.* ([Plenary], no. 2014/15769, 30 November 2017), the Court has concluded that the examination of the application involving the applicant's claim for pecuniary and non-pecuniary compensation due to being unlawfully deprived of his liberty by virtue of an administrative order would be contrary to the *subsidiary nature* of the individual application mechanism, as he had failed to exhaust the *full-remedy action* that was accessible as well as capable of offering reasonable prospects of success and providing him with adequate redress (see *B.T.*, § 73; and *A.A.*, no. 2014/18827, 20 December 2017, § 37).

38. It appears that the applicant was released from the removal centre in accordance with the voluntary repatriation request form signed by him. In this sense, the Court has found no ground to depart from the above-cited principles insofar as it concerns the alleged violation of the right to personal liberty and security.

39. For these reasons, this part of the application must be declared inadmissible for *non-exhaustion of legal remedies*, there being no need for further examination in the light of the other admissibility criteria.

C. Alleged Violations of the Right to Life and the Prohibition of Ill-treatment

1. The Applicant's Allegations

40. The applicant complained of his repatriation to Syria, his country of origin, without the action he had brought for quashing of the deportation order being concluded. He maintained that he had been forced to sign

the voluntary repatriation request form against his will. Pointing to the internal disorder and war going on in Syria, the applicant also claimed that there had been violations of the right to life, the prohibition of ill-treatment, and the right to a fair trial.

2. The Court's Assessment

41. Article 17 §§ 1 and 3, titled *"Personal inviolability, corporeal and spiritual existence of the individual"*, of the Constitution reads as follows:

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

…

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

42. Article 15 of the Constitution, titled *"Suspension of the exercise of fundamental rights and freedoms"*, reads as follows:

"In times of war, mobilization, a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war (Amended on 7.5.2004 by Article 2 of Law no. 5170); no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling."

43. 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 safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual

and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."

44. 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 Court examined the alleged risk of death or ill-treatment in case of his deportation from the standpoint of the right to life and the prohibition of ill-treatment, thus seeing no ground to make any further assessment under the right to a fair trial.

a. Admissibility

45. The alleged violations of the right to life and the prohibition of ill-treatment must be declared admissible for not being manifestly ill-founded and there being no other grounds for their inadmissibility.

b. Merits

i. General Principles

46. The general principles applied in case of deportation to a country where there is a risk of death or ill-treatment are laid down in the judgment *A.A. and A.A.* ([Plenary], no. 2015/3941, 1 March 2017, §§ 54-72). In brief, these principles are as follows:

i. Article 17 of the Constitution, read in conjunction with Article 5 of the Constitution and Article 16 thereof, which provides that the fundamental rights and freedoms of aliens may be restricted by law in accordance with international law, also imposes a positive obligation on the State to protect aliens within its sovereign jurisdiction who may be subjected to ill-treatment in the country to which they are to be expelled, against risks to their corporeal and spiritual existence. In fact, Article 17 of the Constitution does not contain any exception to the (negative) obligation of the State not to inflict ill-treatment, and Article 15 of the Constitution, which allows for the suspension of the exercise of fundamental rights and freedoms in times of war, mobilisation or state of emergency, states that the integrity of corporeal and spiritual existence cannot be infringed.

ii. In order to provide real protection to the deportee against the risks he/she may face in the country of origin under the aforementioned positive obligation, the deportee must be given an effective opportunity to challenge the deportation order. Otherwise, it will not be possible to assert that real protection can be offered to an alien who claims to be in danger of being ill-treated if removed, and who has more limited means of substantiating this claim than the State. It is therefore beyond doubt that the positive obligation to protect against ill-treatment - inherent to the rights protected under the prohibition- involves the procedural safeguards which provide an alien to be deported with the opportunity to have such claims investigated and to have the deportation order against him fairly examined. In this sense, the allegation that the prohibition of ill-treatment would be violated in the country to which the alien would be deported through the removal procedure must be arguable (verifiable/ questionable/worthy of investigation/gives rise to reasonable suspicion) and attain a certain degree of seriousness. Besides, if there are information and documents submitted in support of the allegation, the administrative and judicial authorities must investigate in detail whether there is a real risk of ill-treatment in the country concerned. In accordance with the abovementioned procedural safeguards, deportation orders issued by administrative authorities must be reviewed by an independent judicial body, during which period such orders must not be enforced, and the parties concerned must be enabled to effectively participate in the proceedings.

iii. In order to conclude that the prohibition of ill-treatment may be violated if the deportation order is executed, it must be shown that the risk in the country of return involves *a real risk*, going beyond a mere possibility. Depending on the nature of the allegation, the burden of proof may lie with the public authorities and/or the applicant.

iv. In principle, the circumstances at the time of the deportation order should be taken into account in considering whether there are material facts giving rise to a real risk. However, in the case of significant developments that have a direct bearing on the outcome of the assessment to be made, the new situation should also be taken into consideration.

v. The primary role of the Court in individual applications concerning deportation orders is confined to examining whether the procedural

safeguards inherent in the aforementioned prohibition have been provided by the administrative and judicial authorities where there is an arguable allegation as to the risk of ill-treatment in the country of return. If the Court considers that procedural safeguards have not been afforded, it will necessarily issue a judgment finding a violation for a re-trial, in accordance with the subsidiarity principle. In cases where procedural safeguards have been provided, it is separately assessed whether there is a real risk of ill-treatment in the country of return. Exceptionally, however, the Court may examine at first hand whether there is a real risk of ill-treatment in the country of return if it considers this necessary in the particular circumstances of the case. In such a case, the Court may assess whether the substantive aspect of the prohibition of ill-treatment would be violated in the event of deportation.

ii. Application of Principles to the Present Case

47. The applicant is a national of the Syrian Arab Republic. Having been granted temporary protection status, he was in Türkiye with his family.

48. The applicant was ordered to be deported to a safe third country or, if he consented, to be repatriated to his country of origin, and also be placed in administrative detention due to a brawl in which he had been involved. His counsel then brought an action, seeking the quashing of the deportation order issued against him. He was then removed to his country of origin through the Cilvegözü border crossing pursuant to the *voluntary repatriation request form*, without the outcome of the quashing proceedings being finalised.

49. At the end of the proceedings whereby the applicant sought -before the incumbent administrative court- the quashing of the deportation order, a decision staying the execution of the deportation order was issued on 18 September 2019, namely after his removal from Türkiye, and on 20 November 2019, the deportation order was quashed with final effect.

50. Even if it is recognised that the protection afforded by the Convention can be waived, the positive obligation remains incumbent on the State to protect aliens, who may be potentially exposed to ill-treatment in the country of return, from the risks against their corporeal and spiritual existence. In cases where it is accepted that the risk in the country

of return poses a *real risk*, going beyond a probability, and the applicant has voluntarily returned, the said positive obligation then requires the State to ascertain whether the applicant was informed *to a sufficient degree* before deciding to return, that is to say, whether it was a process of the applicant's *conscious* choice.

51. In the present case, in order to establish whether the right to life and the prohibition of ill-treatment were violated, it must be initially proven that the risk involved in the country of return attained the level of *a real risk*, beyond being a mere probability. In case of finding that it attains the level of *a real risk*, it must be ascertained whether the applicant -argued to *voluntarily* return- was *sufficiently* informed before his return, in other words, whether this *voluntary* return was of a *conscious* choice.

52. In the decision dated 16 July 2019 which ordered the deportation of the applicant, a national of the Syrian Arab Republic who had been granted temporary protection status in Türkiye, it is noted that *"[the applicant's] deportation to his country of origin would be prejudicial pursuant to Articles 4 and 55 § 1 (a) of Law no. 6458."*. It is therefore stated that *"his deportation to a safe third country, or to his country of origin if he volunteers"*. In Article 4, titled *"Non-refoulement"*, of Law no. 6458, which is referred to in the decision, it is set forth that no one shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment, or where his or her life or freedom may be under threat on account of his or her race, religion, nationality, membership of a particular social group or political opinion. It is laid down in subparagraph (a) of paragraph 1 of Article 55, titled *"Those against whom a deportation decision shall not be issued"*, that a deportation decision shall not be issued against those for whom there are serious indications that he or she will be subjected to death penalty, torture, cruel or degrading treatment or punishment in the country to which they will be deported.

53. As is seen, the decision ordering the deportation of the applicant, who had been granted temporary protection status, pointed to the prejudicial nature of the applicant's deportation to his country of origin. Therefore, the competent authorities acknowledged that the risk involved in the country of return posed *a real risk*, going beyond a mere probability. As a matter of fact, the documents issued by the respective bodies of the

United Nations at the relevant time and covering the period when the applicant was returned explicitly demonstrate that the forced return of Syrian citizens to their country is not inadvisable due to ongoing hostilities, arbitrary arrests and acts of violence inflicted against civilians.

54. As it is acknowledged that the risk in the country of return attained the level of *a real risk*, which has gone beyond a mere probability, the main point to be clarified is whether the applicant argued to *have consented* to his return was *sufficiently* informed, namely whether his return was of a *conscious* choice.

55. The applicant was deported pursuant to the voluntary repatriation request form of 18 July 2019, a printed document issued in Turkish and Arabic.

56. This form was undersigned by the applicant himself and the officer in charge. In the Circular no. 2017/10 on the Principles and Procedures concerning the Affairs as to the Aliens under Temporary Protection, which was issued by the Ministry of Interior, it is noted that *"voluntary repatriation request from"* shall be undersigned by the alien seeking return, as well as by a representative of the United Nations High Commissioner for Refugees; in the absence of this representative, a representative of the Red Crescent, in the absence of the representative from the Red Crescent, a representative of a non-governmental organisation deemed appropriate by the governor's offices or officials of the human rights and equality board operating under the governor's offices. However, the form undersigned by the applicant does not bear the signature of any official of the respective institutions.

57. Besides, the individual application form submitted by the applicant does not involve any allegation that the applicant does not speak Turkish or is illiterate even in Arabic. Nevertheless, the form was provided both in Turkish and Arabic, and also the applicant was provided with an interpreter. In brief, as there is no allegation that the applicant was not well aware of the content of the form, the Court did not find it necessary to make any separate examination on these matters.

58. The printed form states, *"Pursuant to my voluntary repatriation request, I have been comprehensively informed by the authorities of the general*

situation and security-related conditions in my country.". However, it does not cover any detail as to the applicant's personal status in Syria. Nor does it provide any explanation as to why the probable risk, which required the grant of temporary protection, is no longer applicable.

59. Upon the applicant's request for legal assistance following the issuance of a deportation order against him, the respective bar association assigned a counsel for him on 17 July 2019. Although the counsel submitted a copy of the decision on legal assistance, as a substitute for a power of attorney, to the Provincial Directorate of Migration Management on the date when he was assigned, he was not notified of signing of the *"voluntary repatriation request form"* dated 18 July 2019. Therefore, the form does not bear the signature of the applicant's defence.

60. The applicant requested legal assistance immediately after the deportation order. Following the applicant's contact with the counsel on 17 July 2019, the latter brought an action for quashing of the deportation order before the incumbent administrative court on 18 July 2019, namely on the very next day. In this sense, there must be highly strong evidence to conclude that the applicant volunteered his return, with his own consent and in an informed manner, only one day after his consultation with the counsel, that is, the same day when the action for quashing of the deportation order apparently brought on his instruction.

61. Even if it may be assumed that the rights enshrined in Article 17 of the Constitution may be derogated, it appears that the applicant was not informed, *to a sufficient degree*, of the *real risk* that went beyond a mere probability in the country of origin, which is also acknowledged in the deportation order. It is unreasonable to suggest that the applicant, who had asked his counsel the day before his *voluntarily* return to bring an action for quashing of the deportation order against him, agreed to *voluntarily* return his country of origin along with his family after having signed a form in the absence of his counsel or any representative of an international and national non-governmental organisation, which is against the ordinary course of life.

62. In the light of the foregoing, it must be held that the right to life and the prohibition of ill-treatment safeguarded by Article 17 of the Constitution was violated.

D. Alleged Violation of the Right to an Effective Remedy in conjunction with the Right to Life and the Prohibition of Ill-treatment

1. The Applicant's Allegations

63. The applicant maintained that there had been a violation of the right to an effective remedy due to his forced return to his country of origin, namely Syria, without the proceedings for the quashing of the deportation order against him being finalised, and even despite his declaration to the contrary and in the absence of any notification to his counsel or the applicant himself.

2. The Court's Assessment

64. Article 40 § 1 of the Constitution, titled *"Protection of fundamental rights and freedoms"*, provides as follows:

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

a. Admissibility

65. The alleged violation of the right to an effective remedy in conjunction with the right to life and the prohibition of ill-treatment must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

66. Pursuant to the well-established case-law of the Court, Article 17 § 3 of the Constitution imposes a positive obligation on the State to protect aliens, who are likely to face a risk of death or ill-treatment in the destination country, against the risks directed towards their physical and spiritual integrity (see *A.A. and A.A.*, § 59).

67. Within the scope of this positive obligation, the person to be deported must be provided with an effective *"opportunity to challenge"* the deportation order, for being afforded a real protection against the risks he may face in his own country (see *A.A. and A.A.*, § 60).

ii. Application of Principles to the Present Case

68. In Article 53 § 3 of Law no. 6458, it is set forth that the alien may appeal to the administrative court against the deportation order within seven days as of the date of notification, and that in case of an appeal or in the term of litigation, the alien shall not be deported until the finalisation of the proceedings. However, it is cited therein that there is no need to await for the finalisation of the proceedings if *"alien consents"* to the deportation process.

69. In order to prevent public authorities from abusing the voluntary return procedure, the Circular no. 2017/10 on the Principles and Procedures Regarding the Procedures of Foreigners under Temporary Protection, issued by the Ministry of Interior, states that the *"voluntary repatriation request form"* shall be undersigned by the alien wishing to return, as well as a representative of the United Nations High Commissioner for Refugees or, in the absence of a representative, by an official of a national non-governmental organisation.

70. In the present case, the form undersigned by the applicant does not bear the signature of a representative of the United Nations High Commissioner for Refugees or a representative of a national non-governmental organisation. It also appears that the applicant's counsel was not notified of, and thus made present during, the signing of the form. As a matter of fact, there is no signature on the form in the name of the applicant's counsel.

71. In the action brought before the administrative court for the quashing of the deportation order against the applicant, a decision on the stay of execution was issued on 18 September 2019, after he had left Türkiye, and subsequently, a quashing decision with final effect was issued on 20 November 2019. However, as the applicant was to leave the country on 18 July 2019 pursuant to his signature on the *"voluntary repatriation request form"*, the quashing decision did not achieve an effective and real outcome.

72. It has been observed that the applicant against whom a deportation order had been issued but who could not be, as a rule, deported until the finalisation of the proceedings was nevertheless deported immediately,

without the proceedings being concluded, on the basis of *"his consent"*, which is an exception laid down in Article 53 § 3 of Law no. 6458.

73. The applicant's departure from the country on the same day that he signed the voluntary repatriation request form prejudiced the effectiveness of the remedy envisaged in Law no. 6458 against the deportation procedure, which affords protection even within the time-limit prescribed for filing an action. The applicant could not avail himself of the available remedies having suspensive effect whereby he could challenge his repatriation to Syria prior to his return. Nor was it demonstrated in a convincing manner that he had waived his right to challenge explicitly, in other words in a conscious and informed manner.

74. In the light of the foregoing, it must be held that the right to an effective remedy, safeguarded by Article 40 of the Constitution, when taken in conjunction with the right to life and the prohibition of ill-treatment was violated.

E. Application of Article 50 of Code no. 6216

75. Article 50 §§ 1 and 2 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."

76. The applicant requested the Court to find a violation, to take the necessary measures for the redress of the violations and consequences

thereof, and to award 50,000 Turkish liras (TRY) in compensation for his non-pecuniary damage.

77. In the present case, it has been concluded that there were violations of the right to life, the prohibition of ill-treatment; as well as of the right to an effective remedy in conjunction with the former right and prohibition, which stemmed from the repatriation procedure conducted by the administration.

78. It must be held that the applicant be awarded a net amount of TRY 50,000 for non-pecuniary damage which cannot be compensated by the mere finding of a violation.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 2 May 2023 that

A. The request for legal aid be GRANTED;

B. 1. The alleged violation of the right to personal liberty and security be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

2. The alleged violations of the right to life and the prohibition of ill-treatment be DECLARED ADMISSIBLE;

3. The alleged violation of the right to an effective remedy, taken in conjunction with the right to life and the prohibition of ill-treatment, be DECLARED ADMISSIBLE;

C. 1. The right to life and the prohibition of ill-treatment safeguarded by Article 17 of the Constitution were VIOLATED;

2. When taken in conjunction with the right to life and the prohibition of ill-treatment safeguarded by Article 17 of the Constitution, the right to an effective remedy safeguarded by Article 40 thereof was VIOLATED;

D. A net amount of TRY 50,000 be PAID to the applicant in compensation for non-pecuniary damage;

E. The total litigation costs of TRY 9,900 including the court fee 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 Interior and the Ministry of Justice.

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SEVDA YILMAZ

(Application no. 2017/37627)

2 March 2023

On 2 March 2023, the First Section of the Constitutional Court found a violation of the prohibition of discrimination safeguarded by Article 10 of the Constitution, in conjunction with 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 *Sevda Yılmaz* (no. 2017/37627).

(I-IV) SUMMARY OF THE FACTS

[1-37] The applicant went to the Bank to obtain a loan upon the message from the bank informing her of an available credit limit. The Bank officer indicated that in order to complete the loan transactions, the applicant should sign the contract by writing "*I received a copy of the contract by hand*". Although the applicant indicated that she could not write the requested sentence due to her visual impairment but different methods such as the braille alphabet or camera recording might be used, the applicant was kept waiting more than two hours in the Bank and she had to leave without receiving the loan. The applicant initiated an action for compensation against the Bank before the civil court, seeking compensation for non-pecuniary damages. The trial court, partially accepting the case, ordered the payment of non-pecuniary damages to the applicant by the defendant Bank. Having examined the Bank's appeal, the regional court of appeal dismissed the case with no right of appeal.

V. EXAMINATION AND GROUNDS

38. The Constitutional Court ("the Court"), at its session of 2 March 2023, examined the application and decided as follows:

A. The Applicant's Allegations

39. The applicant stated that she was visually impaired, that she was informed that she could get a loan from the bank, that she went to the Ümraniye Branch of the Bank to complete the loan transactions, and that the Bank officer asked her to sign the contract by writing "*I received a copy of the contract by hand*". She indicated that although she had stated that she could not write the sentence in handwriting because she was visually impaired but that she could write it in another way, the Bank

officer insisted that she would write it in handwriting and then sign it. In this context, the applicant stated that the Bank officer made her wait for a long time before other customers in the Bank and that she was subjected to discriminatory treatment by not being able to receive the loan due to her visual impairment.

B. The Court's Assessment

40. Article 17 § 1 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."

41. Article 10 of the Constitution reads, insofar as relevant, as follows:

"Everyone is equal before the law, without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

...

State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."

42. 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 mainly concerns her inability to obtain a loan on the sole ground that she was visually impaired, her having been kept waiting for a long time at the Bank, and her having been subjected to discriminatory treatment by the Bank officer. Therefore, the applicant's claims should be examined within the scope of the prohibition of discrimination, in conjunction with the right to protect and improve one's corporeal and spiritual existence.

1. Applicability

a. General Principles

43. The principle of equality is recognised both as a right in itself and as a fundamental principle governing the exercise of other rights

and freedoms. Article 10 of the Constitution does not contain any restriction as to who may benefit from the principle of equality or as to its scope. Pursuant to Article 11 of the Constitution, which provides that "*the provisions of the Constitution are fundamental legal rules binding on the legislative, executive and judicial organs, administrative authorities and other institutions and individuals*", the principle of equality set out in the "*General Principles*" section of the Constitution applies to the said organs, institutions, and individuals. In addition, the last paragraph of Article 10 of the Constitution, which stipulates that "*state organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings*" obliges the legislative, executive and judicial organs and administrative authorities to act in accordance with the principle of equality and the prohibition of discrimination (see *Nurcan Yolcu* [Plenary], no. 2013/9880, 11 November 2015, § 35; and *Gülbu Özgüler* [Plenary], no. 2013/7979, 11 November 2015, § 42). As a matter of fact, in relation to Article 10 of the Constitution, the Advisory Council has stated in its reasoning that state organs and administrative authorities are obliged to carry out their state activities in their own proceedings, without discriminating between people.

44. Although Article 10 of the Constitution is not regulated in the form of the *prohibition of discrimination*, the prohibition of discrimination must be implemented more effectively, since the principle of equality has a normative value that can be invoked in all cases in the constitutional context (see the Court's decision no. E.1996/15, K.1996/34, 23 September 1996). In other words, the principle of equality also embodies the prohibition of discrimination as a substantive norm of reference (see *Tuğba Arslan* [Plenary], no. 2014/256, 25 June 2014, § 108; *Nurcan Yolcu*, § 30; and *Gülbu Özgüler*, § 37).

45. Since the prohibition of discrimination affects the enjoyment of the rights and freedoms safeguarded by the Constitution, it does not have a mere existence independent of the substantive rights and is complementary to other rights. Although the application of the prohibition of discrimination does not require a violation of other provisions, it is not possible to apply the prohibition of discrimination in the Court's assessment, unless the disputed issue falls within the scope of at least one constitutional right (see *Nuriye Arpa*, no. 2018/18505, 16 June 2021, § 43).

46. It is specified in Article 17 § 1 of the Constitution 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 Convention (see *İlker Arslan*, no. 2019/36858, 23 November 2022, § 21).

b. Application of Principles to the Present Case

47. In the present case, the first instance court partially upheld the applicant's claim for non-pecuniary damages on the grounds that she had not been granted a loan for her inability to write a given statement due to the sole reason of her visual impairment and that she had been subject to discrimination by being kept waiting at the bank for a long time. However, as a result of the appellate proceedings, the applicant's case was dismissed, with no right of further appeal, on the grounds that there had been no discriminatory treatment against her.

48. In order for an examination to be made from the standpoint of the prohibition of discrimination in conjunction with the right to protect and improve one's corporeal and spiritual existence, it must first be determined whether there has been an interference with the individual's interest falling within the scope of the relevant right.

49. It has been considered that the applicant's inability to write the statement requested from her by the bank officers on the loan contract due to her visual impairment, her being kept waiting at the bank for a long time, and her not being able to receive the loan did not exceed the minimum threshold of severity specified in Article 17 § 3 of the Constitution. As a result, the impugned interference has been considered to have fallen within the scope of the right to protect and improve one's corporeal and spiritual existence, safeguarded by Article 17 § 1 of the Constitution, within the meaning of the right to protection of honour and dignity.

50. Thus, the applicant had an interest falling within the scope of the right to protect and improve one's corporeal and spiritual existence under Article 17 of the Constitution, which has been sufficient to make an examination from the standpoint of the prohibition of discrimination safeguarded by Article 10 of the Constitution.

51. On the other hand, the impugned interference alleged to have violated the prohibition of discrimination had been made by a private bank, not by public authorities. The prohibition of discrimination enshrined in Article 10 of the Constitution is a fundamental constitutional principle, which is binding not only on the public authorities but also on private persons. The State also has a positive obligation to prevent violations of the prohibition of discrimination by private persons. Therefore, the present case has been examined within the scope of the State's positive obligations.

2. Admissibility

52. The alleged violation of the prohibition of discrimination, in conjunction with 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.

3. Merits

a. General Principles

53. The principle of "*equality before the law*", enshrined in Article 10 of the Constitution, applies to those who experience the same legal conditions. The principle provides for legal equality, not *de facto* equality. The purpose of the principle of equality is to ensure that the same procedures are applied to people with the same legal status and to prevent discrimination and the granting of privileges. This principle prohibits violating the principle of equality before the law by applying different rules to certain persons with the same legal status. Equality before the law does not mean that everyone is treated equally in all respects. The special circumstances of certain individuals or communities may require that different rules or applications be applied to them. If the same rules are applied to those with the same legal status and different rules are applied to those with a different legal status, the principle of equality enshrined in the Constitution would not be violated (see the Court's decision no. E.2009/47, K.2011/51, 17 March 2011).

54. The principle of equality specified in Article 10 of the Constitution has a broad meaning, including the prohibition of discrimination

safeguarded by Article 14 of the Convention. Therefore, it is not possible to examine all types of alleged violations of the principle of equality within the framework of the individual application mechanism, but only the prohibition of discrimination falling within the common sphere of protection can be examined (see *Reis Otomotiv Ticaret ve Sanayi A.Ş.* [Plenary], no. 2015/6728, 1 February 2018, § 78).

55. The existence of a matter which may be examined by the Court under Article 10 of the Constitution in the individual application procedure presupposes the existence of a difference in treatment between individuals in the same or a relatively similar situation. The requirement to prove the existence of a similar situation does not require the groups being compared to be identical (see *Nuriye Arpa*, § 55).

56. Not every difference in treatment automatically constitutes a violation of the prohibition of discrimination. Only differences of treatment and situations based on identifiable characteristics listed in Article 10 of the Constitution can constitute differences of treatment in this sense. Article 10 of the Constitution stipulates that "*everyone is equal before the law, without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds*" and clearly lists the grounds for discrimination as "*language, race, colour, sex, political opinion, philosophical belief, religion and sect*", which are also important grounds for discrimination in several international legal instruments. In addition, the phrases "*everyone*" and "*such grounds*" in the text of the article indicate that a non-restrictive approach was adopted in relation to individuals protected against discrimination and the grounds for discrimination, and that the grounds for discrimination listed in the article are only examples (see *Hüseyin Kesici*, no. 2013/3440, 20 April 2016, § 56; and *Reis Otomotiv Ticaret ve Sanayi A.Ş.*, § 79).

57. In interpreting the phrase "*any such grounds*", the Court has clearly pointed out that the grounds for discrimination are not limited to those listed in the article, stating that "*… One of the most important concepts enshrined in the Constitution in relation to freedoms is the principle of equality before the law. ... The grounds for discrimination are not limited to those listed in the text of the article. The phrase "any such grounds" has broadened the grounds on which discrimination cannot be based, therefore clarifying the application of the*

provision" (see the Court's decision no. E.1986/11, K.1986/26, 4 November 1986).

58. The principle of equality enshrined in Article 10 of the Constitution prohibits the application of different treatment, without objective and reasonable grounds, to individuals who are in the same or a similar situation while enjoying the fundamental rights and freedoms safeguarded by the Constitution. A difference of treatment which cannot be objectively and reasonably justified, i.e. which does not pursue a legitimate aim or which does not ensure a reasonable proportionality between the means chosen and the aim pursued, would be recognised as discriminatory within the meaning of Article 10 of the Constitution (see *Nuriye Arpa*, § 58). Accordingly, the principle of equality will not be violated in cases where the different treatment of those having the same legal status is based on objective and reasonable grounds, and the said different treatment is proportionate to the legitimate aim pursued, in other words, the person subjected to different treatment is not exposed to an excessive burden (see *Burcu Reis*, no. 2016/5824, 28 December 2021, § 50).

59. There is no doubt that public authorities have a certain margin of appreciation in assessing whether the difference in treatment is based on justified reasons or to what extent the difference can be justified. Moreover, the extent of the margin of appreciation may vary depending on the nature of the right concerned and the conditions and characteristics of the present case (see *Nuriye Arpa*, § 59).

60. In the context of the prohibition of discrimination, the burden of proving the existence of a difference in treatment lies with the applicant. Once the applicant has established the existence of a difference in treatment, it is for the public authorities to prove that this difference in treatment is based on objective and reasonable grounds and that there is a reasonable proportionality between the means employed and the aim pursued (see *Nuriye Arpa*, § 60). However, exceptions should be made where the applicant fails to demonstrate the non-existence of objective and reasonable grounds for the difference in treatment, or it is impossible or unreasonable to expect its objective demonstration (see *Burcu Reis*, § 52).

61. In examining the allegation of discrimination, it is essential to first assess whether there is a difference in treatment under Article 10

of the Constitution and, in this context, to determine whether there is a difference in treatment in relation to an interference with the right to protect and improve one's corporeal and spiritual existence in the same or a similar situation. It must then be examined whether the difference in treatment is based on objective and reasonable grounds and is proportionate.

i. Determination of Similar Situation but Different Treatment

62. In the present case, it should first be determined whether the applicant is in a comparable and similar situation with those others seeking a loan. Having approved the credit limit that was available to the applicant, the bank initiated the relevant transactions. The reason why the applicant could not receive the loan was her inability to write a statement to be included in the loan contract due to her visual impairment and the bank officers' failure to provide an alternative solution in this regard. Therefore, it is obvious that the applicant was in a similar situation with other individuals who wanted to receive a loan, except for the former's visual impairment.

63. Secondly, it must be determined whether the applicant had been subjected to a different treatment when compared to other customers at the bank who had been in a similar and comparable situation. In determining the existence of a different treatment, the circumstances of the case must be considered as a whole (see *Reis Otomotiv Ticaret ve Sanayi A.Ş.*, § 88).

64. The safeguards inherent in the prohibition of discrimination laid down in Article 10 of the Constitution are triggered in cases where those in similar legal situations are subjected to different treatments. Therefore, the existence of a similar situation and different treatment must first be ascertained. If the alleged different treatment is apparent *at first glance*, the applicant cannot be expected to prove it. In this regard, the applicant cannot bear an additional burden of proof for the *different treatment* that arises from the legislation or arises independently of the motive/intent of the person treating differently, even if it arises from the practice. However, in cases where the impugned treatment is the result of the motive/intent of the person concerned -such as the ill-treatment of a person based on discriminatory motives- the burden of proof lies with the applicant. In

such cases, it is the intention of the person inflicting the treatment, which makes the impugned act regarded as a *different treatment* (see *Burcu Reis*, § 57).

65. As a result, the applicant's inability to receive a loan due to her visual impairment constituted difference in treatment. Thus, it should be acknowledged that there was a difference between the bank clients -in similar situations- on the basis of their disability status, in terms of receiving loan.

ii. Existence of an Objective and Reasonable Ground

66. It has been observed that the Bank's transaction and the decision of the regional court of appeal did not include any information about the reason of the alleged *different treatment* in the present case. Although banks enjoy a certain degree of discretion in regulating the conditions of loan utilisation and applying different procedures to individuals in this sense, it must be demonstrated that the said different treatment is based on objective and reasonable grounds. However, in the present case, the Bank was unable to substantiate the existence of such grounds for the alleged different treatment of the applicant for her visual impairment.

67. Public authorities are expected to take measures to ensure that persons with disabilities have access to a certain standard of living in economic and social terms. Arrangements should be put in place to ensure that persons with disabilities utilise or benefit from all human rights and fundamental freedoms equally with others, and Article 10 of the Constitution should be interpreted to this end. In this sense, the State has a positive obligation to ensure that persons with disabilities can live on an equal footing with other individuals, bearing in mind their special needs. As a matter of fact, in the examination of statutory provisions applicable to the present case, it has been observed that there is a consensus on the protection of persons with disabilities against discriminatory treatment in national and international sphere.

68. In this sense, considering the domestic legal regulations, first of all, it has been observed that Law no. 5378 contains detailed provisions on this issue. It is set forth in the aforementioned Law that certain measures should be taken in order to ensure the full and effective participation

of persons with disabilities in social life on equal terms with other individuals, and that there can be no discrimination based on disability. It is also clearly specified therein that the equality of opportunity must be satisfied in order to ensure that persons with disabilities enjoy all rights and services, as well as that accessibility must be ensured to enable them to live independently besides fully and effectively participating in society. In this regard, it is underlined that necessary measures shall be taken to put in place reasonable arrangements for persons with disabilities so as to prevent discrimination. Bearing in mind the necessity to ensure persons with disabilities to live independently in society under equal conditions with other individuals, the relevant arrangements also seek to ensure that they are not forced to settle into special living conditions, and that they have access to the community-based support services they need, including individual support services, in order to facilitate their integration into and their ability to live within society. Article 4 of the Regulation that is based on Law no. 5411 also specifies the necessary measures to be taken to ensure that individuals with disabilities have equal access to bank services. Lastly, in its letter regarding the use of signature by visually impaired persons in banking transactions, the Bank indicates that visually impaired persons can sign, as other individuals do, according to the relevant legal regulations.

69. Pursuant to the United Nations Convention on the Rights of Persons with Disabilities, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. In principle, persons with disabilities are entitled to all the rights and freedoms, including the freedom to make their own choices, avail of equal opportunities, and access to services, as anyone does. The State has a positive obligation to protect and promote the rights and freedoms of all persons with disabilities like other individuals, without discrimination of any kind on the basis of disability. This obligation includes prohibiting all forms of discrimination based on disability, providing reasonable arrangements for persons with disabilities to enjoy all the rights and freedoms enjoyed by all others, and taking measures to facilitate the access of persons with disabilities to public and private services accessible to everyone.

70. After it has been determined that the State has established a legal structure to prevent discrimination before third parties in the context of its positive obligations, it should be considered, in the present case, whether the inferior courts carried out the judicial proceedings by respecting the relevant constitutional and legal safeguards. In this sense, the discretion of the courts to interpret the legal provisions brings about the obligation to interpret them in the light of the provisions of the Constitution and international conventions. Accordingly, the courts are obliged to interpret the statutory provisions applicable to a given dispute by observing the constitutional principles and safeguards. In cases where a statutory provision may be interpreted in several ways, it is required by the principle of the supremacy of the Constitution that any interpretation running contrary to the Constitution must be avoided. In other words, the principle entailing the interpretation being compatible with the Constitution determines the limit of the judge's freedom to interpret the legal provisions (see *Arif Huseynli and Others*, no. 2019/39033, 28 June 2022, § 57).

71. In the present case, the applicant could not obtain a loan since she was unable to write the phrase "*I received a copy of the contract by hand.*" on the loan contract due to her visual impairment. In this sense, in view of the reasoning of the regional court of appeal, it has been observed that the bank officer's refusal to grant the applicant a loan was based on the latter's hesitation regarding the technical procedures to be carried out due to the applicant's visual impairment. Therefore, the special needs of the visually impaired applicant were ignored. As a matter of fact, neither the Bank nor the regional court of appeal demonstrated the exercise of due diligence in the effective implementation of an alternative measure whereby the applicant's situation was taken into account regarding the impugned bank transaction.

72. In this case, the main reason for the applicant's inability to use the loan was her visual impairment and the failure to apply the relevant statutory provisions by respecting constitutional principles. The regional court of appeal failed to present relevant and sufficient reasoning indicating that national and international regulations on the legal procedures concerning persons with disabilities were interpreted in the light of constitutional guarantees.

73. As a result, it has been concluded that there was no objective and reasonable ground for the treatment of the applicant based on her visual impairment (i.e. her inability to obtain a loan and being kept waiting at the Bank for a long time). Considering that there was no reasonable ground for the impugned treatment, there is no need for further examination in terms of proportionality.

74. In the light of the foregoing, it must be held that there was a violation of the prohibition of discrimination safeguarded by Article 10 of the Constitution, in conjunction with the right to protect and improve one's corporeal and spiritual existence safeguarded by Article 17 § 1 of the Constitution.

4. Redress

75. The applicant requested the Court to find a violation, order a retrial and award her 7,500 Turkish liras (TRY) for non-pecuniary damages that was ordered by the first instance court.

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 (for the details regarding retrial procedure in terms of individual application, which is laid down in Article 50 § 2 of the Code no. 6216 on Establishment and Rules of Procedures 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).

77. In order for the consequences of the violation to be completely redressed within the scope of the restoration rule, the applicant should be awarded TRY 7,500 for non-pecuniary damages.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 2 March 2023 that

A. The alleged violation of the prohibition of discrimination, in conjunction with the right to protect and improve one's corporeal and spiritual existence, be DECLARED ADMISSIBLE;

B. The prohibition of discrimination safeguarded by Article 10 of the Constitution, in conjunction with 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 14th Chamber of the İstanbul Civil Court (E.2015/440, K.2017/86) in order to be referred to the 4th Civil Chamber of the İstanbul Regional Court of Appeal (2017/1171, K.2017/86) for retrial to be conducted to redress the consequences of the violation of the prohibition of discrimination, in conjunction with the right to protect and improve one's corporeal and spiritual existence;

D. A net amount of TRY 7,500 be REIMBURSED to the applicant for non-pecuniary damages;

E. The total litigation costs of TRY 10,157.50, including the court fee of TRY 257.50 and counsel fee of TRY 9,900, 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.

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SİNAN IŞIK (3)

(Application no. 2020/1329)

10 May 2023

On 10 May 2023, the First Section of the Constitutional Court found violations of the substantive and procedural aspects of the prohibition of inhuman or degrading treatment, safeguarded by Article 17 § 3 of the Constitution, in the individual application lodged by *Sinan Işık (3)* (no. 2020/1329).

I. SUMMARY OF THE FACTS

[1-9] While performing his compulsory military service as a private soldier, the applicant was subjected to an assault by İ.H.D., who was serving as a corporal in the same unit. According to the statements of the eye-witnesses, the applicant was handcuffed to a radiator during the physical intervention while İ.H.D. was joking with him. The applicant, who became ill sometime after the incident, had his spleen removed, and a report declaring him unfit for military service was issued following the medical process. He was accordingly discharged from military service. The applicant's father filed a complaint against those responsible on account of the physical violence inflicted on his son.

At the end of the criminal investigation, the military prosecuting authorities issued a decision of non-prosecution. The Court, examining the individual application lodged by the applicant with respect to the decision of non-prosecution, found a violation of the procedural aspect of the prohibition of ill-treatment, ordered retrial and the payment of non-pecuniary compensation to him. Following the Court's judgment finding a violation, the incumbent chief public prosecutor's office obtained an expert report on the basis of which it decided not to prosecute. However, upon the applicant's challenge, the chief public prosecutor's office revoked the decision and filed a criminal action against İ.H.D. for allegedly committing torture. The applicant also brought a full-remedy action against the Ministry of National Defence before the Supreme Military Administrative Court ("SMAC"), which dismissed his action as there was no neglect of duty. The dismissal decision became final after the appellate review. Upon the second application lodged by the applicant, the Court found a violation of the procedural aspect of the prohibition of ill-treatment, in parallel with its previous judgment finding a violation in the applicant's case.

The assize court sentenced İ.H.D. to 1 year's imprisonment for assaulting a subordinate. However, in consideration of the possible effects of the sentence on the offender's future, the assize court ultimately sentenced the offender to 10 month's imprisonment and suspended the pronouncement of the judgment.

II. THE COURT'S ASSESSMENT

10. The Constitutional Court ("the Court") has accepted the request for legal aid by the applicant who has been found to be unable to afford the litigation costs.

11. The applicant claimed that his constitutional rights had been violated, stating that he had suffered organ loss due to physical violence inflicted on him by his superior, that the situation was supported by medical reports, and that in spite of this, a decision on the suspension of the pronouncement of judgment was issued at the end of the proceedings. The Ministry of Justice, referring to the case-law on human rights, indicated that there was no reason to depart from the findings and conclusions of the judicial authorities.

12. The application has been examined from the standpoint of the prohibition of ill-treatment.

13. The right to protection and improvement of corporeal and spiritual existence, safeguarded by Article 17 of the Constitution, primarily requires the public authorities to restrain from causing physical and mental harm to individuals as a negative obligation, but also imposes a positive obligation on the State to take measures in order to prevent individuals from being subjected to torture and ill-treatment or to punishment or treatment incompatible with human dignity. The State's positive obligation under the prohibition of ill-treatment also has a procedural aspect. This procedural obligation requires the State to conduct an effective official investigation capable of leading to the identification and, if necessary, punishment of those responsible for ill-treatment. The essential purpose of such investigation is to secure the effective implementation of the law protecting human dignity, and to ensure the accountability of public authorities or other individuals for

acts of ill-treatment and to prevent the impunity of grave assaults on corporeal and spiritual existence. Impunity can be manifested as the failure to bring those responsible for acts of torture and ill-treatment to justice, to punish them in a manner commensurate with the offence they have committed or to ensure the execution of the sentence they have been imposed. If impunity is prevented, the necessary redress for the victims may be provided on one hand, and a chilling effect may be created to prevent new violations on the other. In cases where the punishment is not proportionate to the offence committed or there is no punishment, then there will be no chilling effect, and the positive obligation to protect the physical and mental integrity of individuals through administrative and legal legislation will not be fulfilled (see *Cezmi Demir and Others*, no. 2013/293, 17 July 2014; and *S.D.*, no. 2013/3017, 16 December 2015).

14. On the other hand, the suspension of the pronouncement of the judgment, which means that the conviction of the defendant does not have any legal consequences, results in the dismissal of the criminal case through the revocation of the suspended judgment if no new offence is committed intentionally within the supervision period and if the obligations are complied with. Accordingly, the suspension of the pronouncement of the judgment does not have the characteristics of a punishment, but merely a threat of punishment. As in the present case, the punishment of the one whose offence has been found established by the court is conditioned on the committal of a new offence intentionally within the supervision period, and therefore, her/his act, which has been found established by a court decision, remains unpunished, unless she/he commits a new offence. In the evaluation of whether the aforementioned institution of impunity, which has been introduced by the legislator with a view to reintegrating the person concerned back into society on account of the offence she/he committed, should be applied, an interpretation should be made in the specific circumstances of each case, taking into consideration the chilling effect of the punishment in proportion to the gravity of the offence and the degree of suffering by the victim (for considerations in the same vein, see *Tahir Canan*, no. 2012/969, 18 September 2013, § 30; and *E.A.* [Plenary], no. 2014/19112, 17 May 2018, § 60).

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

16. In the course of the proceedings, the judicial authorities accepted that the applicant had been assaulted by his superior -although it is debatable whether the act was intended as a joke- and the one who was responsible was identified. However, the trial court mitigated the sentence of the military officer, who had inflicted the impugned physical assault on his subordinate, and sentenced him to 10 months' imprisonment for the offence, the upper limit of which was two years, and suspended pronouncement of the judgment. Although it is not for the Court to address the issues of personal criminal liability, the Court is entrusted with the duty to make a constitutionality review in cases where there is a manifest disproportionality between the gravity of the acts committed by public officials as well as their consequences and the punishment on account thereof (for considerations in the same vein, see *Cezmi Demir and Others*, § 76). Nevertheless, it should be underlined that it is at the discretion of the court to characterise the type of offence.

17. In order to ensure the redress of the grievance arising from the violations of the prohibition of ill-treatment, the judicial authorities are primarily expected to establish the violation/identify the legal responsibility precisely, and to adjudicate the case through an effective remedy (as well as imposing a punishment proportionate to the impugned act) (for considerations in the same vein, see *Şenol Gürkan*, no. 2013/2438, 9 September 2015).

18. In the present case, since the judicial authorities established the material fact and identified the one responsible for the incident, in other words, they found a violation of the prohibition of ill-treatment, the examination has focused exclusively on the proportionality of the punishment and the decision on the suspension of the pronouncement of the judgment to the imputed act, its potential chilling effect on the prevention of similar incidents, and whether it afforded an adequate redress for the victim. Such an examination is decisive for both substantive and procedural aspects of the prohibition of ill-treatment.

19. It is essential, in terms of proportionality, that there is a reasonable relationship between the protection of the victim and the punishment of the perpetrator. In other words, given the proportionality between the unlawful act and the sanction, the principles of justice and equity must be complied with. The impugned act in the present case, as also established by a judicial decision, constituted physical violence intentionally inflicted on a subordinate by a military officer exercising public power. Following the incident, the applicant suffered the organ loss due to trauma. While it has not been established that the said physical violence resulted in the organ loss, the otherwise, namely the existence of another reason, is not certain either. In addition, even if it is considered to be an act intended as a joke, considering that the impugned physical violence had occurred while the applicant's hand had been tied to the radiator and that the person who had committed the act was the applicant's superior, the said act may not be regarded as a mere and inconsequential interference in the circumstances of the case. In this context, in consideration of the circumstances surrounding the incident and the aforementioned details regarding the manner in which it had occurred, the impugned interference has been characterised as torture.

20. As laid down in Article 117 of the Military Penal Code no. 1632, dated 22 May 1930, the offence of assaulting a subordinate is punishable by a term of imprisonment for up to two years. In the present case, the applicant's superior, who was a military officer, was sentenced to one years' imprisonment, which was subsequently reduced to 10 months by the exercise of a discretionary power. The court imposed a sentence close to the lower limit and reduced the sentence by taking into account the potential impact on the defendant's future. Although the exercise of discretion belongs to the judges, it should have been taken into consideration that the accused person is a military officer yielding public power, that the person against whom he used violence is his subordinate (at his command), and that the person who was subjected to violence during the action was handcuffed, and these issues should have been discussed in the reasoning. It should have also been demonstrated in the decision that an appropriate conclusion has been reached. It has been,

however, observed that these issues were disregarded in the decision, which could not provide deterrence and would be insufficient to redress the suffering in relation to the criminal act for which imprisonment of up to two years is envisaged as a sanction.

21. There are objective and subjective conditions sought to issue a decision on the suspension of the pronouncement of judgment. Although it is the judge who will decide on the matter, it should have been discussed in the reasoning that the accused person is a military person and has committed a deliberate act of violence and it should have been also demonstrated that the discretionary power was exercised accordingly. In the decision, the pronouncement of the judgment was suspended by merely referring to the provisions of the relevant law in the operative part of the decision. In this context, despite the circumstances surrounding the incident, the fact that the accused person is a military officer in the position of the applicant's superior and that the imputed act is of an intentional nature, no assessment was made in the decision so as to provide a legal basis for the suspension of the pronouncement of judgment. Although there is no legal obligation for the offence related to an intentional act of physical violence and there is a full discretionary power in this regard, the suspension of the pronouncement of judgment, which will not bear any legal consequence as clearly stated in the law, was ordered in the case. Therefore, it has been concluded that the judges exercised their discretionary power not to demonstrate that the act of intentional physical violence is intolerable, but rather to minimise the consequences of this act as much as possible.

22. In consideration of all these findings, it has been concluded that although it was found established, at the end of the criminal proceedings, that the applicant had been subjected to physical violence, thereby giving rise to a finding of a violation, the decision rendered by the inferior courts did not provide deterrence in respect of the accused person and afford appropriate/sufficient redress for the suffering concerned. It has been accordingly concluded that the applicant still had the victim status. In this context, it has been held that the impugned process, far from being deterrent, led to impunity and thus gave the impression that the accused was exempted from punishment, and that

this situation was manifestly contrary to the State's obligation to carry out a criminal investigation that could be capable of leading to the punishment of those responsible in an appropriate and sufficient manner to provide effective deterrence, for the purpose of preventing similar future violations.

23. In the light of the foregoing, it must be held that there were violations of both procedural and substantive aspects of the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

III. REDRESS

24. The applicant requested the Court to find a violation, and award him 500,000 Turkish liras (TRY) for pecuniary and non-pecuniary damages, respectively.

25. 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).

26. In order for the consequences of the violation to be completely redressed within the scope of the restoration rule, the applicant should be awarded TRY 90,000 for non-pecuniary damages, bearing in mind the fact that no compensation was awarded for the violation of the procedural aspect of the prohibition of ill-treatment in the previous application. On the other hand, since the applicant failed to submit materials to substantiate the alleged pecuniary damage he had suffered, his claim for pecuniary compensation should be dismissed.

IV. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 10 May 2023 that

A. The request for legal aid be GRANTED;

B. The alleged violation of the prohibition of torture be DECLARED ADMISSIBLE;

C. The prohibition of torture safeguarded by Article 17 § 3 of the Constitution was VIOLATED in terms of both its substantive and procedural aspects;

D. A copy of the judgment be REMITTED to the 1st Chamber of the İstanbul Assize Court (E.2018/169, K.2019/271) for retrial to be conducted to redress the consequences of the violation of the prohibition of torture;

E. A net amount of TRY 90,000 be REIMBURSED to the applicant for non-pecuniary damages, and the remaining claims for compensation be REJECTED;

F. The litigation costs of TRY 9,900, including the counsel fee, be REIMBURSED to the applicant;

H. 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

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

FATİH SEYİS

(Application no. 2018/32269)

14 June 2023

On 14 June 2023, the Plenary of the Constitutional Court found violations of prohibition of ill-treatment and the freedom of expression, safeguarded respectively by Articles 17 and 26 of the Constitution, in the individual application lodged by *Fatih Seyis* (no. 2018/32269).

I. SUMMARY OF THE FACTS

[1-8] The applicant, who had been placed in a T-type closed penitentiary institution, complained of the poor conditions of his detention, arguing that he had been placed in an overcrowded ward and that his request to purchase certain periodicals had been refused. The applicant applied to the execution judge, requesting a decrease in the number of inmates as well as his access to the said periodicals. The judge dismissed the applicant's request on various grounds. The applicant's subsequent appeal was dismissed by the incumbent assize court, with no right of appeal.

II. THE COURT'S ASSESSMENT

9. The Constitutional Court ("the Court") has accepted the request for legal aid by the applicant who has been found to be unable to afford the litigation costs.

A. Alleged Violation of the Freedom of Expression

10. The applicant claimed that his request to purchase a newspaper called Yeni Asya through the administration of the penitentiary institution at his own expense had been rejected due to the allegedly insufficient demand. The Ministry stated that the applicant's allegations might be unfounded, and that the relevant legislation and the Court's judgments should be taken into consideration in the assessments to be made on the merits. The applicant did not submit any counter-statements.

11. The application has been examined from the standpoint of the freedom of expression.

12. 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.

13. In its judgment in the case of *Recep Bekik and Others* ([Plenary], no. 2016/12936, 27 March 2019), the Court set the applicable constitutional principles after examining the application having factual similarities with the present case. The Court concluded that the freedom of expression had been violated due to the lack of mechanisms capable of preventing arbitrariness in terms of ensuring the prisoners' access to periodicals, ensuring the application of a uniform procedure to those in a similar situation, as well as guaranteeing clear, guiding and consistent administrative acts. Although a series of measures have been taken through Law no. 7242, dated 14 April 2020, and the relevant regulatory acts subsequent to the judgment of *Recep Bekik and Others*, it has been observed that the present case is related to the interferences before the said statutory and procedural amendments. Therefore, there is no reason for the Court to depart from the principles set forth and the conclusion reached in the aforementioned judgment.

14. In the light of the foregoing, it must be held that there was a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

B. Alleged Violation of the Prohibition of Ill-Treatment

15. The applicant claimed that he had slept in front of the toilet due to the overcrowding in the ward, that he had to queue constantly because there had been two toilets and one bathroom in the ward, that he had had no access to fresh air and oxygen, and that there had been serious health and hygiene problems. The Ministry stated that the Constitution, the relevant legislation, and the judgments of the Constitutional Court and the European Court of Human Rights should be taken into account in the assessments to be made as to whether the applicant's allegations were arguable. The applicant did not submit any counter-statements.

16. The application has been examined from the standpoint of the freedom of expression.

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

18. Article 17 of the Constitution also guarantees that the living conditions of a prisoner are compatible with human dignity. The manner and method of execution must not expose prisoners to distress or grief beyond the unavoidable suffering inherent in the deprivation of liberty. In this respect, three factors are taken into account in relation to the complaints of overcrowding and lack of personal space, which are (i) the allocation of 4 square metres for each prisoner, (ii) the provision of a separate sleeping area for each prisoner, and (iii) the construction of the ward floor in such a way enabling the prisoners to move freely between the pieces of furniture. The absence of any of these three factors gives rise to *a strong presumption* of a violation of the prohibition of ill-treatment due to the poor conditions of detention. In addition, even if a strong presumption of a violation of Article 17 of the Constitution were to arise as a result of the reduction of the minimum living space allocated to an inmate in the multiple-occupancy wards to less than 4 square metres, this presumption could be rebutted by the fulfilment of three factors. First, the reduction of the minimum personal space below 4 square metres should be short-term, minor and occasional. Secondly, such a reduction must be accompanied by sufficient freedom of movement and activities outside the ward. Finally, the detainee must be placed in a penitentiary institution which is generally adequate and which does not aggravate the conditions of detention (see *Cengiz Yetgin* [Plenary], no. 2019/39068, 14 June 2023, §§ 58-63).

19. In the present case, the applicant was accommodated for 280 days in the relevant penitentiary institution. He was provided with 4 square meters of personal space for the first 34 days of said period and personal space ranging between 3.6 square meters, 3.7 square meters and 3.9 square meters for more than eight months until his release. The period with the least amount of personal space allocated to the applicant (3.6 square meters) lasted for a total of sixty days, which consisted of two periods lasting thirty days each at intervals of approximately two months. Apart from this, the applicant was provided with 3.7 square meters of space during most of the remaining period. Accordingly, during the said period, the minimum personal space to be allocated to the applicant was reduced to less than 4 square meters for a total of eight consecutive months. The

reduction of the minimum personal living space per se gives rise to *a strong presumption* of a violation of the prohibition of ill-treatment due to the poor conditions of detention.

20. The *strong presumption* of a violation of Article 17 of the Constitution can be rebutted by the coexistence of the three elements. In this regard, the initial assessment should focus on the duration, frequency and severity of the reduction of the minimum personal living space below 4 square meters. In this sense, the inadequacy of the personal living space, which lasted for 8 months, cannot be said to have been short-term, minor and occasional. It has therefore been concluded that, taking into account the various and cumulative effects of the detention conditions on the applicant, the reduction of the minimum personal living space attained the minimum level of severity required to constitute a violation of the prohibition of ill-treatment within the meaning of Article 17 of the Constitution. As the first element sought for rebutting the strong presumption has not been fulfilled, it is unnecessary to consider the other two elements, which requires that such a reduction of the personal space must be accompanied by sufficient freedom of movement and activities outside the ward, and that the detainee must be placed in a penitentiary institution which is generally adequate and which does not aggravate the conditions of detention.

21. In the light of the foregoing, it must be held that there was a violation of the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

III. REDRESS

22. The applicant requested the Court to find a violation, and award him 996,000 Turkish liras (TRY) for pecuniary and non-pecuniary damages.

23. Since the applicant is no longer held in the penitentiary institution, there is no legal interest in conducting a retrial to redress the consequences of the violation. In order to redress the said consequences, the applicant should be awarded a total of TRY 78,000 for non-pecuniary damages, TRY 18,000 for violation of the freedom of expression and TRY 60,000

for violation of the prohibition of ill-treatment. Since the applicant failed to submit sufficient materials substantiating his claim, his request for pecuniary damages should be rejected.

IV. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 14 June 2023 that

A. The request for legal aid be GRANTED;

B. 1. The alleged violation of the freedom of expression be DECLARED ADMISSIBLE;

2. The alleged violation of the prohibition of ill-treatment be DECLARED ADMISSIBLE;

C. 1. The freedom of expression safeguarded by Article 26 of the Constitution was VIOLATED;

2. The prohibition of ill-treatment safeguarded by Article 17 of the Constitution was VIOLATED;

D. A net amount of TRY 78,000 be REIMBURSED to the applicant for non-pecuniary damages, and the 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 Düzce Execution Judge (E.2018/1468, K.2018/1487) for information; and

G. 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

AYHAN DENİZ AND OTHERS

(Application no. 2019/10975)

14 June 2023

On 14 June 2023, the Plenary of the Constitutional Court found violations of the right to respect for private life and the freedom of expression, safeguarded respectively by Articles 20 and 26 of the Constitution, in the individual application lodged by *Ayhan Deniz and Others* (no. 2019/10975).

(I-IV) SUMMARY OF THE FACTS

[1-27] At the material time, the applicants were employed in a company, and inquiry reports were issued on the basis of their social-media posts. As a result of these inquiry reports, their employment contracts were terminated pursuant to the decisions of the Disciplinary Board of the company in question. The applicants brought separate declaratory actions, seeking their re-employment against the impugned decisions, which were dismissed by the labour court on the grounds that the applicants' contracts were terminated with a just reason. Upon the appellate request of the applicants, the regional court of appeal annulled the first-instance decisions, expressing that the action should have been rejected on the grounds that the termination was based on valid reasons rather than a just reason, and accordingly ordered the issuance of a fresh decision. The appeals against the impugned decisions were rejected by the Court of Cassation, which ultimately upheld them.

V. EXAMINATION AND GROUNDS

28. The Constitutional Court ("the Court"), at its session of 14 June 2023, examined the application and decided as follows:

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

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

29. The applicants maintained that they had been dismissed from office, their only source of income, due their social-media posts that indeed contained no element of an offence and was merely expression of political criticism and thoughts, and that the termination of their employment contracts on account of the thoughts they had shared

merely with their friends was in breach of the right to respect for private life, freedom of religion and conscience, prohibition of discrimination, as well as the rights to property and labour.

30. In its observations, the Ministry noted as regards the applications that the opinion and respective documents submitted by the Kocaeli Metropolitan Municipality were submitted for consideration, and that in assessing whether there was a violation of the applicants' right to respect for private life, the provisions of the Constitution and the respective laws, the Court's relevant case-law and the particular circumstances of the present case must also be taken into consideration.

31. In their counter-statements, the applicants, reiterating their former submissions, did not accept the Ministry's observations.

2. The Court's Assessment

32. The Court is not bound by the legal qualification of the facts by the applicants and it makes such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The essence of the applicants' allegations concerns the termination of their employment contracts due to expression of thoughts via social media. The Court has found it appropriate to examine the applicants' allegations under this heading, as a whole, under the right to respect for private life safeguarded by Article 20 of the Constitution.

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

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

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. In the present case, the dispute in question is the termination of the employment contracts on account of the impugned social-media posts. In this sense, 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, in all cases, from any arbitrary interference with the 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 right to respect for private life even in the sphere of interpersonal relations (see, for similar assessments, *Adnan Oktar (3)*, no. 2013/1123, 2 October 2013, § 32; and *Ömür Kara and Onursal Özbek*, no. 2013/4825, 24 March 2016, §§ 45, 46). However, it should be noted that regardless of whether positive or negative obligations of the State are concerned, the applicable principles are mostly similar to a considerable extent (see *Hesna Funda Baltalı and Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti.* [Plenary], no. 2014/17196, 25 October 2018, § 70).

36. The State's obligations in pursuance of the right to respect for private life require the State to create a legal structure for the resolution of the disputes, to deal with the disputes through proceedings that observe the requirements of a fair trial and involve necessary procedural safeguards, and to review whether constitutional safeguards on fundamental rights have been fulfilled during the proceedings. In other words, the taking of necessary measures for the prevention of interferences by third parties with the rights and freedoms of individuals and the affording of protection by courts also fall into the scope of these obligations. Although the necessary structural measures have been taken by public authorities, in cases where individuals are not provided with protection against the interference by third parties in the decisions issued by the courts conducting the proceedings, these obligations shall not be deemed to have been duly fulfilled. This means that the rights and freedoms of individuals are left unprotected by the courts that are the

public authorities (see, in the same vein, *Ömür Kara and Onursal Özbek*, §§ 47-49).

37. Accordingly, in cases where the disputes concerning the alleged interferences with the constitutional rights of individuals working within the scope of private law employment relationship are adjudicated, the inferior courts must not ignore these safeguards, a fair balance must be struck between the competing interests of employer and employees, and the decision rendered at the end of the proceedings must provide relevant and sufficient justifications (see *Ömür Kara and Onursal Özbek*, § 50; and *Kasım Çiftçi and Others*, no. 2019/33243, 4 July 2022, § 32).

38. In counterbalancing the interests of the parties, the inferior courts must consider how the restrictive and coercive regulations are determined in the employment contracts, whether the interest giving rise to an interference with the fundamental rights of the employees is superior, whether the termination of the contract is reasonable and proportionate in the face of the actions or inactions of the employees, having regard to the particular circumstances of the given case. In addition, inferior courts must pay strict attention to ensure that the procedures carried out during the proceedings and the reasoning of the decision rendered at the end of the proceedings do not constitute an interference with the right to respect for private life (see, *mutatis mutandis*, *Ömür Kara and Onursal Özbek*, § 51; and *Kasım Çiftçi and Others*, § 33).

ii. Application of Principles to the Present Case

39. In the present case, the applicants maintained that they had been dismissed from office, only source of income for themselves and their families, and that given the effects of the impugned termination, they were deprived of certain economic and social rights, which was in breach of the right to respect for private life. In the light of these explanations, the steps required to be taken in the present application is to ascertain whether the State duly fulfilled its positive obligations to strike a fair balance between the applicants' right to respect for private life and the employer's interests, which would be ensured through the setting up and functioning of an effective judicial system by public authorities,

upon the termination of the applicants' employment contract by the employer (see, for considerations in the same vein, *Volkan Çakır*, no. 2017/35488, 7 April 2021, § 28).

40. In the present case, a number of posts between 2011 and 2016 – some of which were shared by third parties and quoted by the applicants and some of which were shared by the applicants themselves– shared on personal social media accounts of the applicants, who had been working as employees at İZAYDAŞ, a subsidiary of the Kocaeli Municipality, were the subject of a disciplinary investigation in 2016. At the end of the disciplinary investigation, an inquiry report was issued with respect to the applicants. The reports, which are essentially similar to each other, indicated that the applicants' impugned posts fell within the scope of Article 25 (b) of Labour Code no. 4857 ("Code no. 4857") under the heading "Cases contravening the code of ethics and duty of good faith", which provides for*"… in cases where the employee has used expressions, or acted in a way, that would harm the honour and reputation of the employer or any of his/her family members"*. At the end of the proceedings, the incumbent labour court concluded that the applicants' social-media posts fell within the scope of Article 25 (e) of Code no. 4857 under the heading *"Cases contravening the code of ethics and duty of good faith"*, which provides for *"the employee's conduct and behaviours that are in breach of honesty and loyalty, such as breach of confidence on the part of the employer..."*.

41. On appeal, the regional court of appeal considered that the applicants' posts in question constituted *"a valid reason for termination arising from the worker's incompetence or behaviour"*, which is among the valid reasons for termination laid down in Article 18 of Code no. 4857. The regional court of appeal provided some abstract explanations regarding Article 18 *"Termination on the basis of a valid reason"* and concluded that the applicants' acts *"led to the breakdown in the trust relationship between employer and employee and caused negative atmosphere at the workplace"*, without indicating to which circumstance laid down in the provision the applicants' impugned act corresponded. The Court of Cassation upheld the decision of the regional court of appeal without providing any further grounds. Ultimately, the applicants' employment contracts were terminated on the grounds that their expression of

thoughts had impaired the trust relationship between the employee and the employer.

42. Article 18 of Code no. 4857 stipulates that the employer must provide a valid reason for the termination of indefinite-term employment contracts. The valid reasons are enumerated in the provision. As stated both in the judgments of the regional court of appeal and the Court of Cassation in other cases, in order for the employer to terminate the employment contract, the employer must show a valid reason arising either from the incompetence and behaviours of the employee or from the requirements of the enterprise, workplace or affairs. In the legislative intent of the said provision, it is stated that in order to terminate the employment contract under this provision, the conduct and behaviours of the employee must adversely affect, to a sufficiently serious extent, his obligation to perform his work, or has prevented him from fulfilling his obligation to perform his work properly, and the maintenance of the employment relationship cannot be reasonably expected by the employer. According to the provision, a behaviour can be considered as a valid reason only when it creates negative atmosphere at the workplace. If the employee's behaviour does not have a negative impact on the efficiency and labour relationship process at the workplace, it is not possible to qualify these behaviours as a valid reason for the termination of the employment contract.

43. First of all, it may be said that the employer may impose restrictions on certain behaviours and actions that fall within the scope of the employee's private life for legitimate and justifiable reasons, such as the effective performance of the work, occupational health and safety, and the protection of the employer in criminal and judicial matters. It should be, however, emphasised that the powers and rights of the employer are not unlimited, that the fundamental rights and freedoms granted to the employees - in the present case, the right to respect for private life - are also afforded protection within the boundaries of the workplace, and that at the same time, restrictive and compulsory workplace rules should not give rise to infringement of the essence of the fundamental rights of the employees. In this context, to acknowledge that the employer is entitled to terminate the employment contract

on the sole ground of social-media posts that are of no relevance to the work, the workplace or the employer would not be in line with the employee's justified expectation that his/her fundamental rights and freedoms in a democratic society should be respected also while working. In this framework, it is of importance whether the applicants' posts had a bearing on the conduct of the work and the occupational health and safety (for considerations in the same vein, see *H.Ç.*, no. 2017/14907, 30 September 2020, § 42).

44. Besides, as is the case in the present application, the automatic acknowledgement that situations that do not take place at the workplace or with any workplace tools, that do not affect the functioning of the business and that occur in the personal sphere will be the underlying reason for the termination will result in the upset of the balance required to be struck, between the interests of the employer and those of the employee, by the State within the scope of its positive obligations, to the latter's detriment. Having regard to these explanations taken together with the above-mentioned principles, it has been concluded that in order for the social-media posts to be accepted as a just reason for termination, the employer must properly demonstrate that he/she can no longer ensure the continuation of the employment contract, along with the negative effects of the impugned posts on the performance of the work. Furthermore, the inferior courts must provide sufficient and relevant justification in consideration of the repercussions of the given posts on the workplace and the performance of the work, the duty performed by the employee, his/her personal record, the public nature of the posts. They must also counterbalance the conflicting interests between the employer and the employee by considering whether the termination of the employment contract is appropriate and proportionate to the legitimate aim pursued by the employer (see *H.Ç.*, § 43).

45. In the present case, the applicants generally targeted politicians, the government, the administrators wielding public power and their political and administrative stance in their social-media posts. From the applicants' point of view, it was accepted that their remarks against certain politicians, public officials and government policies caused a *breakdown in the relationship of trust* between them and the employer

company and *caused negative atmosphere at the workplace*. Although the Court does not make a more detailed assessment, the thoughts expressed by the applicants in their posts do not relate to the private sphere of their lives, which is beyond the knowledge of other individuals. The issues addressed in the social-media posts are related to a matter of public interest, and it is clear that the scope of conversations that closely concern the society remains largely in the political sphere. In this context, the processes involving important public debates are under the close scrutiny of the applicants in their capacity as voters and citizens (see *Orhan Gökdemir*, no. 2017/38377, 30 September 2020, § 47; *Cem Atmaca*, no. 2018/6030, 8 September 2021, § 40; and *Turgut Altınok*, no. 2017/36724, 29 January 2020, § 31). Besides, the applicants expressed their thoughts on social media platforms, which have become one of the common and popular means of enjoying freedom of expression on the internet. Therefore, the inferior courts failed to counterbalance the competing interests in the present case, where the company's rights impaired on account of the attacks on honour and reputation of certain state officials were in conflict with fundamental rights and freedoms of the applicants (see, *mutatis mutandis*, *Kemal Kılıçdaroğlu (3)*, no. 2015/1220, 18 July 2018, § 63; and *İsa Gök*, no. 2015/805, 12 September 2018, § 55).

46. Moreover, there is no allegation that the impugned posts were shared during working hours or with workplace tools or at the workplace, and that the applicants could not fulfil their responsibilities arising from the employment contract on account thereof. Nor did the inferior courts assert that the posts in question were of relevance to the applicants' work, workplace or employer. In the reasoning of the decision of the regional court of appeal, which was upheld by the Court of Cassation, the principles to be observed in similar cases were outlined, and although it was clearly implied in an abstract manner, there was no assessment that the applicants' remarks in question *had a significant negative impact on the performance of work at the workplace*; it was not precisely ascertained *which contractual obligation was concretely imposed on the employee* and *which behaviour of the employee gave rise to a breach of the contractual obligation*; and it was not explained *which commercial interests of the employer were impaired*. There was no explanation as to the

damages that the applicants caused to the Company *itself, its property and its other legally protected assets* on account of their posts. Nor could it be demonstrated how and why the impugned posts undermined the purpose pursued through the employment contract and were qualified as *an act that would impair the mutual trust*.

47. In the light of these considerations as a whole, the Court has observed that in qualifying the applicants' acts in question as one of the valid reasons arising from the employee's conduct and behaviours, which are laid down in Article 18 of Code no. 4857, the inferior courts failed to make a sufficiently detailed assessment as to the nature and context of the impugned posts and their probable impacts. In the present case where the applicants' employment contracts were terminated on account of the social-media posts on current issues and ongoing social debates, the inferior courts failed to provide relevant and sufficient grounds to justify their acknowledgement that the *relationship of trust between the applicants and the employer had been impaired* and *the posts had created negative atmosphere at the workplace*. It appears that the acknowledgement that the applicants' posts caused a breakdown in the relationship of trust between the employer and the applicants was based on the employer's unilateral declaration, and that the employer and the courts failed to demonstrate the reasons why the employer could no longer be expected to maintain the employment contract.

48. Moreover, regard being had to the fact although the said posts were shared on various dates in the years 2011-2016, the applicants continued working at the workplace in the absence of any accusations against them during that period, the applicants' dismissal from office was an extremely severe sanction employed to attain the pursued aims, also given the length of their service at work and their imputed acts (for assessments on the severity of the termination of employment contract on the freedom of expression, see *Volkan Çakır*, § 39).

49. For these reasons, it must be held that the right to respect for private life enshrined in Article 20 of the Constitution was violated, since the inferior courts adjudicating the dispute failed to diligently conduct the proceedings whereby the constitutional safeguards on the right

to respect for private life were observed, and the State did not fulfil its obligations to protect the respective constitutional safeguards.

B. Alleged Violation of the Freedom of Expression

50. In the present case, the applicants maintained that their social-media posts giving rise to the termination of their employment contracts did not contain any criminal element and were of a critical and political nature based on current and social issues, and that their freedom of expression was violated, since their employment contracts had been terminated due to the expression of thoughts which had been shared merely with their group of friends.

51. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*", insofar as relevant, reads as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities…

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary."

52. As previously pointed out by the Court in its several judgments, the freedom of expression enshrined in Article 26 of the Constitution constitutes one of the main pillars of a democratic society and among the conditions *sine qua non* for the progress of the society and the improvement of individuals (see *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 69; and *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 34-36). By very reason of the significance attached to freedom of expression, the Constitution places positive obligations on the State in the sphere of this freedom (see *Nilgün Halloran,* no. 2012/1184, 16 July 2014, § 32; and *Ergün Poyraz (2)* [Plenary], no.

2013/8503, 27 October 2015, § 48). The effective enjoyment of the freedom of expression, one of the prerequisites for the functioning of democracy, is not based merely on the State's duty to abstain from interference. This freedom may require the State to take legal and practical protective measures even in terms of the inter-personal relations. Given the importance of the freedom of expression, the State is expected to afford the highest level of protection with regard to this freedom (see *Bizim Fm Radyo Yayıncılığı ve Reklamcılık A.Ş.* [Plenary], no. 2014/11028, 18 October 2017, § 56.)

53. In the present case, the applicants generally targeted, in their posts, politicians, the government, the administrators wielding public power, and their political and administrative stances, and made remarks against certain politicians, public officials and government policies from their point of view. As regards the assessment by the inferior courts that the applicants' impugned acts were one of the valid reasons arising from the employee's behaviour under Article 18 of Code no. 4857, the Court found that the inferior courts failed to conduct a sufficient and thorough examination of the nature and the context of the disputed posts, as well as of their probable effects. In this sense, there is no ground that would require the Court to depart from the above-cited detailed assessments made under the right to respect for private life.

54. As a result, it has been observed that the inferior courts adjudicating the dispute failed to conduct the proceedings with due diligence in which the constitutional safeguards inherent in the freedom of expression were observed, that the State did not fulfil its obligations to protect constitutional safeguards, and that Article 18 of Code no. 4857 was subject to an excessive interpretation and was thus invoked as a basis for the indirect restriction of the freedom to express thoughts.

55. In the light of the foregoing, it must be held that the freedom of expression safeguarded by Article 26 of the Constitution was violated.

C. Alleged Violation of the Right to a Fair Trial

56. The applicants asserted that the reinstatement proceedings lasted 2 years and 11 days, and that thus, their right to a trial within a reasonable time was violated due to the prolongation of the proceedings.

57. The Court has previously discussed and ultimately indicated the basic principles entailing that disputes concerning civil rights and obligations must be resolved within a reasonable time (see *Güher Ergun and Others,* no. 2012/13, 2 July 2013; *Güher Ergun and Tosun Tayfun Ergun,* no. 2012/12, 17 September 2013; and *Nesrin Kılıç*, no. 2013/772, 7 November 2013). As regards the present case, there is no ground that would require the Court to depart from these principles.

58. Considering the sets of the proceedings in question, the Court has concluded that the proceedings, lasting two years and eleven days before three levels of jurisdiction, were concluded within a reasonable period of time.

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

D. Application of Article 50 of Code no. 6216

60. The applicants requested the Court to find a violation and order a retrial in their cases, as well as to award him 100,000 Turkish liras ("TRY") and TRY 50,000 in compensation for pecuniary and non-pecuniary damages, respectively.

61. There is a legal interest in conducting a retrial in order to redress the consequences of the violations found in the present case. In this respect, the procedure to be followed by the judicial authorities to which the judgment would be remitted is to initiate the retrial procedures and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation (for detailed information on the retrial procedure specific to the individual application mechanism set out in 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 (2)*, no. 2016/12506, 7 November 2019, §§ 53-60, 66; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

62. Furthermore, given the nature of the violations found, the Court has held that a net amount of TRY 20,000 be paid to the applicants

respectively in compensation for non-pecuniary damage. The applicants' claims for pecuniary compensation were rejected in the absence of any information or document submitted by them in support of the pecuniary damage they had allegedly sustained.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 14 June 2022:

A. 1. UNANIMOUSLY that the alleged violation of the right to a trial within a reasonable time be DECLARED INADMISSIBLE for being *manifestly ill-founded*;

2. UNANIMOUSLY that the alleged violations of the right to respect for private life and the freedom of expression be DECLARED ADMISSIBLE;

B. 1. BY MAJORITY and by the dissenting opinion of Mr. Muhterem İNCE that the right to respect for private life safeguarded by Article 20 of the Constitution was VIOLATED;

2. BY MAJORITY and by the dissenting opinion of Mr. Muhterem İNCE that the freedom of expression safeguarded by Article 26 of the Constitution was VIOLATED;

C. A copy of the judgment be REMITTED to the 5th Chamber of the Kocaeli Labour Court (E.2017/100, E.2017/101, E.2017/102, E.2017/103, E.2017/104 and E.2017/105) to conduct a retrial so as to redress the consequences of the violations of the right to respect for private life and the freedom of expression;

D. The court fee of TRY 364.60 be REIMBURSED RESPECTIVELY to the applicants, and the counsel fee of TRY 9,900 be REIMBURSED JOINTLY to the applicants;

E. A net amount of TRY 20,000 be PAID RESPECTIVELY to the applicants in compensation for non-pecuniary damages, and the remaining compensation claims be REJECTED;

F. The payments be made within four months as from the date when

the 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

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

DISSENTING OPINION OF JUSTICE MUHTEREM İNCE

1. The applicants, whose employment contracts had been terminated due to their social-media posts, maintained that their right to respect for private life and freedom of expression were violated. The majority of the Court found violations of the right to respect for private life and freedom of expression on the grounds that the inferior courts, engaging in the adjudication of disputes arising from private law labour relations, failed to conduct the proceedings in a diligent way whereby the constitutional safeguards inherent in the right to respect for private life and freedom of expression were observed, and that the State did not fulfil its obligations to protect constitutional safeguards.

2. The Inspection Board of the Kocaeli Metropolitan Municipality referred the applicants, who worked at İzmit Waste and Residues Treatment, Incineration and Assessment Corporation (İZAYDAŞ), to the İZAYDAŞ Disciplinary Board due to their social media posts. The İZAYDAŞ Disciplinary Board decided to terminate the applicants' employment contracts on the grounds that their social-media posts were considered to constitute "cases contravening the code of ethics and duty of good faith" under Article 25 of the Labour Code. The applicants filed separate actions for reinstatement against the decisions whereby their employment contracts were terminated, and the 5th Chamber of the Kocaeli Labour Court ("labour court") dismissed the applicants' actions on the grounds that *"...the relationship of trust was impaired between the defendant employer and the plaintiff employee established through the employment contract. It is no longer possible for the defendant employer to ensure the continuation of the employment relationship. It has been concluded that the actions of the plaintiff subject to the investigation report are in the nature of behaviours incompatible with good conduct and loyalty on the part of the employer, and the termination of the plaintiff's employment contract was justified..."*. The applicants' subsequent appeal requests were rejected on the same grounds.

3. In order for an interference with the freedom of expression to be considered as being compatible with the requirements of a democratic society, it must meet a pressing social need, as well as be proportionate

(see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 53-55). The inferior courts must strike a fair balance between the individuals' right to express their thoughts and the legitimate aims set forth in Article 26 § 2 of the Constitution (see *Bekir Coşkun*, §§ 44-47). In striking such a balance and assessing whether the given interference with the freedom of expression met a pressing social need, the inferior courts enjoy a certain margin of appreciation (see *Kemal Kılıçdaroğlu*, no. 2014/1577, 25 October 2017, § 57).

4. On the date when the present applications were lodged, the applicants were employed by İZAYDAŞ, a company operating under the Kocaeli Metropolitan Municipality. The applicants admit that they posted the above-mentioned statements on their Facebook accounts. In these posts, the applicants made statements to the effect that members of the government and their family members were engaged in theft and bid-rigging, and that they gave free rein to theft in public institutions. The applicants are not a representative of a political party. Nor are they a journalist. The Disciplinary Board ordered the termination of the applicants' employment contracts on the grounds that their social-media posts fell within the scope of *"cases contravening the code of ethics and duty of good faith"* in Article 25 of the Labour Code no. 4857, and the 5th Chamber of the Kocaeli Labour Court and, subsequently, the Court of Cassation found lawful the decisions ordering the termination of their employment contracts, referring to their posts on Facebook.

5. The Disciplinary Board, the labour court and the Court of Cassation provided relevant and sufficient grounds in their decisions. First of all, it should be noted that the applicants are not journalists or representatives of a political party. Nor are they an ordinary citizen. On the date of the applications, they were employed by İZAYDAŞ, a company affiliated to the Kocaeli Metropolitan Municipality. While it is clear that the applicants have the right to freedom of expression like any other citizen, it is also undoubted that they are under certain obligations when making a statement or sharing an opinion as a requirement of their position. In the present case, the applicants' employment contracts were terminated, as their impugned posts were of a political nature and clearly contained opinions charging the members of the government with theft and

dishonesty. It also appears that the decisions of the Disciplinary Board and the inferior courts carried out a sufficient assessment of the termination of the employment contracts due to the applicants' social-media posts and demonstrated that the conditions prevailing at the time of the posts shared on social media had been taken into consideration, and that the decision ordering the termination of the employment contracts was proportionate. Therefore, the respective decisions in the present case provided relevant and sufficient reasoning.

6. For these reasons, I dissent from the majority's finding of violations, since I am of the opinion that there was no violation of the applicants' right to respect for private life and freedom of expression, which are safeguarded respectively by Articles 20 and 26 of the Constitution.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

YILDIZ CEYLAN VAR

(Application no. 2020/10490)

25 July 2023

On 25 July 2023, the Plenary of the Constitutional Court found a violation of the right to respect for family life, safeguarded by Article 20 of the Constitution, in the individual application lodged by *Yıldız Ceylan Var* (no. 2020/10490).

(I-IV) SUMMARY OF THE FACTS

[1-28] B.V. who was married to the applicant's mother brought an action before the incumbent family court requesting to adopt the applicant. The trial court accepted B.V.'s request on the grounds that the applicant had been living with him and her mother F.K. since she was six years old, that B.V. had been covering education fees and other all kinds of expenditures of the applicant, and that establishing a legal parent-child relationship would be in the interest of the applicant.

Having received the relevant court judgment, the district registry office notified the Chief Public Prosecutor's Office, which found that the adoption procedures could not be carried out on the grounds that the age difference between the child and the adoptive parent was below the statutory age gap limit prescribed for the adoption procedures, requested the annulment of the said procedures. The family court accepted the public prosecutor's request since the statutory requirement stipulating that the child should be at least eighteen years younger than the adoptive parent had not been met and accordingly ruled that the adoption order should be annulled and lifted. The appeal request on points of law submitted following the rejection of the appeal on points of law and facts by the Regional Court of Appeal was also dismissed, and ultimately, the judgment became final.

V. EXAMINATION AND GROUNDS

29. The Constitutional Court ("the Court"), at its session of 25 July 2023, examined the application and decided as follows:

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

30. The applicant stated that that she had recognised B.V. as her father since she was four years old, that she was pleased to be granted the authorisation to establish an adoptive relationship between them,

that the requirement for a certain age difference between the adoptive parent and the adopted child was intended to ensure a genuine parent-child relationship to the extent possible and protect the interests of the child, and that there was no situation contrary to this purpose in her case but, on the contrary, it would be in her interest to establish an adoptive relationship with B.V.. The applicant accordingly claimed that the right to respect for family life and the right to a fair trial had been violated due to the decisions against him, stating that a change in her surname would have a negative bearing on her, that the age-gap requirement was more flexible in France and Switzerland, and that the family unity and family relations would be impaired in case of the strict interpretation and application of the existing regulations, which do not allow for any exceptions.

31. In its observations, the Ministry stated that the age-gap requirement relied upon by the inferior courts was intended to provide a permanent family environment in which the adopted child would maintain his life, thus protecting social peace, and that the State had a broad margin of appreciation in this sense. It was also noted that the applicant provided no explanation as to the impacts of the impugned interference on the safeguards inherent in the right to a fair trial, and that the claims put forward were related to the assessment of evidence and the interpretation of the provisions of law. In the petition submitted on 13 February 2023 against the Ministry's observations, the applicant stated that her only request was the establishment of a bond of filiation between her and B.V. and reiterated the issues already raised in the application form.

B. The Court's Assessment

32. Article 20 of the Constitution provides, insofar as relevant, as follows:

"Everyone has the right to demand respect for his/her (…) family life. Privacy (…) or family life shall not be violated."

33. Article 41 of the Constitution provides, insofar as relevant, as follows:

"Family is the foundation of the Turkish society (…).

The State shall take the necessary measures and establish the necessary organisation to protect peace and welfare of the family, especially (…) children, (…).

Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests.

The State shall take measures for the protection of the children against all kinds of abuse and violence."

34. 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). It appears that the essence of the applicant's allegations concerns the lack of any exception in the provision of law regarding the age-gap between the adoptive parent and the adopted child, which is one of the requirements sought for adoption of a child, and the inability of the practice in place to ensure the establishment of the parent-child relationship. Considering that this situation, the effects of which are likely to last a lifetime, has had or may have consequences on the applicant's family life, the Court decided that the present application may be examined under the right to family life. However, it must be first assessed whether the right to respect for family life is applicable to the disputed matter.

1. Applicability

35. The concept of family, as laid down in the Constitution, must be subject to an autonomous interpretation, which would not be confined to the definition provided in the Turkish Civil Code no. 4721 ("Code no. 4721"). The right to respect for family life may come into play only in case of close personal ties that may be considered to fall under the concept of family (see *Murat Demir* [Plenary], no. 2015/7216, 27 March 2019, § 72).

36. Such tie may be established either by blood or through *de jure* or, in exceptional cases, *de facto* means. In this context, it is undisputed that children who are related to their parents by blood and adopted children have family ties with their parents. In some cases, it can be acknowledged

that family ties have been established, despite the lack of any blood or adoption ties, between children and persons who provide the former with care and supervision and support them in all their needs under the particular circumstances of the given case (see *Murat Demir*, § 73).

37. Considering that the applicant spent most of her childhood in the house where she lived with B.V., who was married to her mother, that a *de facto* father-child relationship was already established between them, and that there was no contrary consideration as to the will of the applicant to recognise B.V. as her parent and B.V. to adopt the applicant as his child, the Court has concluded that the relationship in the present case amounted to a tie within the concept of family. Therefore, the application was found applicable within the scope of the right to respect for family life.

2. Admissibility

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

3. Merits

a. General Principles

39. The right to respect for family life is safeguarded by Article 20 § 1 of the Constitution which points to, when taken together with its legislative intent, the requirement that public authorities shall not interfere with individuals' private and family life, and that a person organises and steers his personal and family life as he/she chooses. It is the constitutional provision that corresponds to the right to respect for family life safeguarded by Article 8 of the European Convention on Human Rights ("the Convention"). It is also evident that Article 41 of the Constitution, in lieu of the holistic nature of the Constitution, must be taken into consideration especially in assessing the positive obligations inherent in the right to respect for family life (see *Murat Atılgan*, no. 2013/9047, 7 May 2015, § 22; and *Marcus Frank Cerny* [Plenary], no. 2013/5126, 2 July 2015, § 36).

40. The obligation incumbent on the State under the right to respect for family life does not only require to avoid any arbitrary interference with the said right, but also cover the positive obligations that ensure the effective respect for family life. These positive obligations entail measures to ensure respect for family life, even in the sphere of interpersonal relationships (see *Murat Atılgan*, § 26). The desire of parents and children to live together is an indispensable element of family life, and the failure to establish, or *de jure* or *de facto* dissolution of, a common family life does not abolish family life. The right to respect for the family life of parents and children also includes the measures taken by public authorities to reunify the family (see *Murat Atılgan*, § 25).

41. Moreover, the *child's best interest*, as worded in Article 41 of the Constitution, as well as in the Convention on Rights of the Child, is a principle that is to be observed in all acts and actions performed by courts, administrative authorities and the legislative organ, which are of concern to the children. In this sense, in cases where an act to have an effect on the child will be performed, making an assessment as to whether this act is in the child's best interest is of great importance for the fulfilment of the positive obligations inherent in the right to respect for family life (see *Şükran İrge,* no. 2016/8660, 7 November 2019, § 33).

42. One of the positive obligations incumbent on the State for the protection of family life is to clearly set the statutory rules and put in place the legal arrangements. The regulatory framework must be suitable to establish legally recognised family ties, and must be clear, foreseeable and accessible to a sufficient extent.

43. When the steps to be taken by the State to ensure the unity of the family and to ensure that the family lives in peace and prosperity and the basic principle requiring the protection of the child's best interests are taken together, the rules regarding adoption, which is one of the institutions necessary for *de jure* and sometimes *de facto* establishment of the family, must be established and implemented in accordance with these obligations. Indeed, the protection of children's mental and physical health and their being healthy individuals is directly related to the existence of legal rules that ensure the taking of measures regarding the emotional,

social and moral development of children and that identify and designate the place of children in the family and society. In this respect, the State should act in a way to promote the relationship between the child and the family members within its broad margin of appreciation and should implement the regulations embodying legal guarantees that will ensure the integration of the child with his/her family both in the *de facto* and *de jure* sense as soon as possible, in a manner applicable to everyone without any exception.

b. Application of Principles to the Present Case

44. The issue in the present case concerns the application of Article 308 of the Code no. 4721, which stipulates that the age gap between the adoptive parent and the adopted child must be at least eighteen years in order for an authorisation for adoption to be granted. The applicant asserted that she recognised B.V., who was married to her mother on the date of the proceedings, as her father and that it would be in her best interest to establish an adoptive relationship between them. However, the inferior courts abolished the adoptive relationship on the grounds that the age-gap requirement stipulated in the legislation was not fulfilled.

45. Family law relations can be established not only by blood but also by legal means. The adoptive relationship, which is one of the institutions of family law and regulates the bond of descent, may also be established through legal means and subject to conditions set in pursuance of the best interests of the child. In this sense, it is indubitably within the State's broad margin of appreciation to indicate what the applicable conditions are, whether there will be any exceptions to the prescribed rules, and which authorities shall be competent to establish such legal relationship.

46. In our country and in all other countries where modern legal systems are in force, the institution of adoption is subject to many conditions, given the importance of the adoption process and its impact on the parties involved, the family and the society as a whole. There are certain conditions determined in this framework, such as that the age of the parties must be convenient for the establishment of a parent-child relationship, that the child has not been adopted yet by any other person, that the parties give consent to the adoption process, that the guardianship authority has

granted permission, that the child has been cared for by the prospective adoptive parent for a certain period of time, and that the adoption is in the best interest of the child. In this context, the rule stipulating that there must be a certain age gap between the child to be adopted and the prospective adoptive parent is also set as a condition for the adoption procedure in our country, as in many legal systems.

47. The principle of *"adoptio naturam imitatur (Adoption imitates nature)"*, which originates from Roman law and is reflected in today's legal systems, serves as the foundation for the stipulation that *there should be a realistic age gap between the parties* involved for the purpose of establishing a family relationship between the adopted child and the adoptive parent, which is similar to the age gap between children and parents in the families based on blood ties. Indeed, since the adoption process regulates the genealogical bond and, above all, aims to establish a real parent-child relationship between the adoptive parent and the adopted child, it is reasonable and acceptable to seek a certain age gap between the parties, in consideration of the age difference between the biological parents and the child.

48. In the Turkish legal system, while there is a rule regarding the minimum age gap between the adoptive parents and the adopted child, there is no condition regarding the maximum age gap between the parties involved in the adoption process. In consideration of the comparative law, it appears that some countries set a minimum age-gap limit as in the Turkish law, while some legal systems include conditions on both minimum and maximum age gaps. It also appears that despite the rules regarding the age-gap limit in many legal systems, there are also exceptional provisions that leave room for discretion to bend the age-gap requirement for exceptional situations that arise or are likely to arise. It has been also observed that some countries do not include any precise regulations on the age gap and have implemented general regulations on this issue.

49. Currently, pursuant to Article 308 of Code no. 4721, the adopted child must be at least eighteen years younger than the adoptive parent. It can be said that the said requirement in our law is determined on the basis of the actual age of the biological mother and father, considering that

marriage can be contracted, as a rule, upon the completion of seventeen years of age. It appears that there is no other provision regarding the age gap in the adoption process in our legal system.

50. In principle, the regulation embodying the minimum age gap cannot be said to prevent the establishment of an adoptive relationship or to introduce conditions that are difficult to fulfil. On the contrary, it can be stated that the regulation in question aims to protect the rights and interests of the parties, especially the adopted child, and to ensure the formation of a healthy and peaceful family. The introduction of a minimum age gap may facilitate the compliance with, as much as possible, natural and real parenting conditions, and may be considered as a measure to prevent unforeseen and undesirable situations such as child abuse. In addition, Code no. 4721, which embodies provisions on adoption, stipulates that in order for a minor to be adopted, the adoptive parent must first take care of and nurture the minor for a certain period of time. The Code also provides that one of the spouses may adopt the child of the other, provided that they have been married for at least two years or the adoptive parent has reached the age of thirty. As stated in the legislative intent of Code no. 4721, all these regulations prevent the adoption of a minor whom no one has cared for and contributed nothing to his upbringing, and allow the parties to get to know each other during a sort of trial period. With this general approach, the stipulated conditions demonstrate that the aim of protecting the best interests of the child should be prioritised and also point to the necessity to act in the best interests of the minor in all cases in adoption, as stated in Article 305 of the Code.

51. The requirement prescribing a mandatory statutory age gap of at least eighteen years between the adoptive parent and the adopted child is a definite and blanket condition in the law. Given the underlying aim of its introduction, the general nature of the said requirement cannot be said to place an unbearable or impossible burden on those concerned. In the impugned proceedings, the inferior courts made assessments on the legal regulation as to the statutory age gap sought between the adoptive parents and the adopted child. The courts indicated that the statutory age gap in question was intended to protect the adoption institution and to prevent its abuse and that it was appropriate in terms of the universal

realities and the best interest of the child, considering other matters such as the physical development of the child and her marriage age. These reasons are explicitly relevant to demonstrate the necessity of the general regulation.

52. However, the most important matter to be addressed in the present application is whether the definitive nature of the statutory age gap required for the adoption procedures and the absence of exceptional circumstances provided for in the legal regulations in this regard are in contravention of the positive obligations incumbent on the State to enact legal provisions within the framework of the right to respect for family life.

53. The definitive nature of the statutory age gap required for the adoption procedures and the absence of exceptional circumstances provided in the legal regulations in this regard may lead to grievances in imperative cases entailed by the best interest of the child. For instance, in cases where a minor who has lost his or her parents is raised by a close relative and subsequently wants to be adopted, or the person requesting the adoption is married to the biological mother or father of the minor to be adopted and has been taking care of the minor for a long time, the strict application of the minimum age-gap requirement in the Code may be contrary to the best interests of the child, and this situation may also impair the ongoing family relationships, provided that it is objectively demonstrated by expert reports that a sound child-parent relationship has been established between the parties.

54. By establishing a general and definitive rule regarding the minimum age-gap between the adoptive parents and the adopted child, the legislator excludes the parties who have a reasonable age gap between them but do not meet the minimum age-gap requirement of eighteen years in some exceptional cases, in respect of which there may be several examples. Although it is reasonable and necessary to introduce the minimum age-gap requirement as a general rule for the reasons stated above, the absence of any exception to the rule specific to exceptional situations, such as when the age gap is reasonable and the adoption is especially necessary for the protection of the best interests of the child, may be contrary to the

positive obligation of the State to introduce provisions of law that mark and designate the place of children within the family and society.

55. The aforementioned determinations and assessments should be considered in the particular circumstances of the present application, and the impact of the rule, which is definite and allows of no exception, on the applicant's right to respect for family life should be determined. Regard being had to the fact that the applicant was born in 2000, and in 2006, the applicant's mother F.K. married B.V., who was born in 1984, that -according to the statements of both the applicant and B.V.- the applicant recognised B.V. as her father from the age of four, including the period before the marriage, and that B.V. continued to care for and supervise the applicant as a father for years, and even that the applicant later changed her surname and took B.V.'s surname, it is apparent that a natural and real child-parent relationship has been actually established between the applicant and B.V.. On the other hand, B.V. also claimed that he would never become a biological father due to the traffic accident he had experienced. In addition, the applicant argued many times that it would be in her best interest to establish an adoptive relationship with B.V. during the ongoing legal process, and it was also found established by the public authorities that the adoption would be in the applicant's best interest and would contribute to the preservation of family relations.

56. Given this process as a whole, it has been concluded that if the judge is granted margin of appreciation regarding the age gap, the *de facto* family ties of the parties with a reasonable age gap between them should be afforded *de jure* protection to the fullest extent. Since it is clear that such protection cannot be afforded through the current legal regulations, the positive obligation of the State to make legal arrangements for the recognition of family unions must come into play at this very moment, and regulations that introduce exceptions to the general rule must be implemented.

57. In the current situation, despite this necessity, it appears that the impugned rule of a definitive and general nature does not allow for any exception. Its definitive nature and the lack of any exceptional arrangements for those who are in a disadvantageous position or who need

more protection, as in the present case, impair the principle of prioritising the best interests of the child and family life relations. As regards the present case, it has been considered that there is an incomplete regulation that excludes the exceptional situation and the justified demands of the applicant, and that the current grievance arises from the fact that the provision in Article 308 of Code no. 4721 does not allow for any exception.

58. As a result, it has been concluded that the positive obligations of the State to introduce statutory arrangements have not been fulfilled, since the regulation in force is definitive, does not allow for any exceptions and leave any discretion to the legal practitioners in case of compulsory situations. It has been concluded that the right to respect for family life has been violated due to the failure to fulfil the obligation in question and that the violation directly arises from the fact that the minimum age-gap requirement laid down in Law no. 4721 does not include any justified and acceptable exceptions, in other words, there is an incomplete regulation on the respective issue.

59. In the light of the foregoing, it must be held that there was a violation of the applicant's right to respect for family life safeguarded by Article 20 of the Constitution.

4. Redress

60. The applicant requested the Court to find a violation and order the re-establishment of the parent-child relationship.

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 found 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 is indicated and adopted in the Court's judgment *Hulusi Yılmaz* ([Plenary], no. 2017/17428, 1 December 2022). 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 legal provision 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 respect for family life, 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 1st Chamber of the Balıkesir Family Court.

66. Accordingly, the total litigation costs of TRY 10,346.90, including the court fee of TRY 446.90 and the counsel fee of TRY 9.900, be REIMBURSED to the applicant.

VI. JUDGMENT

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

A. The alleged violation of the right to respect for family life be DECLARED ADMISSIBLE;

B. The right to respect for family life safeguarded by Article 20 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 1st Chamber of the Balıkesir Family Court (E.2015/743, K.2016/967) for retrial to redress the consequences of the violation of the right to respect for family life;

E. The total litigation costs of TRY 10,346.90, including the court fee of TRY 446.90 and the counsel fee of TRY 9.900, 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 2nd Civil Chamber of the İzmir Regional Court of Appeal (E.2017/305, K.2017/285) and 8th Civil Chamber of the Court of Cassation (E.2020/427, K.2020/1092) and the Ministry of Justice for information.

RIGHT TO RESPECT FOR HOME (ARTICLE 21)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

FORD OTOMOTİV SANAYİ A.Ş.

(Application no. 2019/40991)

23 March 2023

On 23 March 2023, the Plenary of the Constitutional Court found a violation of the right to respect for home, safeguarded by Article 21 of the Constitution, in the individual application lodged by *Ford Otomotiv Sanayi A. Ş.* (no. 2019/40991).

(I-IV) SUMMARY OF THE FACTS

[1-48] The applicant is a joint-stock company operating in the automotive market. The Competition Board (the Board) decided to conduct a preliminary investigation to determine whether certain entrepreneurs, including the applicant, had violated the Act no. 4054 on the Protection of Competition ("Act no. 4054").

The authorised competition experts carried out an on-site inspection in the applicant's premises. As a result of the inspection, documents consisting of electronic mails were obtained from the computers of the company's employees. The report prepared at the end of the preliminary investigation recommended the initiation of an investigation and, in line with this recommendation, the Board decided to conduct an investigation against the undertakings, including the applicant. The report issued by the rapporteurs from the Competition Authority as a result of the investigation concluded that the entrepreneurs, including the applicant, had committed acts contrary to Article 4 of Act no. 4054 and recommended that administrative fines be imposed on the impugned entrepreneurs. The Board decided that an administrative fine be imposed on the applicant.

The applicant brought an action before the 13th Chamber of the Council of State (the Chamber) for annulment of the administrative fine, as well as of the regulation under which the impugned fine was prescribed. The Chamber dismissed the impugned action. The applicant's subsequent appeal was dismissed by the Plenary Session of the Chambers for Administrative Cases of the Council of State (İDDK), on the grounds that the Chamber's decision was in compliance with the procedure and the law.

V. EXAMINATION AND GROUNDS

49. The Constitutional Court ("the Court"), at its session of 23 March 2023, examined the application and decided as follows:

A. Alleged Violation of the Right to Property

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

50. The applicant claimed that, pursuant to Article 21 of the Constitution, the right to respect for home may be interfered with only on the basis of a judge's decision, and that the on-site inspection carried out at the workplace did not contain sufficient legal safeguards.

51. In its observations, the Ministry requested the Court to take into consideration the explanations provided in the letter submitted by the Competition Authority. The letter sent by the Competition Authority through the Ministry indicated that the on-site investigation was conducted pursuant to Article 15 of Act no. 4054.

2. The Court's Assessment

52. Article 21 of the Constitution, titled "*Inviolability of the domicile*", reads as follows:

"The domicile of an individual shall not be violated. Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on these grounds, no domicile may be entered or searched or the property seized therein. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall be automatically lifted."

a. Admissibility

53. The alleged violation of the right to respect for home 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

54. The concept of *home* is generally defined as a physically demarcated place where private and family life flourishes. In addition, the concept of home also covers workplaces and, in this sense, includes the office where a person pursues his or her profession, the registered office of a company run by private persons, and the registered office, branches and other workplaces of legal persons (see *Günay Dağ and others* [Plenary], no. 2013/1631, 17 December 2015, § 133; and *Mehmet Taşdemir*, no. 2013/3436, 18 May 2016, § 55). However, public areas of a workplace that do not contain a private element and are accessible to everyone may not be considered to fall within the scope of the concept of home.

55. A search is a protective measure carried out in order to prevent an offence, either before or after it has been committed, in order to obtain evidence and/or to arrest the accused person or the suspect, which may lead to the restriction of certain fundamental rights of individuals (see *the Court's decision* no. E.2005/43, K.2008/143, 18 September 2008). Protective measures are measures that restrict a fundamental right during the investigation and prosecution process, before a given judgment is finalised, are of a temporary nature, enforcement of which cannot be delayed and, as a rule, require a judge's decision. Decisions on protective measures may result in the violation of one or more of the rights of individuals within the scope of the individual application (see *Hülya Kar*, no. 2015/20360, 27 February 2019, § 17).

56. The search constitutes a restriction of the main fundamental rights, such as the right to respect for private life, the right to respect for home and corporal inviolability. In the present case, the competition experts conducted an *on-site inspection* at the applicant's workplace pursuant to Article 15 of Act no. 4054. The on-site inspection, stipulated in the impugned Article, is the inspection carried out on the premises by the Board officials through paying visits to the workplaces of undertakings or associations of undertakings. To this end, the Board is entitled to examine the books, all types of data and documents of

undertakings and associations of undertakings kept on physical or electronic media and in information systems, and take copies and physical samples thereof, request written or oral statement on particular issues, perform on-site inspections of any assets of undertakings.

57. In view of the powers provided in Article 15 of Act no. 4054, it is evident that the on-site inspection is an activity carried out in the head offices, branches and facilities where a given undertaking exercises its administrative functions. Undoubtedly, the places where the administrative affairs of the undertakings are carried out and the areas which are not freely accessible to everyone, such as workrooms, are considered as homes.

58. In the present case, on 29 July 2009, competition experts authorised to conduct a preliminary investigation visited the applicant's address in the Gölcük district of Kocaeli and conducted an on-site inspection. As a result of the inspection, 78 pages of documents consisting of electronic mails obtained from the computers of the company's employees were seized. Furthermore, in consideration of Article 15 of Act no. 4054 as a whole in the present case, it becomes evident that the facilitation of the on-site inspection is a legal obligation imposed on the entrepreneur. As a matter of fact, Article 16 § 1 (d) of the relevant Act provides for the imposition of a fine on the entrepreneur in the event of any infringement of this obligation.

59. It must be therefore acknowledged that the inspection carried out at the applicant's workplace constituted an interference with the applicant's right to respect for home, also given that the documents were obtained from the computers of the company's employees.

ii. Whether the Interference Constituted a Violation

60. It is set forth in Article 13 of the Constitution that the restrictions on fundamental rights and freedoms shall not run contrary to the wording of the Constitution. Accordingly, one of the criteria with respect to the restriction of fundamental rights and freedoms, which are laid down in Article 13 of the Constitution, is the *compliance with the wording of the Constitution*. The Court also examines, if necessary,

whether the interferences by authorities wielding public power with fundamental rights and freedoms are in accordance with the wording of the Constitution. Such an examination is the requisite of the imperative provision laid down in Article 13 of the Constitution (see *Kadri Enis Berberoğlu (2)* [Plenary], no. 2018/30030, 17 September 2020, § 68; and *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, § 79).

61. The notion, *letter of the Constitution*, specified in Article 13 of the Constitution amounts to the text of the Constitution, that is to say, its wording. The requirement that any interference with fundamental rights and freedoms must comply with the letter of the Constitution is of importance notably when the *additional safeguards* introduced by virtue of various provisions of the Constitution are at stake. In most cases, the Constitution not only bestows a right or freedom but also protects it by putting particular emphasis on, or attaching particular importance to, certain aspects of this right or freedom so as to guarantee the exercise thereof. Besides acknowledging a right, the constitution-maker may also separately and specifically point to an aspect of that right falling under its normative scope, as well as introduce an additional safeguard with respect thereto (see *Kadri Enis Berberoğlu (2)*, § 69; and *Kadri Enis Berberoğlu (3)*, § 79).

62. As a matter of fact, the second sentence of Article 21 § 1 of the Constitution stipulates that unless there exists a decision duly given by a judge, no home may be entered or searched or the property seized therein. The same paragraph also provides that, in cases where delay is prejudicial, a written order of an agency authorized by law may be deemed sufficient instead of the decision directly rendered by a judge. It also stipulates that the competent authority's decision must be submitted to the competent judge for approval within twenty-four hours. Additionally, the obligation for the judge to announce his decision within forty-eight hours of the seizure has been introduced as a specific requirement for the seizure, failing which the seizure is automatically lifted.

63. Article 15 of Act no. 4054 suggests that the ability of competition experts to carry out on-site inspections is not, in principle, subject to a

judge's decision. As previously noted, on-site inspection is an activity that is mostly carried out at the entrepreneur's head office, branches and establishments that are considered as dwellings under Article 21 of the Constitution, and not at its establishments that are open to the public. Therefore, the regulation allows the competition experts to enter areas considered as residential, even without having to obtain a decision from a judge. The rule stipulates that the judge's decision is limited to cases where there is an obstacle to the on-site inspection or the possibility of an obstacle being in place. The particular safeguard provided for in the second sentence of Article 21 § 1 of the Constitution covers all cases in which public officials intend to enter a person's home without his or her consent, and the provision which makes the judge's decision dependent solely on the existence of an obstacle or the possibility of an obstacle is contrary to the relevant safeguard.

64. Furthermore, although Article 15 of Act no. 4054 provides that on-site inspections may be carried out upon a decision rendered by the Board, it is considered that the conducting of on-site inspections by an order of the Board is not limited to cases where delay is prejudicial. Article 21 § 1 of the Constitution stipulates that, only in cases where delay is prejudicial, a written order of an agency authorized by law may be deemed sufficient instead of the decision directly rendered by a judge. It has been concluded that the regulation, which does not confine the possibility of performing on-site inspections upon the Board's order to the cases where delay is prejudicial, is contrary to Article 21 of the Constitution.

65. In addition, even if it is acknowledged for a moment that the Board's decision to carry out an on-site inspection is limited to cases where delay is prejudicial, the lack of an obligation to submit the Board's decision for the approval of the judge within twenty-four hours is also deemed incompatible with the additional safeguard provided in Article 21 of the Constitution.

66. Since there was no attempt by the applicant to prevent the on-site inspection, an on-site inspection was carried out at the applicant's workplace without the need for a judge's decision. It is evident that this

procedure, which apparently complies with Article 15 of Act no. 4054, was in breach of the safeguard stipulated in the second sentence of Article 21 § 1 of the Constitution.

67. In the present case, it has been concluded that the applicant's right to respect for home had been violated due to the fact that the interference with this right of the applicant is contrary to the second sentence of Article 21 § 1 of the Constitution.

68. For these reasons, it must be held that the right to respect for home, safeguarded by Article 21 of the Constitution, was violated.

Mr. İrfan FİDAN and Mr. Muhterem İNCE expressed a dissenting opinion in this respect.

B. Alleged Violation of the Right to Property

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

69. The applicant asserted the following:

i. The administrative fine imposed constituted an unlawful interference with the right to property. The applicant claimed that although the scope of Act no. 4054 covered the goods and services markets of the Republic of Türkiye, the inclusion of export revenues in the calculation of the fine violated the lawfulness principle. The applicant claimed that the half increase in the sentence by recognising three separate offences as a single continuous offence did not meet the lawfulness criteria. The applicant further stated that the interpretation that the exchange of information constituted a *per se* violation was not foreseeable. The applicant emphasised that the fact that the cooperation in the investigation, the discontinuation of the violation, and the lack of a previous investigation were not considered as mitigating circumstances in the assessment of the penalty was in breach of the explicit provision of law. The applicant argued that the *nullum crimen, nulla poena sine lege* principle had also been violated.

ii. The applicant claimed that the lack of procedural safeguards rendered the interference with his right to property disproportionate.

The applicant complained that although the documents relied upon in the sentencing process lacked the required substantiation, this was not met by the inferior courts with a relevant and sufficient justification. In this respect, the applicant stated that the inferior courts had not assessed its allegations that the company's employee had not provided information on its pricing strategy at the 2006 meeting, that the companies had not reached an agreement at the 2008 meeting, and that with regard to the allegations concerning 2009, it had been previously decided that there was no need for an investigation.

iii. The Board's decision and the Council of State's decision were unjustified, which thus rendered the impugned interference disproportionate. In this context, the applicant argued that the decision of the Board did not explain the reasons for the differences between the seven categories of penalty decisions and the basic amounts of the penalties. It also argued that the lack of opportunity to present an adequate defence, due to the ambiguity of the acts attributed to the company in the letter seeking defence submissions and the disregard of the defence submissions presented after the notification of the preliminary investigation report rendered disproportionate the interference with the right to property.

iv. Financial considerations were effective in pricing policy, and the imposition of penalties without demonstrating the causal link between the exchange of information and the setting of prices constituted a violation of the right to property.

v. The right to a fair trial was violated as the decisions of the inferior courts were unjustified and the investigators were in a more advantageous position regarding access to all documents.

70. In its observations, the Ministry noted after providing a summary of the events and facts and the relevant legislation that it would be at the discretion of the Constitutional Court to take these into account when assessing whether the application was manifestly ill-founded.

71. In the letter sent by the Competition Authority through the Ministry, it is stated that, in order to impose a reasonable sanction

on the undertaking in terms of competition law, the turnover of the undertaking in the entire product market in which it operates in the world is taken as a basis and, as recognised in the decisions of the Council of State, Article 16 of Act no. 4054 does not distinguish between the elements of the gross income of the undertaking. The letter argues that, under competition law, each transaction is subject to different competitive conditions depending on different market dynamics and that, therefore, the Board's decision to take export revenues into account in the applicant's case, as distinct from its ordinary practice, was not inconsistent, given the discretionary power enjoyed by the Board. It is emphasised that the Board holds a margin of discretion in determining whether or not the violation is continuing, and it is noted that the finding of a single violation in the present case is indeed in the applicant's favour. In the letter stating that there was no evidence of coordination between entrepreneurs in the period after the excise duty reduction in the first preliminary investigation, it is argued that it was lawful to include this period in the investigation, as it was found out in the second investigation that coordination had continued in the period following the excise duty reduction. The letter states that the law cannot be expected to provide an exhaustive list of acts restricting competition, that in this sense it is evident that the exchange of information also falls within the scope of the law, that there is no inaccuracy in the assessment of the evidence, that the decisions of the inferior courts contain relevant and sufficient justification, and that the amount of the administrative fine was determined on the basis of an individual assessment. Finally, it is asserted that both the investigation stage and proceedings complied with the requirements of the adversarial proceedings.

72. In its counter-statements against the Ministry's observations, the applicant reiterated its previous allegations cited in the application form.

2. The Court's Assessment

73. 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."

74. 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). The essence of the applicant's complaint concerns the alleged violation of the right to property due to the imposition of an administrative fine. The Court has considered appropriate to examine the applicant's allegations under the principle of the *nullum crimen, nulla poena sine lege* within the framework of the lawfulness of the interference with the right to property, and the allegations raised under the principle of equality of arms and the right to a reasoned decision within the framework of the procedural safeguards of the right to property.

a. Admissibility

75. The complaint concerning 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

76. Since there is no doubt that the imposition of an administrative fine caused a decrease in the applicants' assets, this amount of money clearly constituted a *possession* for the applicants (for the Court's assessments in the same vein, see *Orhan Gürel*, no. 2015/15358, 24 May 2018, § 43; *Mustafa Taş*, no. 2017/23968, 31 October 2018, § 35; and *Ö. Ltd. Şti.*, no. 2018/18975, 15 September 2021, § 40).

ii. Existence of an Interference and its Type

77. In view of Article 35 of the Constitution read together with other articles that touch upon the right to property, the Constitution lays down three rules in regard to interference with the right to property. In this respect, the first paragraph of Article 35 of the Constitution provides that everyone has the right to property, setting out the right to *peaceful*

enjoyment of possessions, and the second paragraph draws the framework of interference with the right to peaceful enjoyment of possessions. Article 35 § 2 of the Constitution lays down the circumstances under which the right to property may be restricted in general and also draws out the general framework of conditions of deprivation of property. The last paragraph of Article 35 of the Constitution forbids any exercise of the right to property in contravention to the interest of the public; thus, it enables *the State to control and regulate the enjoyment of property*. Certain other articles of the Constitution also contain special provisions that enable the State to have control over property. It should further be pointed out that deprivation of property and regulation/control of property are specific forms of interference with the right to property (see *Recep Tarhan and Afife Tarhan*, no. 2014/1546, 2 February 2017, §§ 55-58).

78. In the present case, it is evident that the imposition of an administrative fine on the applicant for acting in breach of Article 4 of Act no. 4054 constitutes an interference with the right to property. The purpose of this intervention is to prevent violations of competition law. In this case, the interference should be examined under the provisions governing the control of the use of property in the public interest, taking into account the aim pursued by the interference which is the subject matter of the application (for the Court's assessments in the same vein, see *Mars Sinema Turizm ve Sportif Tesisler İşletmeciliği A.Ş.*, no. 2017/23849, 10 October 2018, § 48; and *Mustafa Taş*, § 38; *Ö. Ltd. Şti.*, § 42).

iii. Whether the Interference Amounted to a Violation

79. 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."

80. Article 35 of the Constitution provides that the right to property is not unlimited and may be subject to certain limitations by law and in

the public interest. Any interference with the right to property must also take account of Article 13 of the Constitution, which sets out the general principles governing restrictions on fundamental rights and freedoms. For an interference with the right to property to be constitutional, it must have a legal basis, pursue a public-interest purpose, and be carried out in accordance with the principle of proportionality (see *Recep Tarhan and Afife Tarhan*, § 62).

(1) Lawfulness

(a) General Principles

81. 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 public interest. Similarly, Article 13 of the Constitution, which sets out the general principles governing the limitation of fundamental rights and freedoms, established the basic principle that *rights and freedoms may be limited only by law*. Accordingly, the primary criterion to be considered in relation to interference with the right to property is whether the interference is based on law. In cases where the Court finds out that this criterion has not been fulfilled, it would automatically conclude that there was a violation of the right to property, without carrying out any further assessment under the other respective criteria (see *Ford Motor Company*, no. 2014/13518, 26 October 2017, § 49).

82. The fact that the interference is based on law primarily necessitates the formal existence of a law. A law in the formal sense is a regulatory legislative act enacted by the Grand National Assembly of Türkiye ("GNAT"), under the name of law, in accordance with the procedure specified in the Constitution. Interference with rights and freedoms is conditional upon the inclusion of a provision, justifying a given interference, in the regulatory acts enacted by the legislature under the name of law. The absence of a formal legal provision enacted by the GNAT 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).

83. 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 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 lawfulness requirement 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).

84. It is within the discretion of the inferior courts to interpret the legal rules to be applied in a dispute, and in particular the provisions of the law which constitute the legal basis for intervention. It is not for the Constitutional Court to review the expediency of the interpretations by the inferior courts in relation to the provisions which are considered to constitute the legal basis for the interference with the right to property. However, to the Court is entitled to conclude that the interference with the right to property lacks any legal basis in cases where the interpretations of the inferior courts are in conflict with the explicit wording of the law, or given its wording, it is not possible for individuals to foresee the consequences of the law, or in cases where a given case is found to be of no relevance to the respectiveprovision of law, or any such relevance, if established, is based on an assessment that involved blatantly illogical reasoning (see, *mutatis mutandis*, in terms of right of access to a court, *Ziya Özden,* no. 2016/67737, 19 November 2019, § 59).

(b) Application of Principles to the Present Case

85. The administrative fine in the present case was imposed pursuant to Article 16 § 3 of Act no. 4054. Article 16 § 3 of the Act no. 4054 stipulates that those who act in breach of Article 4 of this Act

shall be subjected to an administrative fine up to ten percent of annual gross revenues of undertakings and associations of undertakings to be imposed a penalty or members of such associations, which generate by the end of the financial year preceding the decision or, if it is not possible to calculate it, generate by the end of the financial year closest to the date of the decision and which would be determined by the Board. In addition, Article 4 § 1 of Act no. 4054 establishes that agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which are intended to ensure, or effect or likely effect, the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. Accordingly, it has been observed that the interference with the right to property through the imposition of an administrative fine on the applicant, who allegedly acted in breach of Article 4 of Act no. 4054, has a legal basis in a formal sense.

86. It is insufficient, however, for the intervention to be founded upon a law alone. Rather, the law in question must sufficiently precise and foreseeable. In this regard, the applicant claimed that the interpretation that the exchange of information constituted a *per se* violation, the consideration of export revenues in the calculation of the fine, the recognition of three separate acts as a single continuous act, and the non-application of mitigating circumstances were unforeseeable and contrary to the explicit provision of the law.

87. In the present case, it has been established that, between 2006 and 2009, the applicant held meetings and personal communications with some other entrepreneurs operating in the automotive sector in order to determine its pricing strategy, and that these meetings are in the nature of an agreement or concerted practice that is intended to restrict competition, or that have or may potentially have such an effect, which is prohibited by Article 16 of Act no. 4054. According to the Board's interpretation, the conduct of negotiations on pricing strategy was in itself a concerted practice or agreement, and it was not, therefore, necessary to prove that the negotiations had an impact on the vehicle prices in order to qualify these negotiations as a breach of the prohibition set forth in Article 4 of Act no. 4054. The Board noted that

there was a consensus on the anti-competitive effects of price-fixing negotiations, given that price was one of the most important factors steering the procurement process and resource allocation. It appears that the Chamber's decision endorses the Board's opinion. Referring to the preamble of Act no. 4054, the Chamber held that for finding a breach of Article 4 of Act no. 4054, it would be sufficient to reveal that the given agreements, concerted practices or decisions of the association of undertakings were intended to prevent, distort or restrict competition and that there would be no necessity to observe anti-competitive effects of the impugned conduct and behaviours on the market or to have such effects proven.

88. It should be recalled that it is for the inferior courts to interpret the rules of law applicable to the dispute, except in cases of arbitrariness or manifest error of judgment. Article 4 § 1 of Act no. 4054 refers not only to agreements or concerted practices which have the effect of *preventing, distorting or restricting competition*, but also to agreements or concerted practices *which may have such an effect*. In view of this wording of the provision, it is concluded that the interpretation according to which it is not necessary to examine whether the price strategy negotiations between the undertakings actually restrict competition in order to speak of a violation of Article 4 of Act no. 4054 is not of an unforeseeable nature.

89. Article 16 § 3 of Act no. 4054 stipulates that an administrative fine shall be imposed to those who infringed the prohibition laid down in Articles 4 of the Act, up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, which is generated by the end of the financial year preceding the decision, or -if it would not be possible to calculate it- is generated by the end of the financial year closest to the date of the decision and which would be determined by the Board. Accordingly, it is envisaged that the annual gross income will be used as the basis for assessing the penalty. According to the Board, the relevant provision makes no distinction as to the market from which the gross income is derived, and therefore export income is also taken into account in determining the gross income on the basis of which the penalty is applied. The Chamber found lawful this interpretation of the Board.

90. In light of the wording of the article, it was deemed that the consideration of the applicant's entire gross revenue, including export revenues, in the assessment of the fine was not arbitrary or indicative of a manifest error of assessment. The applicant claimed that since the scope of application of the Law was defined in Article 2 of Act no. 4054 as "*markets for goods and services within the borders of the Republic of Türkiye*", only the gross revenues generated from transactions within the borders of the Republic of Türkiye should be taken into account in determining the amount of the fine. It is within the discretion of the inferior courts to interpret the provisions of the Act by having regard to the interplay between different provisions of the Act. The possibility of reaching a different conclusion in the light of the article governing the scope of the law does not in itself indicate that the interpretation of the competent authorities and the inferior courts is unforeseeable. It needs to be stressed that the Constitutional Court is not tasked with determining how to better interpret the laws.

91. The applicant's other claim relating to lawfulness is the consideration of three separate acts performed in 2006, 2008 and 2009 as a single act. In the present case, it was concluded that, by meeting with industry representatives to discuss pricing strategies in mid-2006, late 2008 and March 2009, the applicant had infringed the prohibition on agreements or concerted practices restricting competition. The Board's finding that the applicant participated in an agreement or concerted practice restricting competition was based on its taking part in the negotiations held by certain entrepreneurs in the automotive sector to determine the pricing strategy following the exchange rate increases in 2006 and 2008 and the special consumption tax reduction in March 2009. It is well-known that the three interviews took place on different dates and were based on different facts. Nevertheless, it is within the competence of the relevant public authorities and the Council of State to ascertain whether a unity exists between them. It is inconceivable that the Constitutional Court would substitute its own assessment for that of the relevant authorities and the Council of State unless there were compelling reasons to do so. In consideration of the investigation and proceedings as a whole, there are no compelling reasons to deviate from

the Board's assessment that all three acts were performed in lieu of a single agreement decision.

92. With regard to lawfulness, the applicant also argued that the competent authorities' failure to consider its active assistance to the investigation, the fact that the infringement had ceased, and the lack of a previous investigation against it as a mitigating factor in the assessment of the penalty was contrary to the explicit provision of the law. It appears that Article 7 of the respective Regulation sets out as mitigating factors the assistance provided in the investigation and putting an end to the infringement. Additionally, the relevant article confers discretionary powers on the Board to apply a reduction in regard of the mitigating circumstances. It may be reasonably concluded that the Board is legally empowered to exercise discretionary power in this instance. On the other hand, the review to be carried out by the Court in the context of the principle of lawfulness is confined to ascertaining whether the Board is granted a discretionary power not to apply the mitigating circumstances, and it is not possible to examine the consequences of the exercise of the discretionary power in the context of the criterion of lawfulness.

93. In conclusion, it was considered that the penalty imposed on the applicant was based on an accessible, specific and foreseeable provision, and that the impugned interference had a legal basis.

(2) Legitimate Aim

94. According to Articles 13 and 35 of the Constitution, the right to property may only be restricted 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 and being a reason 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. The concept of public interest brings along the margin of appreciation of the public bodies, and this concept with no objective definition must be assessed on the basis of the particular circumstances of each case (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, §§ 53-56; and *Yunis Ağlar*, no. 2013/1239, 20 March 2014, §§ 28-29).

95. Article 1 of Act no. 4054 establishes that the purpose of the law is to ensure the protection of competition. The legal provisions, forming the underlying basis for the administrative fine imposed on the applicant, are therefore aimed at protecting competition. It is evident that the imposition of obligations on undertakings to protect competition and the imposition of sanctions in the event of breach of those obligations are intended to ensure the public interest.

(3) Proportionality

(a) General Principles

96. Proportionality, which is one of the criteria to be taken into account when restricting rights and freedoms under Article 13 of the Constitution, derives from the principle of the rule of law. Since the restriction of rights and freedoms is an exceptional power in a state governed by the rule of law, this power can only be justified to the extent required by the situation. It would be incompatible with the rule of law to restrict the rights and freedoms of individuals more than the concrete circumstances require, since this would mean exceeding the powers conferred on the public authorities (see the Court's decision no. E.2013/95, K.2014/176, 13 November 2014).

97. 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*, no. 2013/817, 19 December 2013, § 38).

98. Accordingly, for an interference with the right to property to be compatible with the Constitution, it must not only be *suitable* to achieve

the aim pursued but must also be *necessary*. As explained above, the *necessity* test requires that the least restrictive one must be preferred among the means constituting an interference with the right. Among the measures restricting a right or a freedom, the one with a less interfering effect on the norm area of the right must be preferred. Nevertheless, it must be acknowledged that the public authorities are afforded a certain margin of appreciation in choosing the means which will constitute an interference with the right. Indeed, the competent public authorities are better placed to render a right decision on which means will produce effective and efficient results for the achievement of the aim pursued. Especially in cases where there is no alternative means or where the available alternative means are not effective or less effective for the achievement of the legitimate aim pursued, there must be very strong reasons to say that the margin of appreciation afforded to the public authorities in choosing the relevant means does not comply with the *necessity* criterion (see *D.C.*, no. 2018/13863, 16 June 2021, § 48).

99. On the other hand, any interference with the right to property must be proportionate. Proportionality refers to the absence of an excessive imbalance between the aim pursued by the restriction and the restrictive measure employed. In other words, proportionality requires a fair balance to be struck between the aim and the means. Accordingly, there must be a reasonable relationship of proportionality between the legitimate aim pursued by the restriction on the right to property and the applicant's individual interest in enjoying the right to property. The burden imposed on the individual by the restriction must not be excessive and disproportionate to the public interest to be served by the achievement of the intended purpose (see *D.C.*, § 49).

100. The finding that the means chosen imposes on the individual a burden disproportionate to the aim pursued may not be sufficient in itself, in certain cases, for the finding of a violation. It is also of great importance whether there are mechanisms counterbalancing the burden imposed on the individual. Where there are legal mechanisms alleviating the burden imposed on the individual on account of the choice of the means which is considered to be suitable and necessary, a violation may not be found (see *D.C.*, § 50).

101. In the assessment of the proportionality of an interference with the right to property, regard is also paid to whether any fault can be attributable to the applicant and the administration. The factors taken into consideration in this context include what legal obligations the parties had, whether there was any negligence on the part of them during the fulfilment of those obligations, and if so, whether such negligence had an effect on the unlawful result (see *D.C.*, § 51).

102. The existence of procedural safeguards plays an important role in the assessment of proportionality. In this context, the absence of legal remedies whereby an individual can challenge the lawfulness of an interference or seek compensation in respect of pecuniary and non-pecuniary damages arising from the alleged interference may be considered as a factor aggravating the burden imposed on the individual in certain cases. In this regard, an effective examination of the alleged unlawfulness by a court is of importance for the proportionality of the interference (see *D.C.*, § 52).

(b) Application of Principles to the Present Case

103. In the present case, it was found that between 2006 and 2009, the applicant company, which engages in the production, import, export and distribution of automobiles, held meetings and personal communications with some other companies operating in the same sector in order to determine a pricing strategy. Considering that these negotiations were in the nature of an agreement or concerted practice intended to restrict competition or having or likely to have such an effect, an administrative fine of 68,844,704.73 Turkish liras ("TRY") was imposed on the applicant, representing nine per thousand of its gross turnover.

(i) Suitability

104. The first point to be considered in the context of proportionality is whether the imposition of a fine on the applicant is a sutaible means of achieving the objective of protecting competition.

105. The preliminary examination report drafted for the applicant and other entrepreneurs stated that, depending on the structure of the

market and the nature of the information, the exchange of information between entrepreneurs in a sector may restrict competition by reducing uncertainty and increasing predictability for entrepreneurs. In the preliminary examination report, following an analysis of the structure of the market for passenger cars and light commercial vehicles, it was concluded that the sharing of future pricing strategies would have a distortive effect on competition. It was noted that the investigation report and the Board's decision were based on this assessment in the preliminary investigation report.

106. In a highly technical field of law such as competition law, it would be incompatible with the purpose of the individual application to the Constitutional Court, unless there are substantial reasons, to recognise the contrary assessment made by the experts of the Competition Authority that the discussing and sharing of future price strategies has an anti-competitive impact. The applicant did not challenge this assessment in the preliminary examination report. According to the applicant, the mere sharing of information was not a justified ground for punishment. Instead, the applicant argued that public authorities must demonstrate a causal link between the sharing of information and price fluctuations. The applicant's claim has been discussed above, and it has been accordingly determined that the Board's view indicating that an entrepreneur may be penalised under Article 16 § 3 of Act no. 4054 for an agreement or concerted practice with the potential to restrict competition, without necessarily demonstrating that this agreement or concerted practice affects prices, has a legal basis (see §§ 87, 88). Therefore, the question to be examined under the *suitability* criterion is limited to the sanctioning of the sharing of the forward-looking pricing strategy, which is considered to have an anti-competitive effect. It is evident that the sanctioning of the disclosure of information with the potential to distort competition, specifically information on price strategy, is suitable for achieving the objective of competition protection.

(ii) Necessity

107. Secondly, it is required to determine whether the specified means is necessary. The principle of necessity pertains to the selection

of the most appropriate means, that is, the one that causes the least interference with the right in question, in order to achieve the intended purpose. The assessment of the measures required for the protection of competition is primarily within the competence of the relevant public authorities. It is therefore incumbent upon the responsible and competent authorities to determine the appropriate measures to be taken in this area. Consequently, the application of measures is at the discretion of the relevant administrative authorities. Nevertheless, the discretionary power of the administrations with regard to the necessity of the chosen means is not without limits. In light of the aforementioned considerations, it is within the purview of the Constitutional Court to conclude that the interference is not necessary if the chosen means has the effect of significantly aggravating the interference in comparison to the purpose to be achieved. Nevertheless, the Constitutional Court's assessment in this context is not concerned with the degree of convenience of the chosen means, but rather with the severity of the interference it imposes on rights and freedoms (for a similar assessment on the imposition of administrative fines for the prevention of fuel smuggling, see *Ö. Ltd. Şti.*, § 63).

108. Accordingly, in order to secure and promote competition, it is reasonable to conclude that the prohibition of agreements between undertakings and concerted practices that directly or indirectly aim to distort or restrict competition in a specific goods or services market, or that have or may have this effect, as well as the imposition of a proportionate sanction in case of an infringement of this prohibition are within the discretionary power of public authorities. In the present case, the applicant did not bring a complaint regarding the prohibition of agreements or concerted practices that distort or restrict competition, nor did it present a general objection to the imposition of sanctions in the event of an infringement of this prohibition. The applicant's primary complaint is that the disclosure of information regarding the company's pricing strategy was taken as a mere basis for the penalty imposed. The applicant maintained that the imposition of penalties without demonstrating that the information sharing affected prices was in breach of the right to property.

109. A comprehensive analysis of the preliminary investigation report, the investigation report, and the Board decision revealed that there is insufficient evidence to conclude that the sharing of price strategy information by entrepreneurs in the automotive sector has a definitive impact on prices. While reports and decisions made throughout the investigative process indicated that prices may have fluctuated in a different manner had the aforementioned information-sharing act not been committed, the consensus was that these evaluations were largely based on estimates. Nevertheless, the Board's opinion, as adopted by the Chamber, holds that a fine may be imposed under the third paragraph of Article 16 of Act no. 4054 on the basis of price strategy negotiations alone, without the necessity of demonstrating a causal link between such negotiations and price movements. The question for the Court to resolve is whether it is necessary to impose penalties for the mere sharing of a price strategy, without demonstrating that such disclosure has affected prices in the sector.

110. In this regard, it is important to consider the difficulties in proving whether an agreement or concerted practice that distorts or restricts competition actually affects prices. It is crucial to note that the Constitution does not stipulate that the State's power of punishment should be limited to instances where an unlawful act causes harm. The imposition of administrative fines for acts that do not actually cause harm, but which pose a clear and imminent danger of causing harm, is not precluded by the Constitution.

111. The results of the assessment process indicate that price is a significant factor influencing demand, although it is not the sole determining factor. It was therefore concluded by the investigating authorities that the negotiations held by sector representatives on price strategy had a distorting effect on competition. In light of the inevitable distorting or restrictive effect of negotiating and sharing information regarding price strategy, it has been determined that not stipulating the demonstration of the extent to which the price strategy affects the prices is within the scope of the discretionary power of the legislator, taking into account the difficulty of proof. The necessity for proof that an agreement or concerted practice that distorts or restricts competition has also affected prices may render the measures introduced for the

protection of competition ineffective. It is therefore understood that the public authorities cannot be compelled to make the imposition of a penalty on those responsible for the impugned act conditional upon the existence of proof that the price has been affected.

112. Article 172 of the Constitution establishes the obligation of the State to take measures to protect and inform consumers. One of the primary objectives of the regulations under competition law is the protection of consumers. The implementation of regulations that secure and promote competition serves to guarantee that product prices are determined in a manner that is most reflective of market realities under conditions of free market economics. This, in turn, serves to prevent the exploitation of consumers by undertakings and associations of undertakings. It is essential to note that requiring proof that an agreement or concerted practice that distorts or restricts competition affects prices for punishment may pose a risk to the State's obligation to protect consumers as set forth in Article 172 of the Constitution.

113. In light of the aforementioned considerations, it has been concluded that considering the applicant's involvement in the price strategy negotiations as a sufficient ground for imposition of penalties on it in accordance with Article 16 § 3 of Act no. 4054 falls within the constitutional ambit of discretionary power of the public authorities. Accordingly, it has been concluded that the interference meets the necessity criterion.

(iii) Commensurateness

114. One of the issues to be considered when assessing the commensurateness of the interference is whether a court has effectively examined alleged unlawfulness of the interference. It was noted that the applicant was able to lodge an appeal with the Chamber for the annulment of the administrative fine imposed on it, to present it claims and objections, to be represented by a lawyer and to benefit from the possibility of an appeal. In the context of the exercise of procedural remedies, the applicant complained that, although the documents relied on in the criminal proceedings were not evidentiary, the inferior courts did not provide a relevant and sufficient statement of reasons.

115. The investigating authorities concluded that nineteen entrepreneurs in the automotive sector, including the applicant, exchanged information on future pricing strategy within the framework of an agreement or concerted practice, based on the documents relating to the meetings held under the umbrella of the Automotive Distributors Association and the Automotive Industry Association, as well as the data obtained from the e-mail addresses of the representatives and employees of the entrepreneurs. A detailed analysis of the documents revealed that the entrepreneurs had engaged in the exchange of information pertaining to prospective price strategies.

116. It is not within the jurisdiction of the Constitutional Court to evaluate the sufficiency of the documents obtained from the electronic messages of the aforementioned associations and the representatives and employees of the entrepreneurs in proving that the entrepreneurs disclosed information regarding future price strategies. The assessment of the evidence is a competence that rests with the inferior courts, and the intervention of the Court in the assessment of the inferior courts in this respect, except in cases of arbitrariness or manifest error of judgment, is incompatible with the purpose of the individual application mechanism. It is clear that the allegations made by the applicant are not sufficient to acknowledge that the conclusion reached by the investigating authorities and the inferior courts to the effect that the applicant committed the impugned act is arbitrary or contains a manifest error of appreciation.

117. In addition, it is important to note that the applicant's claim that the documents seized during the on-site inspection at the workplace were obtained unlawfully and that their use in the proceedings was unlawful was not included in the individual application form. It has been understood that the applicant's primary claim regarding the evidence is that it is not sufficient to prove that pricing strategy information had been exchanged. It was therefore not possible to ascertain whether the use of evidence obtained during the on-site inspection process in the proceedings constituted a violation of the procedural safeguards pertaining to the right to property.

118. Furthermore, the applicant asserted that the allegations pertaining to the period subsequent to the reduction in the special consumption tax were the subject of a new investigation, despite the previous determination that further investigation was not required. It is noted that the applicant also presented this allegation during the investigation stage and the proceedings. In consideration of the period subsequent to the Council of Ministers' decision dated 16 March 2009 concerning the reduction of special consumption tax, the Board resolved to undertake a preliminary investigation in accordance with its decision dated 29 April 2009, with the objective of determining the necessity of an investigation. Subsequently, on 24 June 2009, the Board concluded that an investigation was not required, given the absence of compelling evidence substantiating the existence of an agreement or concerted practice that would constitute a violation of Article 4 of Act no. 4054. However, the investigation initiated following the Board's decision dated 9 September 2009, primarily in relation to the developments subsequent to the exchange rate increases in 2006 and 2008, revealed that the coordination persisted throughout the period following the Council of Ministers' decision dated 16 March 2009 concerning the reduction of the special consumption tax.

119. It should be noted that the Board of Directors decided on 24 June 2009 that no investigation was required. It should also be pointed out that the reason for including the period after the special excise duty reduction in the investigation is based on the information and documents obtained during the investigation. A review of the documents pertaining to the administrative proceedings and the Competition Authority's defence submissions during the proceedings revealed that the coordination between the entrepreneurs persisted even after the reduction in the special consumption tax. This was evidenced by the documents indicating that the coordination continued in the period subsequent to the reduction in the special consumption tax, which were provided during the examinations conducted at the workplaces of certain entrepreneurs during the second investigation. In light of the fact that the documents in question were obtained for the first time in the second investigation, the conclusion that the coordinated

action that commenced in 2006 continued into the period following the special consumption tax reduction, and the acceptance that the agreement or concerted practice continued until the end of 2009, was neither arbitrary nor unfounded.

120. The applicant complained that its allegations regarding the lack of explanation as to why the penalties imposed on the undertakings differed had not been satisfied. An analysis of the Board's decision indicates that the penalty imposed on the applicant was increased by half, taking into account the fact that the duration of the applicant's participation in the coordination between the undertakings was more than one year, while a reduction was applied due to the fact that the activity subject to the infringement represented a very small proportion of the annual gross income and was assessed at the rate of nine per thousand of the gross income for 2010. It should be noted that the fine imposed does not exceed the maximum amount provided for in Article 16 § 3 of Act no. 4054. Furthermore, it has been understood that the duration of the impugned act was taken into account when assessing the penalty imposed on the applicant, which was higher than that imposed on other entrepreneurs. It would therefore be unreasonable to claim that the Board’s discretionary power is unjustified.

121. Despite the applicant's assertion in the letter seeking defence submissions that it was denied an adequate opportunity to mount a defence due to the ambiguity of the acts attributed to the company, it was nevertheless aware of the full range of allegations made against him throughout the investigation stage and the proceedings. He was duly furnished with the preliminary investigation and investigation report, as well as the defence submissions presented by the Competition Authority. Consequently, he was able to present his claims and objections in response to these documents. Therefore, the applicant was not put in a disadvantageous position in terms of the opportunity to mount a defence.

122. Another element to be considered in the commensurateness of the interference is the applicant’s act. It has been acknowledged that the applicant instigated the imposition of an administrative fine by his own actions. It is explicitly stipulated in Act no. 4054 that any agreement

or concerted practice that impedes, distorts, or restricts competition between undertakings is prohibited and unlawful. It is not an excessive burden on the applicant to bear the consequences prescribed by law for the act of the applicant who infringes the prohibition prescribed by law, which is revealed to be accessible, specific and foreseeable.

123. Finally, it must be examined whether the reasonable balance between the burden imposed on the applicant by the interference and the intended public interest has been upset. The fine imposed on the applicant was calculated as nine per thousand of his gross income for 2010. In establishing the requisite penalty amount, consideration was given not only to the gross revenue generated from domestic sales, but also to the gross revenue derived from foreign sales. It is important to note that the discretion exercised by the legislature in determining the penalty to be imposed is contingent upon the observance of constitutional principles. In this regard, it should be underlined that there is no provision in the Constitution that prohibits the calculation of the base of the penalty based on the gross revenue and the consideration of foreign revenue in determining the gross revenue. While the consideration of foreign sales results in an increase in the amount of the proposed fine, this does not, in and of itself, render the impugned interference disproportionate. For a fine to be considered disproportionate, it must be established that the applicant's financial interests are adversely affected to a greater extent than the public interest that prompted the imposition of the fine.

124. It has not been alleged that the imposition of a fine amounting to TRY 68,844,704,704.73 on the applicant has resulted in a financial hardship upon it. Furthermore, the applicant received the early payment discount and paid the sum of TRY 51,117,193.71, as stated in the declaration. In light of the substantial public interest in safeguarding consumer rights and competition, it has been determined that the imposition of an administrative fine of nine per thousand of the applicant's net income for 2010, in consequence of the applicant's involvement in an agreement that restricts competition, did not unduly burden the applicant, and that the fine did not disrupt the fair balance between the public interest and the individual interest.

125. For these reasons, it must be held that there was no violation of the applicant's right to property safeguarded by Article 35 of the Constitution.

C. Alleged Violation of the Prohibition of Discrimination in conjunction with the Right to Property

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

126. The applicant claimed that in the Board's decision, fifteen undertakings were imposed fines at different rates, but the highest fine was imposed on it. The applicant maintained that the export revenues were not included in the base of the fine because other companies did not export, or exported through other companies of the holding companies to which they were affiliated, and that the inclusion of the export revenues in the base of the fine imposed on it violated the prohibition of discrimination taken in conjunction with the right to property.

127. In the Ministry's opinion, the explanations in the letter from the Competition Authority were requested to be considered. The letter sent by the Competition Authority through the Ministry stated that Article 16 § 3 of Act no. 4054 stipulates that net sales, rather than domestic net sales, must be taken into consideration, and therefore there was no violation of the principle of equality.

2. The Court's Assessment

128. Article 10 of the Constitution, insofar as relevant, provides as follows:

"Everyone is equal before the law without any discrimination based on language, race, colour, sex, political view, philosophical belief, religion, sect or similar other reasons.

...

State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."

a. Applicability

129. The principle of equality is recognised both as a right in itself and as a fundamental principle governing the exercise of other rights and freedoms. Article 10 of the Constitution does not contain any restriction as to the individuals who may enjoy the principle of equality or as to its scope. Pursuant to Article 11 of the Constitution, which provides that "*the provisions of the Constitution are fundamental legal rules binding on the legislative, executive and judicial organs, administrative authorities and other institutions and individuals*", the principle of equality set out in the "General Principles" section of the Constitution applies to the said organs, institutions, and individuals. In addition, the last paragraph of Article 10 of the Constitution, which stipulates that "*state organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings*," obliges the legislative, executive and judicial organs and administrative authorities to act in accordance with the principle of equality and the prohibition of discrimination (see *Nurcan Yolcu* [Plenary], no. 2013/9880, 11 November 2015, § 35; *Gülbu Özgüler* [Plenary], no. 2013/7979, 11 November 2015, § 42). As a matter of fact, in relation to Article 10 of the Constitution, the Advisory Council has stated in its reasoning that state organs and administrative authorities are obliged to carry out thestate affairs incumbent on them, without discriminating persons.

130. Since the prohibition of discrimination affects the enjoyment of the rights and freedoms safeguarded by the Constitution, it does not exist in isolation of the substantive rights and is complementary to other rights. Although the application of the prohibition of discrimination does not necessarily require a violation of other provisions, the prohibition of discrimination cannot come into play unless the disputed issue falls within the scope of one or more of the rights safeguarded by the Constitution (see *Nuriye Arpa*, no. 2018/18505, 16 June 2021, § 43).

131. The applicant claimed that the prohibition of discrimination had been violated, taken in conjunction with the right to property. As previously stated, the applicant is the proprietor of a property (*see* § 76). In this instance, the finding that the applicant company had an economic

interest under Article 35 of the Constitution was deemed sufficient grounds for an examination to be conducted under the prohibition of discrimination enshrined in Article 10 of the Constitution.

b. Admissibility

132. The principle of "equality before the law", enshrined in Article 10 of the Constitution, applies to those who experience the same legal conditions. The principle provides for equality, not *de facto* , then *de jure*. The purpose of the principle of equality is to ensure that the same procedures are applied to people with the same legal status and to prevent discrimination and the granting of privileges. This principle prohibits a breach of equality before the law by applying different rules to certain people with the same legal status. Equality before the law does not mean that everyone is treated equally in all respects. The special circumstances of certain individuals or communities require that different rules or practices be applied to them. If the same rules are applied to those with the same legal status and different rules are applied to those with a different legal status, the principle of equality enshrined in the Constitution would not be impaired (*see the Court's decision no*. E.2009/47, K.2011/51, 17 March 2011).

133. A matter which may be examined by the Court under Article 10 of the Constitution in the individual application procedure presupposes the existence of a difference in treatment between individuals in the same or a relatively similar situation. The requirement to prove the existence of a similar situation does not require the groups being compared to be identical (see *Nuriye Arpa*, § 55).

134. In the present case, the applicant complained that the other undertakings who were subject to the same decision by the Board did not generate export revenues. Consequently, the applicant maintained that it was subjected to a more severe penalty on the grounds that it did have export revenues.

135. In this context, the initial question to be addressed is whether undertakings with export income among their gross incomes and those without export income can be considered comparable and therefore in a

similar situation. With regard to the infringement of the prohibition set forth in Article 4 of Act no. 4054, it is evident that the circumstances of undertakings with export revenues and those without export revenues are analogous and thus relatively comparable.

136. Secondly, it is necessary to ascertain whether the applicant has been treated in a manner that differs from that of other undertakings in a comparable position. In determining the existence of different treatment, all the circumstances of the case must be considered as a whole (see *Reis Otomotiv Ticaret ve Sanayi A.Ş.* [Plenary], no. 2015/6728, 1 February 2018, § 88).

137. The safeguards afforded by the prohibition of discrimination in Article 10 of the Constitution are triggered when there is a difference in treatment between persons in similar legal circumstances. Therefore, the similar circumstances and the different treatments must first be demonstrated. In cases where the existence of different treatment is *prima facie* apparent, the applicant is not required to undertake any effort of proof. In this context, it is not possible for the applicant to bear an additional burden of proof for a difference in treatment arising independently of the motive/intention of the person being treated, even if such *a difference in treatment* results from legislation or practice. Additionally, in cases where the difference in treatment is attributable only to the motive/intent of the perpetrator - such as mistreatment of a person for discriminatory motives - the burden of proof lies with the applicant. In such cases, it is the intention of the person who commits the act that characterises the act as *different treatment* (see *Burcu Reis*, no. 2016/5824, 28 December 2021, § 57).

138. In the present case, it cannot be stated that it is *prima facie* apparent that the inclusion of foreign income in the tax base of the fine imposed on the applicant, who also had export income, amounts to a difference in treatment. A comprehensive analysis of of Article 16 § 3 of the Act no. 4054 reveals that the "*annual gross income*" shall be taken as the basis for determining the fine to be imposed. The relevant provision does not make a distinction between the types of gross income of the undertakings concerned.

139. The underlying reason for not including, through the same Board decision, the foreign income of the other sanctioned undertakings in determining the base for the penalty is not the formulation of the relevant Act in a way that would give rise to difference in treatment or the discriminatory motive of the administration, but the non-engagement by these undertakings in export business, unlike the applicant. It is beyond doubt that the Board took the 2010 gross revenues of all undertakings as a basis. Nor did the applicant raise an allegation that the Board determined the fine base for some undertakings below their gross income in 2010. In this case, the only reason for the exclusion of foreign income in determining the base for the applicable fine in respect of the other undertakings is the absence of foreign income on their parts.

140. While the inclusion of the applicant's foreign income in the penalty base is a matter worthy of consideration in the context of the proportionality of the interference with the right to property, this does not constitute a difference in treatment. It had been therefore concluded that the inclusion of export revenues in the tax base of the penalty imposed on the applicant, which, unlike other undertakings, also had export revenues, did not constitute a difference in treatment. In this instance, it has been deemed evident that there was no violation of the prohibition of discrimination taken in conjunction with the right to property.

141. The alleged violation of the prohibition of discrimination in conjunction with the right to property must be declared inadmissible for *not being manifestly ill-founded* and there being no other grounds for its inadmissibility.

D. Alleged Violation of the Right to a Fair Trial

1. Alleged Violation of the *Ne Bis In Idem* Principle

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

142. The applicant claimed that, although it was decided that no investigation was required for the period following the special consumption tax reduction, the re-investigation of the period in question violated the *ne bis in idem* principle.

143. In its observations, the Ministry requested that the explanations made in the letter sent by the Competition Authority be taken into consideration. The letter sent by the Competition Authority through the Ministry referred to the explanations made regarding the alleged violation of the right to property.

b. The Court's Assessment

144. Article 36 § 1 on 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."

i. Admissibility

145. The alleged violation of the *ne bis in idem* principle must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

ii. Merits

(1) General Principles

146. The principle of not to be tried or punished twice (*ne bis in idem*) is not explicitly regulated in the Constitution. However, in its *Ünal Gökpınar* ([Plenary], no. 2018/9115, 27 March 2019) judgment, the Constitutional Court, in line with its own case-law concerning the rule of law and the principle of legal certainty, and with reference to the provisions of particular international law, considered this principle, which it had previously accepted as one of the basic principles of the rule of law, as an element inherent in the right to a fair trial safeguarded by Article 36 of the Constitution (see *Ünal Gökpınar*, § 50 The principle of not to be tried or punished twice for the same offence, which safeguards that individuals shall not be tried or punished again after a criminal trial has been conducted and concluded, is intended to ensure legal certainty in criminal proceedings within the scope of the right to a fair trial. As a matter of fact, although the Additional Protocol no. 7 to the European Convention on Human Rights ("Convention") enshrines the right not to

be tried or punished twice as a separate right, it has been emphasised in the judgments rendered by the European Court of Human Rights ("ECHR")that this principle is a particular safeguard mainly concerned with the right to a fair trial. In some international conventions, the principle of not being tried or punished more than once for the same offence is explicitly recognised as a safeguard inherent in the right to a fair trial (see *Ünal Gökpınar*, § 49).

147. In its decision dated 4 November 2021 and numbered E.2019/4, K.2021/78, the Court, taking into account the international documents on the subject, defined the principle of not to be tried or punished twice for the same offence as that no one can be tried or punished again within the scope of criminal proceedings for an act for which he/she has been convicted or acquitted with a final judgment in criminal proceedings. In the relevant decision, some of the requirements that are sought to conclude that this principle has been violated are listed as follows: (1) there is a *criminal* proceeding, (2) this proceeding has resulted in a final conviction or acquittal, (3) a *criminal* proceeding is being re-opened (again), (4) different criminal proceedings are related to the same act, and (5) none of the exceptions to the principle apply (*see the Court's decision* no. E.2019/4, K.2021/78, 4 November 2021, § 27).

148. With regard to the first and third requirements, *criminal* proceedings are not necessarily provided for as proceedings in the sense of criminal justice law, but are subject to an autonomous interpretation in the constitutional sense. As a matter of fact, the Court, in its constitutionality review and individual application decisions, interpreted Articles 36 and 38 of the Constitution and held that the notion of *criminal* proceedings also applies to administrative tax fines (*see the Court's decisions* no. E.2019/16, K. 2019/15, 14 March 2019, § 13; *Gür-Sel İnşaat Malzemeleri San. Tic. Ltd. Şti.*, B. No. 2013/4324, 7 July 2015; and *Ünal Gökpınar*, §§ 54-56).

149. With regard to the second requirement, the Court must autonomously interpret what is to be understood by a conviction or acquittal decision. In this sense, the interest safeguarded by the principle of not to be tried or punished more than once for the same offence is that

the person should not be tried and punished again/repeatedly following a favourable or unfavourable final/confirmed decision on the person's criminal responsibility has been taken by examining the merits of the accusation in respect of an act subject to *criminal* sanction. Therefore, following the assessment of the evidence and the determination of the facts in the proceedings concerning a sanction qualified as a penalty under the autonomous interpretation, a decision containing an assessment as to whether or not the person has committed the relevant offence should be qualified as a decision of conviction or acquittal within the meaning of the principle of not to be tried or punished twice for the same offence. However, decisions which are rendered without examining the merits of the case and which do not involve a determination of the person's criminal responsibility - for example, a decision of dismissal on the grounds of limitation or a decision of non-prosecution - cannot be qualified as a decision of acquittal within the framework of the principle in question (*see* the Court's decision no. E.2019/4, K.2021/78, 4 November 2021, § 29).

150. A violation of the principle occurs when the first four requirements are met. In addition, international law prescribes some exceptional circumstances that may constitute an exception to the principle. It is essential to take these into account when interpreting the Constitution in the framework of the relevant principle. In this respect, the first two exceptional circumstances are the emergence of new evidence, which is laid down in Article 4 § 2 of Protocol no. 7 to the Convention and is recognised through laws in Turkish legal system, and the discovery of a fundamental defect in the previous proceedings which may affect the outcome of the proceedings. The third notable exception pertains to the evolution of ECHR case-law, whereby criminal proceedings, even when formally comprising multiple phases, are increasingly regarded as integral components within a unified framework (see *A and B v. Norway* [GC], no. 24130/11, 29758/11, 15 November 2016, § 130).

151. Accordingly, the emergence of new evidence constitutes an exception to the principle of not to be tried or punished twice for the same offence. Article 4 § 2 of the Protocol provides that a case may be

reopened, in accordance with the law and criminal procedure of the State concerned, on the basis of newly discovered evidence which may have a bearing on the outcome of the case. This cannot be considered as a breach of the safeguard provided by the relevant principle (see *Çetin Doğan* [Plenary], no. 2021/30714, 15 February 2023, § 156).

(2) Application of Principles to the Present Case

152. The Court has previously determined that *disputes pertaining to accusations of an administrative nature* imposed for misdemeanour offences fall within the scope of Article 36 of the Constitution and Article 6 of the Convention, as is the case for *disputes concerning criminal charges* (see *Remzi Durmaz*, no. 2013/1718, 2 October 2013, § 26). It is evident that the dispute concerning the imposition of an administrative fine on the applicant falls within the scope of the *ne bis in idem* principle.

153. In the present case, a preliminary investigation was carried out in order to determine whether an investigation was required based on the Board's decision dated 29 April 2009 regarding the period following the decision of the Council of Ministers dated 16 March 2009 regarding the reduction of special consumption tax. Accordingly, with the Board's decision dated 24 June 2009, it was decided that there was no ground for an investigation by stating that there was not sufficient evidence of the existence of an agreement or concerted action to constitute a violation of Article 4 of Act no. 4054. The applicant maintained that the inclusion of this period in the scope of the investigation initiated in connection with the developments subsequent to the exchange rate increases in 2006 and 2008, as a consequence of the Board's decision dated 9 September 2009, violated the principle of not to be tried or punished twice for the same act. In this instance, it is essential to ascertain whether the Board's decision of 24 June 2009 indicating that there is no need for an investigation into the period subsequent to the reduction in the special consumption tax can be defined as an *acquittal* decision.

154. It has been understood that the Board relied on the preliminary investigation report, not the investigation report, for its decision of 24 June 2009. With regard to Article 40 of Act no. 4054, it should be noted that the purpose of the preliminary investigation is to determine

whether there is sufficient evidence to launch an investigation against the undertaking. In consequence of the preliminary investigation, the question is posed as to whether there is sufficient evidence to initiate an investigation against the undertaking. In the event that the evidence is deemed sufficient to launch an investigation, the decision is taken to proceed with an investigation against the undertaking.

155. While it is indisputable that the decision to launch an investigation does not amount to a *conviction*, it is not straightforward to ascertain whether the decision not to launch an investigation can be regarded as an *acquittal*. Although the examination conducted in the preliminary investigation report is limited to determining whether there is sufficient evidence to proceed with an investigation, the conclusion that there is insufficient evidence to open an investigation may also indicate that the available evidence is inadequate to reach a conclusion regarding the commission of the offence. Consequently, it should be ascertained whether the decision not to initiate an investigation has the force of an acquittal decision under the particular circumstances of every given case. In the present case, this can be attained by examining the content of the Board's decision.

156. It is crucial to establish whether a decision not to initiate an investigation constitutes an acquittal decision and the scope of the evidence on which the decision is based is the determining factor in this regard. In light of these considerations, it can be concluded that if a decision is made by the investigating authorities to not proceed with an investigation after a comprehensive assessment of the available evidence, it may be regarded as an acquittal decision. If, at the preliminary investigation stage, the Board evaluates all the evidence in the file and decides that it is not sufficient to proceed against the undertaking, this means that the criminal liability of the undertaking has been decided. On the other hand, if it is observed that the decision in question was rendered without assessing the evidence, then it may be considered not to be in the nature of an acquittal.

157. In the present case, it has been understood that the Board's decision of 24 June 2009, which found no need to launch an investigation, was based on an assessment of all the evidence available

to the investigating authorities (the Board). In particular, the Board's decision emphasised that there was no communication or exchange of information between the companies which would indicate that the parallel price increases complained of were based on a coordination restricting competition. It is therefore considered that the Board's decision -dated 24 June 2009- not to investigate is the equivalent of an *acquittal*. In this respect, it is evident that the inclusion of the period after the special consumption tax reduction in the scope of the investigation initiated in relation to the developments following the exchange rate increases in 2006 and 2008 is in the nature of a repeated investigation.

158. In conclusion, it should be examined whether there is an exception to the principle of not to be tried or punished twice for the same offence.

159. In the present case, during the investigation initiated in connection with the changes following the exchange rate increases in 2006 and 2008, the period after the reduction in special consumption tax was also included in the investigation upon obtaining some evidence that was not available in the previous preliminary investigation. In this context, on the basis of two documents (electronic messages) dated 19 March 2009 and 16 June 2009, which were obtained during the on-site inspections carried out on 14 September 2009 at D. Joint Stock Company and on 15 September 2009 at A. Joint Stock Company and N. Joint Stock Company as part of the investigation initiated in relation to the price increases following the exchange rate fluctuations, it was concluded that the coordination continued in the period following the special consumption tax reduction. The documents in question were not available to the investigating authorities prior to the adoption of the non-investigation decision dated 24 June 2009. It therefore appears that the second investigation was initiated due to two additional pieces of evidence that were not available during the previous investigation.

160. The principle of not to be tried or punished twice for the same offence, safeguarded by Article 36 of the Constitution, does not preclude the launching of a new investigation if new evidence emerges in relation

to an offence for which an acquittal has previously been pronounced. As a matter of fact, Article 4 § 2 of the Additional Protocol no. 7 to the Convention recognises the initiation of an investigation following the obtaining of new evidence as an exception to the prohibition of double jeopardy and repeated investigation.

161. As a result, it has been understood that the re-investigation of the period after the special consumption tax reduction is based on the ground of *new evidence*, which is one of the exceptions to the principle of not to be tried and punished again for the same offence.

162. For these reasons, it must be decided that the principle of not to be tried and punished twice for the same offence, safeguarded by Article 36 of the Constitution, has not been violated.

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

a. The Applicant's Allegations

163. The applicant maintained that the right of access to a court had been violated due to the withdrawal of the rectification procedure in the course of the proceedings although the rectification was available as a remedy at the time the action for annulment was brought.

b. The Court's Assessment

164. 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 (see *Özbakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti.*, no. 2014/13156, 20 April 2017, § 34).

165. 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).

166. The right to a fair trial does not confer a guarantee of the right to appeal judicial decisions before a court or other tribunal (see *Mustafa*

Kılıç [Plenary], no. 2019/35236, 18 May 2022, § 88). However, the right of access to a court entails the right to bring an action before the first instance court, as well as, if possible, the right to appeal the first-instance decision (see *Ali Atlı*, B. No. 2013/500, 20 March 2014, § 49).

167. Article 54 of the repealed Law no. 2577 provides the opportunity to request rectification of the decisions rendered by the Council of State upon appeal. However, the relevant article was annulled by Article 103 of Law no. 6545 of 18 June 2014. Accordingly, the legal existence of the rectification mechanism in the administrative procedure was terminated on 28 June 2014, with the entry into force of Law no. 6545.

168. In this sense, considering that the right of access to a court does not safeguard the right to appeal against a court decision, the withdrawal of the procedure of rectification of the decision in the Turkish administrative procedure and the employment of this withdrawal in pending proceedings does not constitute an interference with the right of access to a court.

169. As there is no interference with the applicant's right of access to a court, this part of the application must also be declared inadmissible for *being manifestly ill-founded*.

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

a. The Applicant's Allegations

170. The applicant maintained that its right to a trial within a reasonable time had been violated due to the prolongation of the proceedings.

b. The Court's Assessment

i. Admissibility

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

ii. Merits

172. In its previous judgments, the Court has explicitly pointed to the circumstances under which a sanction or a legal act/action may be considered to constitute a *criminal charge* and thus fall under the scope of the safeguards with respect to *offences* and *penalties* (*see D.M.Ç*, no. 2014/16941, 24 January 2018; *B.Y.Ç.*, no. 2013/4554, 15 December 2015; and *Selçuk Özbölük*, no. 2015/7206, 14 November 2018).

173. The proceedings in the present case pertain to administrative fines. In light of the principles set forth in the aforementioned decisions, it is indisputable that the criminal proceedings in question has a broad impact that is binding for all parties involved. It is conducted by a public authority wielding public power, serves a punitive and deterrent purpose, and should be regarded as a *criminal charge* in the context of the right to a fair trial, with due consideration given to the amount of the penalty. Accordingly, it is incumbent upon the Court to determine the applicability of the right to a fair trial, which is afforded common protection under the Convention and the Constitution, to the specific circumstances of the *criminal charge* in question.

174. In the determination of the length of criminal proceedings, the period to be taken into account begins to run as soon as a person is informed by the competent authorities of the fact that he is charged or on the date when the person is first affected by the charge due to the application of certain measures such as search and custody; and it ends once the final judgment is delivered in respect of the criminal charge or when, with regard to ongoing proceedings, the Court renders its judgment on an alleged violation of the right to a trial within a reasonable time (see *B.E.*, no. 2012/625, 9 January 2014, § 34).

175. Matters such as the complexity of a case, levels of jurisdiction, the attitude of the parties and the relevant authorities during the proceedings and the applicants' interest in the speedy conclusion of the proceedings are the criteria which are taken into consideration in the determination of whether the length of the criminal proceedings is reasonable (see *B.E.*, § 29).

176. Accordingly, considering the aforementioned principles and the decisions of the Court in similar cases, it must be concluded that the period of 9 years, 10 months and 26 days between 24 June 2009, when the second preliminary investigation process was initiated against the applicant, and 20 May 2019, when the administrative judicial process was finalised, was not reasonable.

177. For these reasons, it must be held that there has been a violation of the applicant's right to a trial within a reasonable time within the scope of the right to a fair trial protected under Article 36 of the Constitution.

E. Redress

178. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, insofar as relevant, provides 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 a 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."

179. The applicant requested the Court to find a violation, award TRY 51,117,193.71 as pecuniary compensation along with legal interest to be accrued as of the date of payment, and order a retrial if the compensation is not awarded.

180. In its judgment in the case of *Mehmet Doğan* ([Plenary], no.

2014/8875, 7 June 2018), the Court indicates the general principles as to how a violation of any fundamental right, which has been found established by the Constitutional Court, and its consequences will be redressed. In another judgment, the Court 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).

181. 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 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).

182. Before ruling on what needs to be done to redress the violation and its consequences, the source of the violation must first be ascertained. In this respect, a violation may stem from administrative acts and actions, judicial acts, or legislative acts. Determining the source of the violation plays a significant role in finding the appropriate way of redress (see *Mehmet Doğan*, § 57).

183. If a violation has emerged as a result of the application by the administrative authorities or the inferior courts of a provision of law with such a clarity that does not enable them interpret it in accordance with the Constitution or as a result of uncertainties in the law, then the violation stems not from the application of the law but directly from the law itself. (see *Yıldız Eker* [Plenary], no. 2015/18872, 22 November 2018, § 84). In this case, the found violation may be eliminated with all of its consequences only when the provision of law giving rise to the violation is either repealed completely or amended in a way that will not lead

to further violations or the uncertainty is eliminated to prevent it from causing any further violations (see *Süleyman Başmeydan*, no. 2015/6164, 20 June 2019, § 70).

184. In the present case, it has been determined that the right to the right to respect for home had been violated due to the on-site inspection conducted with no prior judicial decision. It has been understood that the violation stems from the failure to regulate the authority granted for on-site examinations, as outlined in the pertinent provisions of Act no. 4054, in accordance with the safeguards set forth in Article 21 § 1 of the Constitution.

185. As the violation of the right to respect for home is not contingent on the outcome of the proceedings, there is no legal interest in ordering a retrial. Additionally, in order to prevent similar violations in the future, it is required to review the provision that led to the violation. In this context, a copy of the judgment should be transmitted to the legislature for its appreciation, since the enactment of regulations, taking into account the constitutional principles mentioned above, would be in line with the purpose and function of the individual application mechanism in terms of preventing similar violations.

186. As the applicant did not claim compensation in relation to the violations of the right to a trial within a reasonable time and the right respect for home, it was not deemed possible to award compensation.

187. The litigation costs of TRY 10, 264.60, including the court fee of TRY 294.70 and counsel's fee of TRY 9,900, 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 23 March 2023:

A. 1. That the alleged violation of the right to respect for home be DECLARED INADMISSIBLE;

2. That the alleged violation of the right to property be DECLARED ADMISSIBLE;

3. That the alleged violation of the prohibition of discrimination in conjunction with the right to property must be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

4. That the alleged violation of the principle of not to be tried or punished twice for the same offence be DECLARED ADMISSIBLE;

5. That the alleged violation of the right of access to a court be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

6. That the alleged violation of the right to a trial within a reasonable time must be DECLARED ADMISSIBLE;

B. 1. BY MAJORITY and by dissenting opinion of Mr. İrfan FİDAN and Mr. Muhterem İNCE, that the alleged violation of the right to respect for home safeguarded by Article 21 of the Constitution was VIOLATED;

2. UNANIMOUSLY that the right to property safeguarded by Article 35 of the Constitution was NOT VIOLATED;

3. UNANIMOUSLY that the principle of not to be tried or punished twice for the same offence safeguarded by Article 36 of the Constitution was NOT VIOLATED;

4. UNANIMOUSLY that the the right to a trial within a reasonable time safeguarded by Article 36 of the Constitution was VIOLATED;

C. That the situation necessitating an amendment for the elimination of the structural problem be NOTIFIED to the Grand National Assembly of Türkiye;

D. That the total litigation costs of TRY 10,264.60, including the court fee of TRY 364.60 and counsel's fee of TRY 9,900, must be REIMBURSED to the applicant;

E. That the payment be made within four months as from the date when the 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 fourmonth time-limit to the payment date;

F. That a copy of the judgment be REMITTED to the 13th Chamber of the Council of State (no. E.2011/3814, K.2017/958) for information; and

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

DISSENTING OPINION OF JUSTICES İRFAN FİDAN AND MUHTEREM İNCE

1. The applicant argued that, pursuant to Article 21 of the Constitution, the right to respect for home may only be interfered with by a judge's decision, and that the on-site inspection carried out at the workplace did not contain sufficient legal safeguards.

2. The "search procedure" restricts fundamental rights such as the right to privacy, the right to respect for home and the right to physical integrity. (see the Court's decision, E.2005/43, K.2008/143, 18 September 2008). In the present case, the competition experts conducted an on-site inspection at the applicant's workplace pursuant to Article 15 of Act no. 4054. The on-site inspection, stipulated in the impugned Article, is the inspection carried out on the premises by the Board officials through paying visits to the workplaces of undertakings or associations of undertakings. To this end, the Board is entitled to examine the books, all types of data and documents of undertakings and associations of undertakings kept on physical or electronic media and in information systems, and take copies and physical samples thereof, request written or oral statement on particular issues, and perform on-site inspections of any assets of undertakings.

3. In view of the competencies provided in Article 15 of Act no. 4054, it is understood that the on-site inspection is an activity carried out in the head offices, branches and facilities where a given undertaking exercises its administrative functions. Undoubtedly, the places where the administrative affairs of the undertakings are carried out and the areas which are not freely accessible to everyone, such as workrooms, are considered to be homes.

4. In the present case, on 29 July 2009, competition experts authorised to conduct a preliminary investigation visited the applicant's address in the Gölcük district of Kocaeli and conducted an on-site inspection. As a result of the investigation, 78 pages of documents consisting of electronic mails obtained from the computers of the company's employees were acquired. Moreover, having regard to Article 15 of Act no. 4054 as a whole in the present case, it is evident that the facilitation of the on-site

inspection is a legal obligation imposed on the entrepreneur. In fact, Article 16§ 1 (d) of the relevant Act provides for the imposition of a fine on the entrepreneur in the event of breach of this obligation.

5. It may be acknowledged that the on-site inspection of the applicant's workplace constituted an interference with the right to respect for home safeguarded by Article 21 of the Constitution.

6. Article 21 of the Constitution reads as: "*The domicile of an individual shall not be violated. Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on these grounds, no domicile may be entered or searched or the property seized therein*."

7. The applicant is a joint stock company operating in the automotive market, which has acquired the rights to manufacture and sell certain models of Ford Motor Company. The primary operations of the applicant company are the production, import, export and distribution of Ford brand vehicles and parts. Firstly, the applicant company manufactures vehicles and spare parts in its two factories in Kocaeli and Eskişehir. The applicant also operates on the Stock Exchange and is a publicly listed company.

8. First of all, it should be noted that the inspection at the applicant's place of work is not a search activity, but an "on-site inspection", which the Competition Authority is authorised by law to carry out. An "on-site inspection" was carried out at the applicant's workplace on 29 July 2009.

9. In the present case, the applicant alleged that the on-site inspection at its workplace was in breach of the Constitution. The on-site inspection was conducted and concluded on 29 July 2009.

10. The jurisdiction of the Court may be exercised in respect of proceedings, acts and decisions finalised after 23 September 2012. As the assessments and the decision in the annulment proceedings brought by the applicant relate to dates after 23 September 2012 and

to the annulment of the administrative fine, they may be the subject of an individual application and examined by the Court. However, the inspection activity carried out in 2009 cannot be considered to fall within the Court's jurisdiction, as it was examined in the context of the alleged violation of the right to respect for home and the violation had ceased at the time of the on-site inspection. As a matter of fact, the Court ruled that the action for compensation filed under Article 141 of the Code of Criminal Procedure against the arrest warrant issued prior to 23 September 2012 was inadmissible for lack of jurisdiction *ratione temporis*, on the grounds that the dates of the arrest took place and ended before 23 September 2012 and that the action related to a period that the Constitutional Court could not examine in terms of lack of jurisdiction *ratione temporis* (see *Safkan Aydoğdu*, no. 2014/7498, 5 April 2017, and *Aziz Yıldırım* (4), no. 2014/4476, 16 April 2015). If the date on which the basic transaction, decision or action was completed and finalised is before 23 September 2012, it cannot be considered within the jurisdiction of the Court to examine the transaction finalised before 23 September 2012 on the basis of the action for annulment of the subsequent administrative fine. Even in the event of a measure such as detention, the Court rejected the applications involving compensation claims based on the detention decision, for lack of jurisdiction *ratione temporis.*

11. In the present case, the inspection activity at the applicant's workplace was carried out and completed in 2009. The subsequent action seeks the annulment of the administrative fine. No actions have been filed alleging damage as a result of the on-site inspection.

12. Admissibility is examined by the Court at every stage. In the present case, since the date of the alleged violation of the right to respect for home falls before 23 September 2012, the application must be declared inadmissible for lack of jurisdiction. The decision adopted by the majority did not make any assessment in this respect and failed to justify the change in case-law.

13. In addition, an "on-site inspection" was carried out at the applicant's workplace. There was no search or seizure, but an on-site inspection was conducted on the basis of the authorisation granted

by Act no. 4054, of which the applicant had prior legal knowledge. No objections were raised by the applicant during the on-site visit.

14. In the present case, it has been understood that the on-site inspection had a legal basis, this circumstance cannot be considered as a violation of the right to respect for home, in fact the inspection was carried out in accordance with the purposes of Act no. 4054 and in this respect, had a legitimate aim.

15. It was concluded that the inspection was carried out with the knowledge of the applicant and on the basis of the information and documents provided by the applicant, that there was no allegation to the effect that the impugned process had gone beyond the extent of an inspection, and that the interference was proportionate.

16. Therefore, we have dissented from the majority's conclusion finding a violation, as we are of the opinion that the applicant's right to respect for home was not violated in the present case, and that the application should have been declared inadmissible due to lack of jurisdiction *ratione temporis.*

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

İLYAS BULCAY

(Application no.2020/24527)

9 February 2023

On 9 February 2023, the Second Section 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 *İlyas Bulcay* (no. 2020/24527).

(I-IV) SUMMARY OF THE FACTS

[1-15] The applicant, who was a lawyer and former administrator of Fenarbahçe fan associations, was sentenced to an administrative fine amounting to 5,014 Turkish liras (TRY) due to his post in a social media platform called Twitter. The applicant's challenge against the administrative fine was dismissed by a magistrate court. The applicant then again appealed against the decision issued by the magistrate judge, which was later dismissed for the judge's decision's being compatible with the procedure and law. The final decision was communicated to the applicant on 7 July 2020.

V. EXAMINATION AND GROUNDS

16. The Constitutional Court ("the Court"), at its session on 9 February 2023, examined the application and decided as follows:

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

17. The applicant underlined that his social media post, which was the subject of the contested penalty, included no incitement to or glorification of violence, or any equivalent rhetoric. The applicant indicated that the content in question lacked any violent elements and solely represented personal opinions, thus falling within the ambit of the freedom of expression. Pointing out that the penalty imposed on him due to his social media post could create a deterrent effect, the applicant indicated that his statements on a matter of public debate had not exceeded the limits of criticisms. In light of the foregoing, the applicant maintained that his freedom of expression had been infringed.

18. The applicant alleged that Article 22 § (2) of the Law no. 6222 on Prevention of Violence and Disorder in Sports ("Law no. 6222"), which

served as the legal basis for the administrative fine, pertained to regulations governing administers of sports clubs or federations. Accordingly, he highlighted that he did not hold any of these positions and that his contentions in this regard had not been duly considered by the courts of instance. The applicant considered that the court made an erroneous assessment as it interpreted his Twitter post as falling within the scope of *statements made in the press or through publication* as prescribed under Article 22 of Law no. 6222. Consequently, the applicant further indicated that the courts of instance dealing with his case had dismissed his appeal in a formalistic manner without providing any reasoned decision. Therefore, the applicant claimed that his right to a fair trial had been violated due to the above-mentioned grounds.

19. In its observations, the Ministry indicated that the present application should be assessed in light of the provisions of the Constitution, relevant legislation, and the case-law of the Constitutional Court on the freedom of expression, as well as in the specific circumstances of the case. In this context, the Ministry emphasized the need to ascertain the existence of the interference with the freedom of expression, its legal basis, the legitimate aim pursued and whether the administrative fine had been proportionate to the legitimate aim pursued and whether the decisions of the Chief Public Prosecutor's Office and the magistrate judge had provided relevant and sufficient grounds.

20. In his counter-statements, the applicant reiterated his previous claims, asserting that his expressions which were subject to the administrative fine had fallen within the scope of the freedom of expression.

B. The Court's Assessment

21. The Constitutional 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). Therefore, the applicant claimed that his right to a fair trial as well as his freedom of expression had been violated. The Court has considered that the essence of the applicant's allegations relates to the administrative fine imposed on him due to the social media post. It has accordingly considered it appropriate to examine the applicant's complaints under Article 26 of the Constitution.

22. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*", provides, 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. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.

The exercise of these freedoms may be restricted for the purposes of ... public order, ... preventing crime, ..."

1. Admissibility

23. 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.

2. Merits

a. Existence of an Interference

24. An administrative fine of TRY 5,014 was imposed on the applicant due to his social media post. This fine interfered with the applicant's freedom of expression.

b. Whether the Interference Constituted a Violation

25. 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 the democratic order of the society ... and the principle of proportionality."

26. It must be assessed whether the foregoing interference complied with the criteria of being prescribed by law, pursuing aims indicated in the relevant article of the Constitution and being in line with the requirements

of the democratic order of the society, as stipulated in Article 13 of the Constitution, which are applicable to the present case.

i. Lawfulness

27. It has been concluded that the interference met the criterion of being *prescribed by law* set out in Article 22 of Law no. 6222.

ii. Legitimate Aim

28. It has been observed that the fine was imposed on the applicant for the purpose of preventing violence and disorder in sports. Therefore, it has been assessed that the impugned interference with the applicant's freedom of expression aimed to *protect public order and preventing crime.*

iii. Compliance with the Requirements of a Democratic Society

(1) General Principles

29. 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 due to 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).

30. 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 judgment no. E.2007/4, K.2007/81, 18 October 2007). 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 *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, § 77; *Sırrı Süreyya Önder* [Plenary], no. 2018/38143, 3 October 2019, § 58; and see, *mutatis mutandis*, *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; and *Tansel Çölaşan*, § 51). The proportionality refers to a fair balance struck between the rights of individuals and the public interests (see *Zübeyde Füsun Üstel and Others*, § 132; and see, *mutatis mutandis*, *Bekir Coşkun*, § 57; *Tansel Çölaşan*, §§ 46, 49, 50; and *Hakan Yiğit*, no. 2015/3378, 5 July 2017, §§ 59, 68).

31. In ensuring the fair balance, the courts of instance have a certain degree of discretion to assess whether the interference with the freedom of expression met a pressing social need. Nevertheless, this discretion is subject to review by the Constitutional Court (see *Kemal Kılıçdaroğlu*, no. 2014/1577, 25 October 2017, § 57).

32. Any interference with the freedom of expression that lacks justification or is based on grounds contrary to the criteria established by the Court constitutes a breach of Article 26 of the Constitution. For any interference with the freedom of expression to be compatible with the requirements of democratic order of the society, the grounds relied on by public authorities must be both relevant and sufficient (see, among other decisions, *Kemal Kılıçdaroğlu*, § 58; *Bekir Coşkun*, § 56; and *Tansel Çölaşan*, § 56).

(2) Application of Principles to the Present Case

33. To determine whether the administrative fine imposed on the applicant due to his social media post had corresponded to a pressing social need and whether the interference in question had been proportionate; the content of the post, the environment in which the statement had been made, the sphere of influence and its consequences should be assessed. In this assessment, it is imperative to ascertain whether the decision of the Chief Public Prosecutor's Office to impose the fine and the decisions of the courts of instance reviewing the applicant's appeal against the fine provided relevant and sufficient grounds justifying the interference.

In addition, the nature of the sanction must also be considered in the assessment of the proportionality of the interference with the freedom of expression.

34. The applicant was sentenced to pay an administrative fine due to his social post on *Twitter*. In its decision to impose an administrative sanction, the Chief Public Prosecutor's Office referred to the applicant's post and merely indicated that it constituted an action stipulated in Article 22 of Law no. 6222. The Chief Prosecutor's Office did not conduct any further assessment as to whether the applicant's post had incited or had been likely to incite violence in sports. Having assessed the applicant's appeal against the administrative fine, the magistrate's judge found that the act had been established and that the administrative fine imposed due to the misdemeanour constituted by the act had been in accordance with the procedure and law. However, it has been considered that the decision of the magistrate's judge remained insufficient for providing reasoned explanations addressing substantial allegations on the merits that had been put forward by the applicant in his petition of appeal. It has been observed that similar assessments were made during the appellate proceedings. Accordingly, in light of the proceedings taken as a whole, it has been understood that no assessment was made as to how the applicant's social media post amounted to an act inciting violence in sports.

35. In the relevant post, the applicant asserted that no disguise could obscure them from realizing the ongoing conspiracy of the 3 July by allied perpetrators. He indicated that the media's attempts to shape public perception would not reduce Fenerbahce fans to mere pawns in a years-long theatre, emphasizing that no one could deceive the Fenerbahce fans. He contended that the conspiracy of 3 July persisted in disguise and that victory would be forged through a united struggle. From the outset, it must be recognized that the applicant, in voicing such sentiments, is a devoted supporter of Fenerbahçe, actively engaged in its fan societies. The debates surrounding the match-fixing investigation retain their relevance, even after a considerable period of time. It has been observed that the applicant expressed his personal opinions via social media on a matter of profound public interest that attracts great amounts of attention from football fans and has remained a pertinent topic of discourse.

36. In the present case, the applicant claimed in his social media posts that the ones orchestrating the match fixing scandal were actually an alliance and that this process had still persisted. Accordingly, he called on Fenerbahçe supporters to fight against these plans. In the assessments of the applicant's post, the elements such as excitement, passion and commitment stemming from the profound sense of belonging to a football team should be evaluated. The applicant indicated that his statements "*Victory will be forged through a united struggle (kavganın topyekûn bir mücadele ile kazanılacağı)*" had not referred to a need to fight for rights by resorting to physical violence, but it should be understood as a statement of personal opinion expressing that the injustice faced by Fenerbahçe can be overcome by the collective determination of all its loyal fans.

37. Furthermore, public authorities did not put forward any finding or facts that following the applicant's social media posts, the supporters of the team had poured into the streets, various acts of violence had been committed, or the applicant had created such an environment capable of endangering the security and order of the sports events. Similarly, there had been no assessment in the decision of the Chief Public Prosecutor's Office and the courts of instance that the applicant's statements were of nature capable of offending the supporters, employees or administrators of other football teams and of evoking hostility in these people.

38. It has been observed in the present case that the statements resulting in the imposition of an administrative fine on the applicant had been disseminated via a *tweet* posted on *Twitter*. Consideration must also be given to the nature of the social media platform in question, which serves as a dynamic forum for the immediate expression of spontaneous thoughts and emotions. These expressions are swiftly disseminated and quickly rendered out-dated due to the platform's high usage. Accordingly, the limited number of followers on the applicant's social media account where the said post had been shared also limited the objective influence of the post over broader audiences. In this respect, it has been ascertained that the sphere of influence of the expression of opinion via a social media platform remained limited in the particular circumstances of the present case.

39. An administrative fine of TRY 5,014 was imposed on the applicant due to his social media post. Considering the applicant's support for Fenerbahçe, his role as an administrator in the fans' club, and the interference with his freedom of expression through a criminal sanction, it is evident that imposing an administrative fine for a social media post would have a chilling effect on his future expression of opinions regarding match-fixing discussions.

40. In conclusion, it has been concluded that the authorities failed to put forward *relevant and sufficient grounds* proving that the administrative fine imposed on the applicant due to his social media posts had corresponded to a pressing social need. It has been further assessed that the interference with the applicant's freedom of expression was disproportionate to the pursued legitimate aim. Therefore, it has been found that the impugned interference was not compatible with *the requirements of a democratic society.*

41. In the light of the foregoing, it must be held that there was a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

3. Application of Article 50 of Code no. 6216

42. There has been a legal interest in conducting a retrial in order to redress the consequences of the violation identified in the case. In this respect, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial procedures and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation (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; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100, for the details of the retrial procedure in relation to the individual application set out in Article 50 § 2 of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011).

43. 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.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 9 February 2023 that

A. The alleged violation of the freedom of expression be DECLARED ADMISSIBLE;

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

C. A copy of the judgment be REMITTED to the İstanbul Anadolu 1st Magistrate Judge (E.2020/2515, miscellaneous) for retrial to redress the consequences of the violation of the freedom of expression;

D. The applicant's claim for compensation be REJECTED;

E. The total litigation costs of TRY 10,346.90, including the court fee of TRY 446.90 and the counsel fee of TRY 9,900, 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 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.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MELTEM RADYO VE TELEVİZYON YAYINCILIK A.Ş.

(Application no. 2018/13551)

23 February 2023

On 23 February 2023, the Plenary of the Constitutional Court found no violation of the freedom of expression, safeguarded by Article 26 of the Constitution, in the individual application lodged by *Meltem Radyo ve Televizyon Yayıncılık A.Ş.* (no. 2018/13551).

(I-IV) SUMMARY OF THE FACTS

[1-20] The Radio and Television High Council (RTÜK) initiated an inspection due to a programme broadcast on the applicant's television channel with Meltem TV logo and drafted a report as a result of this inspection. In line with the said report, the applicant was issued a warning and sentenced to an administrative fine due to the doctors' remark that may erode public trust in medical professionals and hospitals and amounted to covert commercial communication. The applicant brought an action for the annulment of the administrative act, but the administrative court dismissed the case. Having examined the applicant's appeal request, the Council of State upheld the decision.

V. EXAMINATION AND GROUNDS

21. The Constitutional Court ("the Court"), at its session on 23 February 2023, examined the application and decided as follows:

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

22. The applicant;

- contended that the court's finding of c*overt commercial communication* on the basis of an abstract claim, was unlawful. The conduct leading to the penalty did not satisfy the statutory definition of covert commercial communication as stipulated by the Law no. 6112 on the Establishment and Broadcasting Services of Radio and Television.

- indicated that the declaration of the Ministry of Health concerning the advertisements of supplements, which was the basis for the imposition of the warning penalty on the applicant, did not cover the impugned programme since the programme in question was not an advertisement but a health-focused television broadcast addressing chronic diseases and complementary medical practices.

-maintained that the Ministry of Health had published the Regulation on Traditional and Complementary Medicine Practices in 2014, acknowledging complementary medicine and its practices as legitimate medical methods. The applicant further referenced substantial scientific studies and publications worldwide on this matter, arguing that the allegations deeming the practices discussed in the programme as scientifically unsound were unfounded. The applicant asserted that the public authority-imposed penalties in an arbitrary manner and through unsubstantiated interpretations without relying on any tangible grounds.

- argued that similar programmes were broadcast on various television channels without RTÜK imposing administrative sanctions against them. Additionally, the judicial authorities had rendered decisions with inadequate examination, which lacked reasoning. The applicant claimed that its rights under Articles 26, 28, and 35 of the Constitution had been violated.

23. The Ministry, in its observation, stated that the legal remedy in the form of rectification of judgment was an ordinary remedy offering a reasonable prospect of success, yet the applicant had filed an individual application with the Court without exhausting this remedy, which necessitated the declaration of the application inadmissible.

B. The Court's Assessment

24. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it conducts such an assessment itself (see *Tahir Canan*, § 16). The Court has determined that the applicant's allegations should be examined within the scope of freedom of expression as enshrined in Article 26 of the Constitution.

25. Article 26, titled "*Freedom of expression and dissemination of thought*" of the Constitution, insofar as relevant, provides as follows:

"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities.

The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, ... protecting the reputation or rights and private and family life of others ..."

1. Admissibility

26. According to the established case-law of the Court, the remedy of rectification of judgment is not a mandatory remedy that must be exhausted prior to filing an individual application. In the absence of exhausting this remedy, applicants must lodge an individual application within thirty days from the date when the decision of the appeal proceedings becomes known (see *Taner Kurban*, no. 2013/1582, 7 November 2013, § 23; *Fikret Güney*, no. 2013/1936, 18 September 2013, § 23). In the present case, the applicant submitted a timely individual application upon the upholding decision by the appeal court and there is no reason in the present application for the Court to depart from its established case-law. Consequently, 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.

2. Merits

a. Existence of an Interference

27. In the present case, the decision to impose warning and administrative fine sanctions on the applicant due to the contested programme aired on the applicant's television channel constitutes an interference with the freedom of expression.

b. Whether the Interference Constituted a Violation

28. The impugned interference would amount to a violation of Article 26 of the Constitution unless it complies with the conditions prescribed in Article 13 of the Constitution.

29. 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."

30. Therefore, it must be determined whether the impugned interference complies with the conditions stipulated in Article 13 of the Constitution of being prescribed by law, pursuing the aims prescribed in the relevant provision of the Constitution, and not being contrary to the democratic society and the principle of proportionality.

i. Lawfulness

31. It has been concluded that the interference was foreseen by Article 8 § 1 (1) and Article 9 § 3 of Law no. 6112, and therefore complies with the criterion of prescribed by law.

ii. Legitimate Aim

32. It has been concluded that the aim sought to be achieved by the decision imposing a warning and an administrative fine on the applicant was the protection of public health, in line with the legitimate aims of protecting the "*rights of others*" and maintaining "*public order*" as regulated in Article 26 of the Constitution.

iii. Compliance with the Requirements of a Democratic Society

(1) General Principles

(a) Compliance of the Interference with the Requirements of a Democratic Society

33. 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 respond to a pressing social need (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 53-55; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 70-72; and the Court's decision, E.2007/4, K.2007/81, 18 October 2007).

34. The measure giving rise to the impugned interference may be considered to meet a pressing social need only when it is suitable for attaining the aim pursued and appears to be in the form of the last remedy

to be resorted to and the most lenient measure available (see, *mutatis mutandis*, *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, § 77; *Sırrı Süreyya Önder* [Plenary], no. 2018/38143, 3 October 2019, § 58; *Bekir Coşkun*, § 51; *Mehmet Ali Aydın*, § 68; *Tansel Çölaşan,* no. 2014/6128, 7/7/2015, § 51). The proportionality indicates striking a fair balance between the interference with the individual's right and the aim sought to be achieved (in the same vein see *Zübeyde Füsun Üstel and Others*, § 132; *Bekir Coşkun*, § 57; *Tansel Çölaşan,* §§ 46, 49, 50; *Hakan Yiğit*, no. 2015/3378, 5 July 2017, § 59).

(b) Significance of the Freedom of Expression in a Democratic Society

35. The Court has consistently maintained that freedom of expression is a cornerstone of democratic society and one of the fundamental conditions for societal development and the progress of each individual (see *Mehmet Ali Aydın*, § 69; *Bekir Coşkun*, §§ 34-36). As a matter of fact, Article 26 § 1 of the Constitution imposes no restrictions on the nature of freedom of expression; it encompasses all forms of expression, including political, artistic, scientific, academic, and commercial expressions of thought and opinion (see *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, § 37; *Önder Balıkçı*, no. 2014/6009, 15 February 2017, § 40). In this context, it is evident that the freedom of expression also embodies the right to seek, receive and share information and ideas on health issues.

36. Nevertheless, the freedom of expression is not an absolute right and subject to the restriction regime envisaged for the fundamental rights and freedoms in the Constitution (see *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, § 70). States may restrict this right to protect the legitimate interests of society. The health of individuals and the public is also among these interests. However, the censorship of health-related information or categorical interferences that restrict the public from participating in health debates and initiatives -on the grounds of the alleged inaccuracy of the information- would constitute a violation of the freedom of expression (see *Mutia Canan Karatay (2),* no. 2018/6707, 31 March 2022, § 33).

(2) Application of Principles to the Present Case

37. The main objective of the assessments to be carried out in respect of the present case would be to ascertain whether the reasoning relied

on by the public authorities in their decisions leading to the interference convincingly demonstrates that the interference was *"in compliance with the requirements of the democratic society."* It is not for the Court to substitute its assessment of the facts for that of the relevant authorities or courts of instance but to determine whether the decisions rendered by the judicial authorities within their margin of appreciation comply with Article 26 of the Constitution (see *Zübeyde Füsun Üstel and Others*, § 76). The Court will assess the following matters having regard to the case file as a whole: whether the imposition of warning sanction and administrative fine on the applicant for airing a television programme, which encouraged conduct and attitudes harmful to the public health and engaged in covert commercial communication responded to a pressing need; whether the impugned interference was proportionate to the pursued legitimate aim; and whether the grounds for the interference were relevant and sufficient (see, in the same vein, *Kemal Kılıçdaroğlu,* no. 2014/1577, 25 October 2017, § 58; *Bekir Coşkun*, § 56; *Tansel Çölaşan,* § 56; *Zübeyde Füsun Üstel and Others*, § 120).

38. In the present case, RTÜK issued a warning to the applicant due to the statements of Dr. M.E. in a television programme regarding *the treatment of diseases with herbal products*. According to RTÜK, Dr. M.E.'s remarks targeting science, medicine, and medical professionals in the programme -where participants claimed to have cured their chronic diseases using Dr. M.E.'s herbal treatments, leading to improved health - may potentially erode public trust in medical professionals and hospitals, divert people from mainstream treatment methods, and have adverse effects on public health. Despite the absence of product names in the programme, RTÜK also deemed the display of telephone numbers for any questions at the bottom of the screen, as covert commercial communication. Consequently, RTÜK decided to impose an administrative fine on the applicant, in addition to issuing a warning.

39. The first instance court relied on RTÜK's argument that Dr. M.E. had described his products and treatment methods in a manner intended to attract viewer interest and arouse curiosity, cited examples of allegedly cured patients to bolster the perceived efficacy of his products, and directed viewers to inquire about the products through a telephone number displayed at the bottom of the screen, without explicitly naming

the products. The trial court found the impugned administrative act lawful, finding Dr. M.E.'s criticism of modern medicine in favour of his recommended herbal treatment for chronic diseases as harmful to public health. Thus, the court concluded that the programme had contained covert commercial communication.

40. In the aforementioned programme, the treatment with herbal products was discussed on television with the participation of studio guests. The programme featured twelve individuals from various age groups, and telephone calls were occasionally exchanged. Participants claimed they had found cures for medical conditions such as heart and vascular occlusion, diabetes, MS, high blood pressure, and meniscus issues by using Dr. M.E.'s treatment methods, resulting in significantly improved health. Although the product name was not disclosed, the following message was displayed at the bottom of the screen: '*For your questions: [0212 598 ...]*'. In the same programme, following a statement by a woman named C.A., who asserted that she had cured many of her diseases with Dr. M.E.'s treatments, Dr. M.E. stated: "*Doctors in that region prescribe a pill for cholesterol, another pill for hepatitis, and another for blood pressure. Do you know who these people are; who tell us these things, who force us, who brainwash us? Do you know who these doctors are? This is the same mentality that our martyrs fought against at the Gallipoli Campaign. I don't believe that those hostile to us will teach us the right things. I don't believe it. Why don't I believe it? You can see the results yourselves*." Taken as a whole, these considerations indicate that the programme's promotional or commercial purpose outweighed its intent to contribute to a public debate in the health sector.

41. Furthermore, Dr. M.E.'s remarks equated doctors who prescribe generally accepted treatment methods with the mentality fought at the Gallipoli Campaign and used language that antagonized doctors. The programme featured discourse with the potential to mislead the audience on health-related issues, characterized by a lack of objectivity, populism, antagonism, and exaggerated rhetoric, which should be particularly avoided in the context of public health. Therefore, it is questionable to assert that such discourse constitutes a scientific and objective transmission of information or that it contributes to a debate in the field of medicine.

42. In light of these evaluations, the penalty imposed by the competent authorities on the applicant, who broadcast within the aforementioned framework, cannot be said to have failed to correspond to a compelling social need or to be contrary to the requirements of a democratic society. Moreover, the applicant was issued a warning penalty, which is relatively a lenient measure, on the grounds that it encouraged attitudes detrimental to public health. Accordingly, it is not possible to conclude that the said penalty is disproportionate.

43. It is now imperative to evaluate the administrative fine imposed on the applicant due to *covert commercial communication*. The Court has previously examined a similar issue regarding the provision of contact information in a health-related programme in the decision of *İlker Erdoğan* (no. 2013/316, 20 April 2016). In that case, the court of instance found that the applicant, who had participated in the programme, had provided information about implant treatment, alleging it was swift and guaranteed; he had expressed unfavourable opinions about other treatment methods and devices, and spoke more about his own treatments rather than providing general insights into oral and dental health. Additionally, the court noted that the contact number of the clinic had been displayed on the screen during the programme, leading to the conclusion that the programme had contained elements of advertising. The Court has found the reasoning of the inferior court relevant and sufficiently clear that the applicant had engaged in advertising during the programme (ibid., §§ 55-57).

44. There is no ground in the present case that would require the Court to depart from the judgment rendered in the case of *İlker Erdoğan*. In the programme *"Doktorunuz Sizinle"* ("Your Doctor with You"), Dr. M.E. discussed the treatment of diseases through herbal products with the participation of studio guests. The programme featured twelve individuals from various age groups and occasional phone calls were exchanged. Participants who phoned in claimed that they had found solutions to conditions including cardiovascular occlusion, diabetes, MS, high blood pressure, and meniscus issues (conditions for which they had previously found no medical remedy) thanks to Dr. M.E.'s treatment methods, resulting in significantly improved health. Additionally, the programme

provided contact information for possible questions at the bottom of the screen. Having regard to the above-mentioned considerations, the conclusion reached by the inferior courts that the programme had engaged in advertising was neither arbitrary nor unfounded. Furthermore, it cannot be concluded that the administrative fine of 11,026 Turkish liras (TRY) imposed on the applicant is disproportionate.

45. In the light of the foregoing, it must be held that there was no violation of the freedom of expression safeguarded by Article 26 of the Constitution.

Mr. Zühtü Arslan, Mr. Hasan Tahsin Gökcan, Mr. Kadir Özkaya, Mr. Engin Yıldırım, Mr. M.Emin Kuz, Mr.Yusuf Şevki Hakyemez and Mr. Kenan Yaşar dissented from this conclusion.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 23 February 2023:

A. UNANIMOUSLY that the alleged violation of the freedom of expression be DECLARED ADMISSIBLE;

B. BY MAJORITY and by the dissenting opinion of Mr. Zühtü Arslan, Mr. Hasan Mr. Tahsin Gökcan, Mr. Kadir Özkaya, Mr. Engin Yıldırım, Mr. M.Emin Kuz, Mr. Yusuf Şevki Hakyemez ve Mr. Kenan Yaşar, that the freedom of expression safeguarded by Article 26 of the Constitution WAS NOT VIOLATED;

C. That the litigation costs be COVERED by the applicant; and

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

DISSENTING OPINION OF PRESIDENT ZÜHTÜ ARSLAN

1. The applicant argued that the warning sanction imposed for inciting conduct and attitudes that could endanger public health in a programme aired on its television channel, along with an administrative fine for covert commercial communication, had infringed on his freedom of expression. However, the majority ruled that there had been no violation in the application.

2. The Radio and Television Supreme Council (RTÜK) decided to impose a warning sanction on a television channel owned by the applicant company for violating Article 8 § 1 (l) of Law no. 6112 on the Establishment and Broadcasting Services of Radio and Television Organizations, which stipulates that "*Conduct and attitudes that may harm public health (…) shall not be encouraged*," and an administrative fine of TRY 11,026 for the repeated violation of Article 9 § 3 of the same Law, which stipulates that "*covert commercial communication shall not be allowed*."

3. The applicant's annulment action of the administrative act was dismissed by the 9th Chamber of the Ankara Administrative Court, which stated: "*there was no infringement of law and legislation in the decision of the respondent administration*" after reiterating the grounds of the administration. This decision was upheld by the 13th Chamber of the Council of State.

4. The freedom of expression, safeguarded by Article 26 of the Constitution, is indispensable element of the democracy. Democratic society necessitates an environment where all kinds of opinions, except those which incite violence, can be freely expressed and disseminated. A society where people are reluctant to express differing opinions cannot be said to promote pluralism. Without pluralism, there can be no true democracy. As underscored in its judgments by the Court, a pluralistic democratic order mandates that diverse opinions are expressed through various channels, that efforts to persuade others are undertaken, and that such efforts are tolerated.

5. Nevertheless, freedom of expression is not without limits. This freedom may be restricted for reasons such as the protection of public

order and public security, as delineated in Article 26 § 2 of the Constitution. However, any restrictions on freedom of expression must have a legal basis, pursue a legitimate aim within the ambit of Article 13 of the Constitution, and conform to the requirements of a democratic society and the principle of proportionality.

6. It can be stated that the sanctions imposed in the present case were implemented to maintain public order and protect the rights of others, in accordance with the relevant provisions of Law no. 6112. However, for any restriction on freedom of expression to comply with the requirements of a democratic society, it must respond to a pressing social need and be proportionate. Accordingly, the measure constituting the interference must be suitable for achieving the legitimate aim, employed as a measure of last resort, and be the most lenient measure available (see *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, § 77).

7. Pursuant to Article 56 of the Constitution, the State has the obligation "t*o ensure that everyone leads a healthy life physically and mentally*." As a requirement of this positive obligation, certain measures may be undertaken to protect the health of individuals and society. Nonetheless, to preserve freedom of expression within the realm of health, it is evident that such measures must be also subject to certain limits; specifically, they must not impede academic and scientific freedom. In this context, censorship of health-related information or interferences that would prevent participation in health-related debates may infringe the freedom of expression (see *Mutia Canan Karatay* (2), no. 2018/6707, 31 March 2022, §§ 31-33).

8. Therefore, in cases where the freedom of expression is restricted to protect the health of individuals and society, the respective administrative and judicial decisions must demonstrate that the measure addresses a pressing social need and is proportionate. Otherwise, banning certain opinions or imposing sanctions on their expression, on the pretext of their being "*inaccurate*" or "*perilous*" may yield the opposite effect, that is further spreading and being embraced by the society.

9. As Constitutional Court has stated, "*to prevent expressions of opinion that are considered to threaten public health, policies must be developed in full*

support of freedom of expression and the right of access to information. Approaches revolving around censorship and sanctions concerning misinformation must be replaced with approaches that uphold transparency and freedom of expression." (see *Mutia Canan Karatay (2), § 36).*

10. Preventing public debates on certain issues through bans and sanctions undermines pluralism, a *sine qua non* for the existence of democracy. When opinions are not freely expressed, it becomes difficult for people to appear as they are, when they wear the mask, it is difficult for them to stay true to themselves. A regime that compels individuals to conceal their true identities in masquerade cannot be characterized as a democracy.

11. In light of these explanations, given the particular circumstances of the present case, it appears that during a programme aired on the television channel owned by the applicant, a medical doctor, known for practising in the field of *phytotherapy*, criticised conventional treatment methods. Additionally, some participants who connected to the programme via telephone reported benefiting from this doctor's treatments, and concurrently, the telephone number was displayed at the bottom of the screen. RTÜK decided to impose a warning sanction on the broadcaster, citing concerns that the statements of the doctor, a regular guest on the programme, "*discouraging individuals from genuine treatment methods and targeting science, medicine, and medical professionals in the programme may potentially erode public trust in medical professionals and hospitals and have adverse effects on public health*" and imposed an administrative fine on account of the doctor's remarks during the programme. The inferior court, reiterating RTÜK's evaluations, concurred with the latter's conclusion and dismissed the annulment action.

12. In its decision, the court noted that the doctor, who was a regular guest on the programme subject to the administrative sanction, had stated: "*Doctors in that region prescribe a pill for cholesterol, another pill for hepatitis, and another for blood pressure. . Do you know who these people are who tell us these things, who force us, who brainwash us? Do you know who these doctors are? This is the same mentality that our martyrs fought against at the Gallipoli Campaign. I don't believe that those hostile to us will teach us the*

right things. I don't believe it. Why don't I believe it? You can see the results yourselves" Accordingly, the court concluded that these remarks had encouraged conduct and attitudes involving the risk of harming public health, referring to the decision of RTÜK.

13. The statements against modern medicine and doctors may be perceived as hostile and even offensive. However, for at least two reasons, these statements alone are insufficient to establish that the applicant's channel encourages conduct and attitudes harmful to public health.

14. Firstly, in assessing whether a restriction infringes the freedom of expression, the expressions used must be evaluated within the full context of the case, without detaching them from their context. However, in the present case, the remarks of the doctor relied on by the administrative and judicial authorities as justification in their decisions were not assessed in their entirety and proper context. Although the aforementioned statements were made during a broadcast in response to a viewer's question from the province of Çanakkale, the context in which these statements were made could not be comprehended, as the decision referred only to the doctor's remarks without providing an insight into the complete context.

15. Secondly, and more critically, freedom of expression also encompasses the protection of remarks that are unpleasant and disturbing. As frequently emphasized by both the European Court of Human Rights and the Constitutional Court, "*freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb*." (see *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 49; *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 36; and the Court's decision, E.2017/162, K.2018/100, 17 October 2018, §109). Similarly, it has been underscored that freedom of expression, "*should be interpreted broadly to allow for exaggeration and even provocation to a certain extent*" (*Zübeyde Füsun Üstel and Others*, § 102).

16. Besides, neither the RTÜK decision nor the court decision, which asserted that "*there was no violation of the law and legislation*" provided concrete evidence regarding the alleged covert commercial communication. In the present case, the administrative and judicial decisions accepted the display

of a telephone number at the bottom of the screen during the broadcast as an indication of covert commercial communication. Although the applicant argued that this number had been provided for the purpose of receiving viewers' questions and opinions, the relevant decisions failed to provide any explanation in this regard. It appears that the administrative fine was imposed on the basis of the assumption that the products of the doctor, who was a regular guest on the programme, could be accessed through the telephone number.

17. In this context, the administrative and judicial authorities have failed to demonstrate, with relevant and sufficient grounds, that the restrictions on the applicant's freedom of expression were necessary in a democratic society and met a pressing social need.

18. For the reasons outlined above, I dissent from the majority's decision declaring the application inadmissible, as I am of the opinion that the applicant's freedom of expression has been violated.

DISSENTING OPINION OF VICE-PRESIDENT HASAN TAHSİN GÖKCAN

1. In this case, the majority did not accept the applicant's allegation that the penalty imposed for engaging in covert commercial communication regarding supplements on the television programme had violated its freedom of expression.

2. According to the principle of subsidiarity of the individual application mechanism, at the outset, the applicant's claim must be examined by the appeal courts, which should decide on the merits of the case and provide sufficient reasoning. The administrative decision whereby a sanction was imposed pointed out that the statements aired on television had not complied with scientific facts and had been unfounded, and that there had been a covert commercial communication in the programme. However, it appears that the court, which examined the lawfulness of the impugned sanction, rendered its decision without providing any grounds, by merely stating "the impugned administrative act is not unlawful", which may be considered self-proclaimed or tautological.

3. As is well known, one of the procedural safeguards inherent in the right to a fair trial is the right to a reasoned decision. In the examination of substantive rights, the provision of minimum procedural safeguards regarding the right to a fair trial in the adjudication processes is critical in this manner. However, in the administrative court's decision to dismiss the action, it is evident that the allegations put forward in the applicant's challenge or the appropriateness of the reasoning provided by the administration were not addressed. In addition, there was no reasoning provided, let alone a relevant and sufficient one. In the face of such a decision, in the appeal proceedings the Council of State was expected to redress this matter that may result in a violation of the given right. Nevertheless, no satisfying ground was provided in the judicial review process, and the decision was upheld based on the same reasoning.

4. I consider that the decision in the absence of reasoning has itself given rise to a breach of the freedom of expression as procedural safeguards were not afforded to the applicant, without the need to proceed to examine whether the applicant's allegations were substantiated or whether the sanction imposed by the administration was lawful. Consequently, I am of the opinion that the majority should have found a violation in the present case.

DISSENTING OPINION OF VICE-PRESIDENT KADİR ÖZKAYA AND JUSTICE YUSUF ŞEVKİ HAKYEMEZ

1. The Court found admissible the application alleging that the applicant's freedom of expression was violated due to the imposition of a warning on the grounds that a programme broadcast on its television channel had encouraged conduct and attitudes detrimental to public health, and the imposition of an administrative fine for covert commercial communication within the same programme. However, at the end of its examination, the majority of the Court unanimously ruled that the applicant's freedom of expression had not been violated.

2. Due to the reasons explained below, we dissent from the majority decision that the freedom of expression had not been violated.

3. In the present case, the programme *"Doktorunuz Sizinle"* aired on the television channel broadcasting under the Meltem TV logo discussed treating diseases with herbal products in the presence of studio guests. Additionally, other participants joined the programme via telephone. During the programme, participants claimed that, thanks to Dr. M.E.'s treatment methods, they found remedies for their health issues such as heart disease, diabetes, MS, and hypertension, thereby maintaining healthier lives. A contact number was displayed at the bottom of the screen for phone inquiries. Through this number, a conversation between a female viewer from the province of Çanakkale and Dr. M.E took place. During the programme, Dr. M.E. heavily criticised the treatment methods of other medical doctors and made comments associating the issue with the battle fought at the Gallipoli Campaign in 1915.

4. Following an investigation initiated by the Radio and Television Supreme Council (RTÜK) in relation to this broadcast, the applicant was imposed, on 29 June 2012, a warning under the provisions of Law no. 6112 for encouraging conduct and attitudes detrimental to the public health, as well as an administrative fine for engaging in covert commercial communication.

5. The petition for action filed by the applicant seeking the annulment of both actions indicated that the disputed broadcast had not included any

advertisement for the promotion of products, but had aimed to provide information to viewers on public health issues. It was stated that Dr. M.E., who had participated in the programme, had conducted several scientific studies on the treatment of serious diseases, had provided information about the herbal treatment called phytotherapy, and had explained how he had treated certain diseases using this method. The petition further claimed that no products had been marketed through the phone number given in the programme, that the allegation concerning covert commercial communication had been unlawful, and that nowhere in the programme it had been suggested that chemical drug treatments should be abandoned, but instead, it was argued that phytotherapy should be applied in conjunction with modern medical methods. It was also argued that it was unlawful for RTÜK to impose a sanction on the grounds that the programme contravened Article 8 § 1 (1) of Law no. 6112.

6. In the decision of the 9th Chamber of the Ankara Administrative Court dismissing the annulment action, the defendant administration's evaluations regarding the claims in question were quoted verbatim, and it was stated that the action had been filed upon the performance of the impugned administrative act. The administrative court's assessment is summarised in a one-paragraph text as follows:

"In this case, although the plaintiff media outlet sought the annulment of the disputed action on the grounds that the aforementioned broadcast only provided information on public health issues, contributed to public health, did not advertise, and did not pursue a commercial purpose; a review of the CD of the broadcast and the accompanying transcription text revealed otherwise. It was concluded that the programme "Doktorunuz Sizinle," aired on 26 May 2012, contravened Article 8 § 1(l) of Law no. 6112, which prescribes that "conduct and attitudes that may harm public health shall not be encouraged," and Article 9 § 3 of the same Law, which provides that "covert commercial communication shall not be allowed." Furthermore, given that the plaintiff previously received a warning penalty for contravening Article 9 § 3 of Law no. 6112, there is no legal or procedural inconsistency in the decision of the defendant administration dated 29 June 2012 and numbered 12, which imposed a warning penalty on the plaintiff for contravening Article 8 § 1(l) and an administrative fine of TRY 11,026 for the repeated violation of Article 9 § 3.

7. As can be observed, it is not possible to assert that the plaintiff's allegations have been effectively addressed in the first-instance decision. The one-paragraph text quoted above, which serves as the court's assessment of the matter, fails to provide grounds explaining why the impugned act was deemed to be lawful in in the face of the allegations. The wording of the paragraph reveals that the administrative court concluded that the disputed act was not unlawful merely by referencing the grounds set forth by the administration. Consequently, the first-instance decision cannot be said to include any ground within the meaning of Article 141 of the Constitution.

8. In its numerous judgments, the Constitutional Court, made the following assessments regarding the requirement that court decisions shall be reasoned, establishing a principle:

"The question of which points must be included in a decision depends on the nature and particular circumstances of the case. In addition, in the event that the allegations and defence submissions raised in a clear and concrete manner have an impact on the outcome of the case, in other words, if they have the capacity to change the outcome of the case, the courts must address with a reasonable ground these points which are directly related to the case.

(…)

As a matter of fact, for the parties in a case to understand and evaluate why they are deemed justified or unjustified by the legal system, it is obligatory, within the scope of the "right to a reasoned decision" to provide a duly-formed reasoned decision. This reasoned part must clearly demonstrate the nature and scope of the case and the points which the court has regarded or disregarded in reaching its decision, and use precise language that leaves no room for doubt.

Failure to provide "relevant and sufficient grounds" on matters recognised as impacting the case's outcome, or failure to address procedural or substantive claims that must be addressed may lead to a violation of any given right." (Sencer Başat and Others [Plenary], no. 2013/ 7800, 18 June 2014, §§ 35, 38-39).

9. To conduct the proceedings in compliance with the right to a fair trial, the decision issued by administrative court must include thorough

reasoning based on its assessment of the plaintiff's main allegations and reach a conclusion on the basis of this reasoning.

10. In the present case, the court dismissed the action without addressing the warning and the administrative fine imposed on the applicant for broadcasting a programme that encouraged conduct and attitudes harmful to public health, marketed products, and engaged in covert commercial communication. Therefore, the court in the present case dismissed the applicant's request without addressing the main concerns in the annulment action

11. In such a circumstance, it is inconsistent with the subsidiary nature of the individual application mechanism for the Constitutional Court to directly evaluate the alleged matters at first hand, and thus reach a conclusion. This stems from the fact that within the framework of the individual application mechanism, the Court does not function as a primary judicial authority that adjudicates matters at first hand. Alleged violations of rights must initially be scrutinized through ordinary legal remedies and concluded with relevant and sufficiently reasoned judgments. In line with the principle of subsidiarity inherent in the individual application process, the Constitutional Court can only examine and assess applications only after the ordinary domestic remedies are exhausted.

"The individual application to the Constitutional Court is a subsidiary remedy that can be resorted to if the alleged violations of rights are not remedied by the inferior courts. As a requirement of the subsidiary nature of the individual application mechanism, ordinary legal remedies must be exhausted before lodging an application with the Constitutional Court (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. *2012/403, 26 March 2013, § 17) It is significant that alleged violations of fundamental rights and freedoms are initially addressed by general courts through the ordinary review mechanism. An individual application may be lodged only if the alleged violations of rights cannot be remedied within this ordinary review mechanism.* (see *Bayram Gök*, no. 2012/946, 26 March 2013, § 18).

In cases where the merits of the dispute have not been examined by the inferior courts, Constitutional Court is not entitled to examine the substantive aspect

of the right, in accordance with the principle of subsidiarity of the individual application." (see *Semra Yelseli*, no. 2015/6006, 12 December 2018, § 21).

12. Therefore, it is not incumbent upon the Court to substitute itself for the first instance court for taking the steps that should have been indeed taken by the latter and to render a decision accordingly. Consequently, in the present case, it is unnecessary to assess the conformity of the warning sanction and administrative fine, which constituted an interference with the applicant's freedom of expression guaranteed under Article 26 of the Constitution, with the principles of lawfulness, pursuing a legitimate aim, the requirements of a democratic society, and the proportionality as enshrined in Article 13 of the Constitution.

13. In conclusion, we dissent from the majority's conclusion on the grounds that the applicant's freedom of expression guaranteed under Article 26 of the Constitution had been violated due to the absence of a relevant and sufficient reasoning in the decisions of the inferior courts, in the individual application lodged for the applicant's being subjected to with a warning and administrative fine as a sanction for broadcasting a programme on a television channel that had encouraged conduct and attitudes detrimental to public health and engaged in covert commercial communication.

DISSENTING OPINION OF JUSTICE ENGİN YILDIRIM

1. The applicant complained of being subjected to a warning sanction for allegedly encouraging conduct and attitudes detrimental to public health, as well as to an administrative fine for allegedly engaging in covert commercial communication during a programme broadcast on its television channel.

2. Article 26 § 1 of the Constitution imposes no limitation on the content of freedom of expression and encompasses all statements concerning political, artistic scientific, academic or commercial thoughts and opinions (see *Ergün Poyraz* (2) [Plenary], no. 2013/8503, 27 October 2015, § 37). Within the context of the present application, it is evident that freedom of expression encompasses the research, discussion, acquisition, and dissemination of information and opinions on health-related issues.

3. It is incumbent upon administrative and judicial authorities to unequivocally establish that the grounds for the interference with the applicant's freedom of expression are in line with the requirements of a democratic society. Accordingly, it is important to evaluate whether the imposition of a warning and an administrative fine on the applicant for broadcasting a programme that allegedly encouraged conduct and attitudes harmful to public health and engaged in covert commercial communication responded to a pressing need, whether it was proportionate to the legitimate aim pursued by the interference, and whether the grounds provided were relevant and sufficient.

4. In the present case, the applicant was sanctioned with a warning by the Radio and Television Supreme Council (RTÜK) for various statements made by Dr. M.E. in a television programme regarding the treatment of diseases with herbal products. According to RTÜK, the remarks of Dr. M.E. targeted science, medicine, and medical professionals, potentially eroding public trust in doctors and hospitals, deterring individuals from mainstream treatment methods, and negatively impacting public health. Despite the absence of product names in the programme, RTÜK also deemed the display of telephone numbers for questions at the bottom of the screen as covert commercial communication. Consequently, RTÜK decided to impose an administrative fine on the applicant, in addition to issuing a warning.

5. The first instance court, relying on RTÜK's grounds, found the administrative act lawful. The court determined that Dr. M.E.'s critiques of modern medicine, in association with his herbal treatment method allegedly developed by him for chronic diseases, were harmful to public health and that the programme had contained covert commercial communication. In its reasoning, the court confined itself to a general assertion that the herbal treatment method proposed by Dr. M.E. was detrimental to public health.

6. However, the first-instance decision failed to present any evidence demonstrating that Dr. M.E. had abused his duties and authority as a medical doctor in his explanation of the herbal treatment method during the TV programme in question. Additionally, the decision did not include an expert report indicating that the proposed herbal treatment method had misled and misinformed patients or had been incompatible with modern medical practices.

7. The first-instance decision should have demonstrated that Dr. M.E.'s remarks in the broadcast had been incompatible with modern medical knowledge by referring to an expert opinion. Had this been done, the court's decision could have been deemed sufficient in terms of the necessity to provide substantiated grounds for its conclusion. The court's reliance solely on the opinion of RTÜK left the administration with an overly broad margin of appreciation. While the assessment made by RTÜK, as an expert and authorised institution in the field of broadcasting, is significant and should be taken into consideration, this assessment must not contravene constitutional rights.

8. In the present case, RTÜK deemed Dr. M.E.'s targeting of modern medicine as a threat to public health based on its own evaluation, without consulting any expert opinion. The trial court subsequently based its decision on this ground. Dr. M.E.'s opinions can be regarded as a form of commercial expression, which is afforded protection lower than that accorded to other types of expression.

9. Scientific knowledge, being inherently objective, should be accepted as the primary criterion for determining the veracity of health-related claims. However, there are other forms of knowledge besides scientific knowledge,

such as literary, artistic, philosophical, moral, and religious knowledge. Furthermore, certain health-related issues, such as the beginning of life (in the context of abortion debates) and its end (in the context of euthanasia debates), are not assessed solely through scientific knowledge derived from modern medicine. They also encompass individual preferences, as well as moral, ethical, religious, and philosophical considerations.

10. The suppression, sanctioning, and censorship of any critique of scientific knowledge, as well as the suppression of alternative approaches, will not contribute to the public debate. This should not be misconstrued as equating scientific knowledge with other forms of knowledge. In a democratic society, individuals have the right to maintain their lives, seek solutions to their problems, and interpret or make sense of natural and social events based on various types of knowledge, provided they do not negatively impact the public, harm the common good, or harm themselves or others. This is why, in democratic societies, there is no consideration given to shutting down entities such as the "Flat Earth Association" or banning astrology or alternative medicine. In a democracy, individuals and organizations have the right to “express seemingly nonsensical ideas”, as long as these ideas do not result in negative consequences or demonstrable harm. Today's "absurd" ideas may transform into tomorrow's "respectable" concepts.

11. In the present application, the primary issue is not whether Dr. M.E.'s controversial opinions merit the protection of freedom of expression, but whether there are relevant and sufficient grounds justifying the impugned interference with the applicant broadcasting organization's freedom of expression. It must be demonstrated with relevant and sufficient grounds that Dr. M.E.'s herbal treatment recommendations are harmful to general health. On the other hand, Dr. M.E.'s ideas may be classified as commercial expression, thereby lacking the safeguards inherent in the freedom of expression. Yet, any such classification must be supported by relevant and sufficient reasoning.

12. According to Article 8 § 1 of Law no. 6112, media service providers are obligated not to promote conduct and attitudes that may harm public health in their broadcasting services. While this rule is essential and suitable for achieving its intended objective, it has the potential to create a

disproportionate, widespread and serious deterrent effect on freedom of the press if interpreted and applied broadly.

13. For holding mass media outlets and individuals expressing their opinions through these media outlets to be legally or criminally liable, as well as being subjected to administrative penalties, it must be demonstrated that they are consistently encouraging conduct and attitudes harmful to public health, as outlined in Article 8 § 1 of Law no. 6112, and that this harmful encouragement is a part of their regular broadcasting policy.

14. Otherwise, punishing the broadcasting organization along with the individuals responsible for the disputed broadcast will also result in the punishment of other people broadcasting through the same media outlet, including its owners, founders, and anyone benefiting from the broadcasts. Therefore, the administration and courts must not merely ascertain whether a given broadcast has caused a breach of any law but must also demonstrate that this pattern of broadcasting is widespread across all services and that the media outlet facilitates systematic violations of statutory provisions.

15. Despite the lack of an allegation in the RTÜK decision that any product or work was promoted in the programme, the first instance court inferred that the display of the applicant's telephone number at the bottom of the screen during the programme incited viewers to access the product. Consequently, the first instance court imposed an administrative fine on the applicant for covert commercial communication pursuant to Article 3 § 1 (g) of Law no. 6112. Neither the administrative nor the judicial authorities provided explanations as to why the telephone number displayed during the television broadcast, which was allegedly provided by the applicant to receive viewers' questions and opinions, was to be considered within the scope of the definition of covert commercial communication under Law no. 6112.

16. In conclusion, it must be accepted that a fair balance was not sought between the applicant's freedom of expression and the protection of public order and the rights of others. Accordingly, the interference, in the form of a warning and an administrative fine imposed on the applicant, was not justified by relevant and sufficient reasons.

17. For these reasons, I dissent from the majority's conclusion, as I consider that the procedural aspect of freedom of expression, guaranteed under Article 26 of the Constitution, was violated, taken in conjunction with the applicant's right to a reasoned decision within the scope of the right to a fair trial protected under Article 36 of the Constitution.

DISSENTING OPINION OF JUSTICE M. EMİN KUZ

In the individual application claiming that the freedom of expression was violated due to the imposition of a warning and an administrative fine, as a sanction, on the grounds that a television programme promoted conduct and attitudes harmful to public health and engaged in covert commercial communication, the Court found no violation of the said freedom.

In the reasoned decision, it was stated that the language used by the programme guest had been misleading about health matters, lacked objectivity, and had not contributed to a meaningful discussion in the field of medicine. Therefore, according to the court, it could not be said that the warning imposed on the applicant had not addressed a compelling social need or had been contrary to the requirements of a democratic society, and that therefore it had been disproportionate. Additionally, nor did the court find the administrative fine arbitrary, unfounded, or disproportionate.

As stated in the decision, the Radio and Television Supreme Council (RTÜK) initiated an investigation due to remarks made in a programme broadcast on the applicant's television channel. Based on the investigation report, a warning and an administrative fine were imposed on the applicant under two separate provisions of the law.

The applicant argued, among other things, that the programme in question had not been an advertisement but had rather intended to provide viewers with information on health issues, that the medical doctor who had participated in the programme as a guest and was sanctioned for his remarks had conducted scientific studies on herbal treatment and had expressed his views as an expert during the broadcast; that the RTÜK decision did not include any allegation as the promotion of a product in the programme; that the telephone number provided in the broadcast had been merely used to receive questions from viewers, and no product had been marketed through this number. The applicant brought an action, seeking the annulment of these acts. This request of the applicant was dismissed by a court decision, which reiterated the grounds presented by RTÜK. The decision was upheld by the Council of State, upon appeal.

In the majority's decision, despite the acknowledgement that the sanctions imposed on the applicant had constituted an interference with freedom of expression, it was stated that this interference had a legal basis, pursued a legitimate aim and complied with the requirements of a democratic society or the principle of proportionality. While I find appropriate the general principles referenced in the reasoning, regarding conformity with the general principles as to the requirements of a democratic society, I cannot concur with the evaluations and conclusions reached as a result of the application of these principles to this case.

As in similar cases, the assessment of the present application should ascertain whether the reasons provided by public authorities convincingly demonstrated that the impugned interference with freedom of expression met the requirements of a democratic society.

Similarly, as emphasized in numerous previous decisions, the role of the Constitutional Court is not to substitute itself for the inferior courts in this review, but to assess the appropriateness of the decisions, which they have rendered within their margin of appreciation, under Article 26 of the Constitution. In this review, it must be determined whether the imposition of the said sanctions on the applicant addresses a compelling need under the circumstances of the present case and whether the grounds provided are relevant and sufficient, having regard to the case as a whole.

In the present case, two separate sanctions were imposed on the applicant due to the remarks of the doctor who participated as a guest in the said programme. In the annulment action filed by the applicant against these sanctions, the first instance court largely relied on the grounds specified in the RTÜK decision and the administration's defence submissions, and ultimately found the impugned administrative act lawful.

Although inferior courts should evaluate statements in their entirety, without detaching them from their context, in determining whether a restriction complies with freedom of expression, the contested administrative and judicial decisions assessed the remarks of the programme guest, who is a medical doctor, in isolation from the overall speech. The courts failed to consider the context and purpose of the impugned remarks, as well as positions of the parties involved.

It is evident that the broad interpretation and application of the rules, which form the basis of the administrative in question and stipulate that media service providers shall not encourage conduct and attitudes that may harm public health and engage in covert commercial communication, are likely to have a widespread and deterrent effect on the exercise of freedom of expression and freedom of the press.

Sanctions can be imposed on parties acting in breach of Law no. 6112 intended to regulate and supervise radio and television broadcasts, which are vital to the sound functioning of democracy. However, to attribute liability on account of such violations to broadcasting organizations and impose penalties in addition to those who express their opinions through the said broadcasting organizations, it must be demonstrated that the sanctioned acts under Law no. 6112 extend to the entire broadcasting services of the organization and are adopted as broadcasting policy. Undoubtedly, this examination must also focus on the question whether the nature of the broadcasting organization is characterized by the breaches of laws given rise to in its broadcasts.

In the present case, the administration and the incumbent courts failed to conduct evaluations in this regard. Moreover, although the administrative decision did not include an assertion that a product or study had been advertised in the programme, the administrative court, in its reasoning for dismissing the annulment action, relied on a new ground. It stated that the applicant's telephone number had been displayed at the bottom of the screen, thereby encouraging viewers to access the product.

The decision also did not clarify why the telephone number, which was, according to the applicant, provided for receiving viewers' questions and opinions, had constituted the act sanctioned under Law no. 6112.

As a result, in light of all the circumstances of the present case, a fair balance could not be struck between freedom of expression, and the protection of public order and the rights of others. The courts failed to address whether the imposition of the sanctions in question had responded to a pressing social need or had been justified by relevant and sufficient reasoning.

For these reasons, since the sanctions cannot be said to address a compelling need within the scope of freedom of expression, I dissent from the majority's decision to the contrary. I consider that the sanctions constitute neither a necessary nor a proportionate interference in a democratic society, and that it should have been held that there was a violation of the freedom of expression guaranteed under Article 26 of the Constitution.

DISSENTING OPINION OF JUSTICE KENAN YAŞAR

1. The application concerns the alleged violation of the freedom of expression due to the imposition of a warning on the applicant for allegedly encouraging conduct and attitudes harmful to public health in a programme "*Doktorunuz Sizinle*" ("Your Doctor with You"), aired on a television channel owned by the applicant and broadcasting under the Meltem TV logo, as well as the imposition of an administrative fine for engaging in confidential commercial communication in the same programme.

2. According to the Radio and Television Supreme Council (RTÜK), Dr. M.E.'s remarks targeting science, medicine, and medical professionals in the programme -where participants claimed to have found relief from chronic diseases using the aforementioned doctor M.E.'s herbal treatments, leading to improved health- could potentially erode public trust in medical professionals and hospitals, divert people from mainstream treatment methods, and have adverse effects on public health. Despite the absence of product names in the programme, RTÜK also deemed the display of telephone numbers for any questions at the bottom of the screen, as covert commercial communication. Consequently, RTÜK decided to impose an administrative fine on the applicant, in addition to issuing a warning.

3. As understood, RTÜK asserted that the treatment method suggested by Dr. M.E. had the potential to deter individuals from genuine treatment methods and adversely affect general health. Furthermore, the first instance court merely stated, in an abstract manner, that the herbal treatment method proposed by Dr. M.E. was likely to harm general health, without offering any further evaluation. Traditional complementary medicine practices, including the phytotherapy methods advocated by Dr. M.E., have been developed over thousands of years and have garnered increasing global attention due to various factors, such as the inaccessibility of modern medicine for some populations, the increased side effects of drugs, and the inadequacy of modern medicine in treating certain diseases.

4. Although the Ministry of Health enacted a regulation in 2014 to regulate and oversee traditional and complementary medicine practices to prevent abuses, there was no regulation strictly prohibiting phytotherapy

practices prior to this date. The decisions of the administrative and judicial authorities did not reference any provision indicating that these practices had been prohibited before 2014. Furthermore, the decisions included no proof suggesting that Dr. M.E. had abused his duty and power as a medical doctor while providing the phytotherapy services mentioned in the programme. Moreover, it has not been demonstrated by an expert report how the treatment method advocated by Dr. M.E. in the programme differed from ancient medical practices or how it misled and misinformed patients.

5. Furthermore, it appears that the administrative and judicial authorities evaluated the remarks made by Dr. M.E. in the aforementioned broadcast -which were said to have targeted science, medicine, and medical doctors- in isolation from the entire speech. They did not consider factors such as the context, the purpose for which the statements were made, the positions of the parties involved, and the previous attitudes of the individuals involved. In determining whether a *restriction* is compatible with freedom of expression, courts are required to evaluate the expressions within the entirety of the speech as a whole, without detaching them from their context (see *Nilgün Halloran*, § 52; *Önder Balıkçı*, § 45). In the broadcast in question, following a telephone conversation with a viewer from the province of Çanakkale, the guest doctor associated the mentality of the martyrs of the Gallipoli Campaign with the mentality of doctors that automatically instruct patients to use conventional medication in today's medical community. However, since the administrative and judicial authorities did not cite in their decisions the viewer's conversation or question, which formed the basis of the doctor's remarks, and the context in which it had occurred, it remains unclear for what purpose and in what context the doctor had uttered the statements in question.

6. Moreover, it should be acknowledged that the broad interpretation and application of Article 8 § 1 of Law no. 6112 could have a severe and pervasive chilling effect on the freedom of the press. This provision requires media service providers to refrain from encouraging conduct and attitudes that might undermine public health through their broadcasts.

7. Undoubtedly, every radio or television organization crafts its own broadcasting policy. Each organization can develop a distinct collective

will, with its own objectives, and act independently. Consequently, a broadcasting organization may be subjected to a penalty if it acts in breach of laws due to its own objectives or independent actions. The decisive factor in this context is the matter whether any liability arising from the programmes aired can be attributed to the broadcasting organization. In other words, in addition to the penalization of individuals expressing their opinions through broadcasting organizations; for mass media outlets to be held legally or criminally liable, including facing administrative penalties, it must be demonstrated that they are consistently encouraging conduct and attitudes harmful to public health, as outlined in Article 8 § 1 of Law no. 6112, and that this harmful encouragement is a part of their regular broadcasting policy.

8. Otherwise, punishing the broadcasting organization along with the individuals responsible for the disputed broadcast will also result in the punishment of other people broadcasting from the same media outlet, including its owners, founders, and anyone benefiting from the broadcasts, which hampers the requirement that criminal liability shall be personal. Therefore, the administration and the courts should not merely ascertain whether there is a breach of laws due to the disputed broadcast but must also demonstrate that this pattern of broadcasting is widespread across all services of the broadcasting organization and that the media outlet systematically facilitates these violations of the law. There is no doubt that such broadcasters pose a distinct threat to legally protected interests, as they facilitate and support breaches of laws through their organized human and material resources and inherent motivation. It is only in such instances that it can be deemed constitutionally legitimate to impose penalties, proportionate to the nature of the acts leading to the violation of existing regulations, on broadcasting organizations that own mass media.

9. Lastly, despite the lack of an assertion in the RTÜK decision that any product or study was promoted in the programme, the first instance court inferred that the applicant's telephone number had been displayed at the bottom of the screen during the programme, encouraging viewers to access the product. Consequently, the first instance court imposed an administrative fine on the applicant for engaging in *covert commercial*

communication. Pursuant to Article 3 § 1 (g) of Law no. 6112, covert commercial communication refers to the promotion of the activity, trademark, name, service or product of any company producing/providing goods or services by the media service provider by means of words or pictures in programmes, outside of designated advertising segments. This must be done without any explanatory sound or image indicating that an advertisement is being made, with the intent to advertise or influence the public. Neither the administrative nor the judicial authorities provided explanations as to why the telephone number displayed during the television broadcast, which was allegedly provided by the applicant to receive viewers' questions and opinions, was to be considered within the scope of the definition of covert commercial communication under Law no. 6112. The reasoning that access to the doctor's products, who has been regularly appearing on the disputed television programme, had been facilitated through displayed telephone numbers is not sufficient to qualify the said administrative fine, which was based on abstract allegations and assumptions, as a measure that responds to a pressing need or constitutes a proportionate measure.

10. In the light of all these evaluations and considering all the circumstances of the present case, it has been concluded that a fair balance was not sought between the applicant's freedom of expression, and the protection of public order as well as the rights of others. Accordingly, the interference, in the form of a warning and an administrative fine imposed on the applicant, was not justified by relevant and sufficient reasons.

11. Thus, I dissent from the majority's decision as I consider that the applicant's freedom of expression, as guaranteed under Article 26 of the Constitution, has been violated.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

MUTİA CANAN KARATAY (3)

(Application no. 2020/4999)

30 March 2023

On 30 March 2023, the First Section 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 *Mutia Canan Karatay (3)* (no. 2020/4999).

I. SUMMARY OF THE FACTS

[1-7] In a television broadcast, the applicant discussed the importance of nutrition and the link between depression and nutrition. She conveyed the messages that pharmaceutical companies were acting in pursuance of commercial interests and that happiness could be achieved not with medications, but with a healthy diet. As a consequence of the impugned statements, the applicant was subjected to a disciplinary investigation, at the end of which a disciplinary fine was imposed on her by the decision rendered by the Honour Board of the Istanbul Medical Chamber. The High Board of Discipline of the Turkish Medical Association (TMA) upheld the impugned decision. The appeal lodged by the applicant against this decision was dismissed, with final effect, by the administrative court.

II. THE COURT'S ASSESSMENT

8. The applicant, emphasising that she was both a medical doctor and an academician, asserted that scientific studies revealed the link between all chronic diseases, including depression, and poor diet. In this sense, she argued that she did not need any form of self-promotion; rather, she had merely disseminated her expert knowledge publicly to aid the preservation of public health. She maintained that it was her duty and responsibility as a doctor to share her research and findings, and thus, her statements in this regard should be protected under the scope of freedom of expression. The applicant further maintained that the decision of the court of first instance had contained manifest error of discretion or arbitrariness; that the reasoned decision had failed to sufficiently address the allegations as well as the facts of the case, and the claims had also been disregarded therein. The applicant added that the trial court had not conducted just and objective proceedings and therefore her right to a fair trial had been violated. The Ministry of Justice communicated the

opinion of the Ministry of Health. According to the Ministry of Health, the applicant's assertions were misleading and exaggerated and not supported by scientific studies nor recognized as an established medical practice, thus they contravened the applicable legislation.

9. The application has been examined within the scope of the freedom of expression. It must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

10. The imposition of a fine on the applicant must be recognised as an interference with her freedom of expression. It has been concluded that the contested interference was prescribed by Article 39 of the Law no. 6023 on Turkish Medical Association, dated 23 January 1953 - read in conjunction with Articles 3 and 4 of the Disciplinary Regulation of the Turkish Medical Association which came into force upon its promulgation in the Official Gazette of 28 April 2004 no. 25446.- Furthermore, it has been noted that the impugned interference pursued the legitimate objective of maintaining public order, which inherently includes the protection of public health. As a result, it remains to be determined whether the interference was compatible with the requirements of a democratic society. Accordingly, a measure restricting fundamental rights and freedoms must meet a social need and be resorted as the last resort. A measure that does not meet these conditions cannot be considered to be compatible with the requirements of the democratic order of the society (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, § 51; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, § 68; and *Tansel Çölaşan,* no. 2014/6128, 7 July 2015, § 51).

11. In the present case, the applicant was sentenced to a disciplinary fine due to her statements broadcast on a television programme. According to the Court, the applicant was predominantly sentenced to an administrative fine on the basis of disseminating erroneous information pertaining to medical matters, potentially perilous to public health, employing means and methods incompatible with the responsibilities expected of a medical practitioner.

12. Article 56 § 3 of the Constitution defines one of the State's purposes as ensuring "*that everyone leads a healthy life physically and mentally*." Accordingly, it is within the positive obligations of the State to formulate and implement action plans to prevent the dissemination of misinformation pertaining to public health. This is due to the fact that misinformation can jeopardize individuals' health and lives, as well as eroding public trust in organizations and healthcare systems. More critically, misinformation can, in certain instances, be mortal. It exploits and exacerbates societal mistrust, undermines fragile confidence in institutions, erodes faith in science and medicine, and fractures society along various lines (see *Mutia Canan Karatay (2)*, no. 2018/6707, 31 March 2022, § 31).

13. Managing misinformation is undoubtedly an essential aspect of health policy. However, the state must also respect the freedom of expression in this regard. The Court has consistently maintained that the freedom of expression is a cornerstone of democratic society and one of the fundamental conditions for societal progress and the development of each individual (see *Mehmet Ali Aydın*, § 69; *Bekir Coşkun*, §§ 34-36). As a matter of fact, although Article 26 § 1 of the Constitution imposes no limitation on the content of freedom of expression and encompasses all statements concerning political, artistic scientific, academic or commercial thoughts and opinions, (see *Ergün Poyraz (2)* [Plenary], no. 2013/8503, 27 October 2015, § 37;and *Önder Balıkçı*, no. 2014/6009, 15 February 2017, § 40), the freedom of science and art, a special type of the freedom of expression, is expressly safeguarded in Article 27 of the Constitution. As a consequence, it is evident that the freedom of expression also embodies the right to seek, receive and share information and ideas on health issues.

14. Despite being a fundamental right, the freedom of expression is not absolute and subject to the restriction regime foreseen for other fundamental rights and freedoms laid out in the Constitution (see *Abdullah Öcalan* [Plenary], no. 2013/409, 25 June 2014, § 70). States may restrict this right to protect the legitimate interests of the society. Maintenance of the health of individuals and the public are also among these interests. Nevertheless, the censorship of health-related information

or categorical interferences that prevent the public from participating in health-related debates and initiatives—under the guise of combating so-called misinformation—would constitute a violation of the freedom of expression (for more detailed assessments on freedom of expression and the righ of access to information in the field of science, see *Mutia Canan Karatay (2)*, §§ 34-36).

15. In this respect, the State must demonstrate that the restriction on the freedom of expression corresponded to a pressing social need and was proportionate. While authorities and courts wielding public power enjoy a degree of discretion in assessing such needs, their decisions remain subject to the scrutiny of the Court. Ultimately, it is the Court that stands as the final tribunal to decide on whether a given interference aligns with the principles of the freedom of expression (see *Kemal Kılıçdaroğlu*, no. 2014/1577, 25 October 2017, § 57; and *Zübeyde Füsun Üstel and Others* [Plenary], no. 2018/17635, 26 July 2019, § 75).

16. In light of the aforementioned considerations, in cases where there is an interference with the expression of information allegedly endangering the health of individuals and society, the incumbent authorities exercising public power and courts of instance must clearly and specifically demonstrate the followings:

-The content of the presumed threat against the health of individuals and society,

-The fact that the information was intentionally disseminated as false or misleading, despite its verifiability, and may mislead individuals, and

-The direct and immediate link between the expressed opinion and the alleged threat (see *Mutia Canan Karatay (2)*, § 38).

17. In the present case, the applicant was sentenced to a disciplinary fine by the Turkish Medical Association due to her statements in a television program on the link between poor diet and depression. According to the Turkish Medical Association, the applicant disseminated her medical assessment on a matter beyond her expertise, thereby endangering public health with her unscientific assertions.

Furthermore, she expressed the impugned statements for self-promotion and unethically argued with medical professionals who disagreed with him on a medical issue.

18. The court of first instance requested an expert report to be drafted to assess the applicant's statements from a medical perspective. Relying on the expert report, it concluded that the applicant's statements had been unethical, endangered public health, and constituted self-promotion. Consequently, the court ruled that she could not avail herself of the protection afforded by freedom of expression and dismissed the case accordingly.

19. In this context, neither the expert report, which the court of first instance primarily relied upon in the reasoning of its decision, nor its assessments contained explanations on how the applicant's statements had endangered public health. Indeed, it could not be demonstrated beyond reasonable doubt that the information shared by the applicant with the public was deliberate, verifiable, false or misleading. Moreover, the immediate and direct connection between the applicant's opinion and the purported threat to public health could not be convincingly established.

20. Secondly, the applicant was punished for expressing her views in a field outside of her expertise. It is understood that the Turkish Medical Association had not found it suitable for the applicant to voice her opinions in a field beyond her certified specialization. Undoubtedly, demanding proof of expertise to express an opinion, even within a scientific realm, undermines freedom of expression to the extent of rendering it ineffective. Moreover, the applicant is a distinguished cardiologist and internal medicine specialist, as well as a prominent academic and scientist in Türkiye. In this context, it is indisputable that advancements in the field of medicine naturally fall within the applicant's sphere of interest.

21. Thirdly, from her perspective, the applicant's words were carefully chosen to convey to the general public the benefits of a proper diet for mental health. Although some of her remarks about her colleagues were critical—perhaps even excessively so— it is not the role of judicial

authorities to dictate the form of expression in such matters by acting as a scientific expert. Furthermore, even if the applicant criticized the use of antidepressants by medical practitioners, arguing that these drugs did not provide a fundamental solution for the root cause of depression and that pharmaceutical companies acted out of commercial interests, her statements should be assessed in the context of her overall discourse and not in isolation. As per the Court's evaluation, the applicant primarily targeted the method employed by the practitioners. Labelling the applicant's remarks as offences against her colleagues would require interpreting her choice of words differently and attributing varied meanings to them (see *Bekir Coşkun*, § 63).

22. If we were to accept that scientists who challenge the established methods in their field, are essentially belittling or defaming their peers who employ these methods, public discourse would be rendered impossible. Freedom of expression inherently encompasses the freedom to critique. Consequently, statements made within the realm of discussing crucial matters for both individual and societal well-being should be met with greater tolerance, even if they are sharp and contentious, particularly when they are not aimed at any specific individual. The mere harsh nature of the expression should not serve as justification for interfering with free speech (see *Mutia Canan Karatay (2)*, § 44).

23. Fourthly, it was argued that the applicant had subtly promoted her book by referencing it while presenting her opinions. Nevertheless, there exists a nuanced distinction between commodifying health care, engaging in competitive advertising, and seeking to profit more, and simply asserting that the scientific foundation of opinions articulated in popular television programs, in a language accessible to all, can be found in her published works. The act of the applicant, who has authored numerous books and garnered considerable acclaim through television appearances, internet presence, and social media channels, directing audiences to her books for more technical explanations to substantiate her arguments, was assessed by the trial courts as engaging in an indirect form of advertisement. However, this assessment encroaches upon the protection sphere of freedom of expression by going beyond the intended

scope of the aim of prohibiting medical practitioners from advertising. Since any encroachment upon the freedom of expression, under any pretext, would undermine the very foundations of a democratic society, such actions cannot be deemed compatible with the Constitution (see *Mutia Canan Karatay (2),* § 45).

24. Undoubtedly, it cannot be assumed that every utterance made by scientists and academics constitutes the absolute truth. Consequently, it is widely acknowledged that embracing diverse and alternative viewpoints provides a broader spectrum for exploring genuine ideas (for assessments in the same vein, see *Kemal Gözler,* no. 2014/5232, 19 April 2018, § 62; and *Zübeyde Füsun Üstel and Others,* § 112). It is therefore of vital importance for individuals, society and the country that the applicant is able to challenge even the most deeply-seated perspectives, particularly on critical and sensitive issues like mental health.

25. Depression and the use of antidepressants to treat depression is of central importance in the present case. Considering the applicant's renowned public persona, it may be acknowledged that the applicant's statements are likely to affect those with insufficient knowledge on the matter. However, since the matter in question is undoubtedly related to the public interest, Article 26 § 1 of the Constitution leaves a minimum room for manoeuvre to restrict the freedom of expression in this area (see, *inter alia, Ayşe Çelik*, no. 2017/36722, 19 April 2018, § 54; *Abdullah Öcalan*, §§ 99, 108; and *Zübeyde Füsun Üstel and Others,* § 101).

26. The courts of instance essentially failed to substantially demonstrate how the applicant's statements endangered public health. Nor it has been found that the judicial decisions included any element indicating a meticulous examination of the applicant's statements in their own context. In the particular circumstances of the case, the Court has concluded that the imposition of an administrative fine on the applicant and the interference with the freedom of expression safeguarded by Article 26 of the Constitution did not correspond to a pressing social need nor it was proportionate.

27. In the light of the foregoing, it must be held that the impugned interference, which was incompatible with the requirements of the

democratic social order, constituted a violation of the freedom of expression safeguarded by Article 26 of the Constitution.

III. REDRESS

28. The applicant requested the Court to find a violation and order a retrial, or otherwise award non-pecuniary damages.

29. 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).

30. The Constitutional Court awarded the applicant TRY 18,000 for non-pecuniary damages which cannot be redressed with the finding of violation.

IV. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 30 March 2023 that

A. The alleged violation of the freedom of expression be DECLARED ADMISSIBLE;

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

C. A copy of the judgment be REMITTED to the 13th Chamber of the Ankara Administrative Court (E.2019/509, K.2019/2731) for retrial to redress the consequences of the violation of the freedom of expression;

D. A net amount of TRY 18,000 be PAID to the applicant in compensation for non-pecuniary damage;

E. The total litigation costs of TRY 10,346.90 including the court fee of TRY 446,90 and the counsel fee of TRY 9,900 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 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;

G. A copy of the judgment be SENT to the Ministry of Health for information; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

ÇETİN SAĞIR AND OTHERS

(Application no. 2021/8864)

24 May 2023

On 24 May 2023, the Second Section of the Constitutional Court found no violation of the freedom of expression, safeguarded by Article 26 of the Constitution, in the individual application lodged by *Çetin Sağır and Others* (no. 2021/8864).

(I-IV) SUMMARY OF THE FACTS

[1-15] The applicants, who were detained or convicted of terrorist offences in the penitentiary institution, went on hunger strike with similar petitions and generally on the grounds that the leader of the terrorist organisation was being held in isolation. The acts in question were carried out around the same time, and some of the applicants even protested several times on various dates. Therewith, the penitentiary institution launched a disciplinary investigation against the applicants and other convicts. As a result of the disciplinary investigation, disciplinary sanctions in the form of solitary confinement were imposed on the applicants due to disseminating propaganda of criminal organizations. The applicants challenged the impugned sanctions before the execution judge. The execution judge accepted the applicants' challenge and ruled that the disciplinary sanctions be quashed. The Chief Public Prosecutor's Office lodged an appeal against the judgments of the execution judge. The assize court upheld the appeal and annulled the judgments.

V. EXAMINATION AND GROUNDS

16. The Constitutional Court ("the Court"), at its session on 24 May 2023, examined the application and decided as follows:

A. Request for Legal Aid

17. The applicants stated that they could not afford to pay the litigation costs and therefore 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 has accepted the request for legal aid by the applicants, who have been found to be unable to afford the litigation costs without suffering a significant financial burden, for not being manifestly ill-founded.

B. Alleged Violation of the Freedom of Expression

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

18. The applicants asserted that their actions, generally conducted in silence and without engaging in violence, fell within the realm of freedom of expression and lacked any publicity. They contended that their disciplinary punishment constituted a violation of the freedom of expression. Moreover, the applicants claimed that the court decisions were devoid of reasoning, noting that they had been sentenced to solitary confinement despite the lack of any provision in Law no. 5275 prescribing such a punishment for hunger strikes. They argued therefore that their right to a fair trial and the principle of *nullum crimen sine lege* had been violated.

19. The Ministry, in its observations, first referred to the decisions of the Constitutional Court and the European Court of Human Rights (ECHR) in similar cases, subsequently explaining the grounds relied on by the administration and the inferior courts. It was noted that the applicants had been imprisoned for membership of the PKK terrorist organization and had engaged in hunger strikes in alternating days to protest the detention conditions of A.Ö., the leader of the PKK, while similar protests had been occurring in other penitentiary institutions in recent years. The Ministry further stated that the applicants had not presented any additional grounds. In this sense, it emphasized that the relevant constitutional and legal provisions, the decisions of the Court and the ECHR, and the particular circumstances of the case should be taken into consideration.

20. In their counter-statements, the applicants reiterated the points set forth in their initial application form.

2. The Court's Assessment

21. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it conducts such an assessment itself. The Court acknowledged that the hunger strikes organized in the penitentiary institutions may be characterized as an expression (see *Mehmet Ayata*, no.

2013/2920, 7 July 2015, § 24; *Kahraman Güvenç (3),* no. 2013/3551, 14 April 2016, § 31; *Kahraman Güvenç (4),* no. 2016/15659, 23 June 2020, § 26; and *Burcu Çelik Özkan,* no. 2018/33605, 4 July 2022, § 17). In this respect, it has been concluded that the disciplinary sanction imposed on the applicants for engaging in hunger strikes should be assessed within the scope of the freedom of expression as a whole.

22. Article 26 of the Constitution, titled "*Freedom of expression and dissemination of thought*" provides, 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 ...protection of .... public order, …"

a. Admissibility

23. 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

24. The applicants were subjected to disciplinary sanctions for engaging in a hunger strike within penitentiary institutions. It must be acknowledged that the disciplinary board's decision constituted an interference with the applicants' ability to freely express and disseminate their thoughts and opinions through various means, thereby with their freedom of expression (see, *inter alia*, *Mehmet Ayata*, § 29; and *Kahraman Güvenç* (3), § 36).

ii. Whether the Interference Constituted a Violation

25. The aforementioned interference would amount to a violation of Article 26 of the Constitution, unless it complies with the conditions set

out in Article 13 thereof. Article 13 of the Constitution provides, 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 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.*"

26. 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

(1) Lawfulness

27. It is noted that hunger strikes in penitentiary institutions are regulated under Article 40 § 2 (g) of Law no. 5275. In the present case, the disciplinary board found that the applicants had committed the disciplinary offence of disseminating propaganda on behalf of criminal organizations, as prescribed in Article 44 § 3 (1) of Law no. 5275, due to their hunger strike.

28. In this context, it is necessary to determine whether the applicants' actions constitute propaganda activities committed on behalf of criminal organizations. If so, it must be subsequently assessed whether the relevant provision meets the criterion of *being prescribed by law.* However, it has been observed that this assessment is closely linked to the assessment of whether the impugned interference was compatible with the requirements of a democratic social order in *the particular circumstances of the present case.* Therefore, it has been considered that it is not necessary, at this stage, to reach a final conclusion on the lawfulness of the interference. This issue should be evaluated in conjunction with the assessment as to the conformity of the interference with the requirements of a democratic social order (see for a similar assessment, *Ahmet Sil and Taner Yay*, no. 2017/35227, 30 September 2020, § 39).

(2) Legitimate Aim

29. In the present case, it has been determined that the objective of the interference with the applicants' freedom of expression was to ensure security in the penitentiary institution. In this regard, such an interference was part of the broader measures aimed at maintaining public order, and thus served a legitimate purpose.

(3) Compliance with the Requirements of a Democratic Society

30. The freedom of expression refers to a person's ability to have free access to the news and information as well as other people's opinions, not to be condemned due to his/her opinions and convictions, and to freely express, explain, defend, transmit and disseminate these either alone or together with others. Thus, the Court has underlined in its numerous decisions that 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).

31. 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 respond to a pressing social need (see *Bekir Coşkun*, §§ 53-55; *Mehmet Ali Aydın*, §§ 70-72; and *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 45).

(a) The Freedom of Expression of Convicts and Detainees

32. Generally, convicts and detainees retain all fundamental rights and freedoms that fall under the common protection area 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). Indeed, there is no doubt that the freedom of expression of convicts and detainees is safeguarded under both the Constitution and the Convention (see *Murat Karayel (5)*, no. 2013/6223, 7 January 2016, § 27). Nevertheless, the freedom of expression is not an absolute right and may be subject to restrictions as specified in Article 26 § 2 of the Constitution.

Consequently, as a necessary aspect of being detained in a penitentiary institution, certain restrictions may be imposed on prisoners' rights, if reasonably justified by the need to protect security and order within the institution, such as preventing crime and maintaining discipline (see *Murat Karayel* (5), § 29).

(b) Principles Regarding the Imposition of Disciplinary Sanction on Convicts and Detainees

33. Pursuant to Article 37 of Law no. 5275, which serves as a general provision regarding disciplinary offences and penalties, it is required that, for a disciplinary offence to be constituted and for the corresponding penalty to be imposed, not only the specific conditions outlined for each disciplinary offence must be met, but also the conditions stipulated in Article 37 must be satisfied. According to Article 37 of Law no. 5275, if a convict commits an offence in violation of laws, by-laws, regulations, or behaviours and attitudes ordered by the administration to ensure an orderly life, security and discipline in penitentiary institutions, the disciplinary penalties specified in the Law shall be imposed based on the nature and severity of the act (see the Court's decision no. E.2013/6, K.2013/111, 10 October 2013; and *Memiş Berber*, no. 2017/38744, 20 October 2021, § 22).

34. According to the Court, even if an act within the penitentiary institution unequivocally constitutes a disciplinary offence as defined between Articles 39 and 44 of Law no. 5275, this fact alone is insufficient to warrant the imposition of a disciplinary penalty. It must also disrupt security, undermine discipline, or hinder the maintenance of orderly life in the institution (see the Court's decision no. E.2013/6, K.2013/111, 10 October 2013; *Murat Karayel (5)*, §§ 43, 44; and *Cihat Özdemir*, no. 2015/214, 9 April 2018, § 22). Furthermore, the Court underlined that, to ensure order and security in penitentiary institutions, there is a necessity to be particularly mindful of collective actions that may contribute to sustaining allegiance to terrorist organizations (see *Murat Karayel (5)*, § 46; *Cihat Özdemir*, § 22; and *Memiş Berber*, § 23).

(c) Application of Principles to the Present Case

35. In the present case, the applicants who were detained or convicted of terrorism charges in the penitentiary institution sent petitions with similar content and organized hunger strikes on the grounds that A.Ö. was kept in isolation. The protests in question were carried out around the same time and even some of the applicants organized multiple protests on various dates. Therewith, the penitentiary institution launched a disciplinary investigation concerning the applicants and other prisoners. As a result of the disciplinary investigation, the disciplinary board imposed disciplinary sanctions in the form of solitary confinement on the applicants due to the commission of the offence of disseminating the propaganda of criminal organizations.

36. Initially, some evaluations are required to be made regarding the finding that the applicants' acts constituted the disciplinary offence of carrying out propaganda activities on behalf of criminal organizations. The disciplinary offence of disseminating propaganda in favour of criminal organizations regulated under Law no. 5275 and the offence of disseminating propaganda in favour of a terrorist organization under Article 7 of the Anti-Terror Law no. 3713 of 12 April 1991, are distinct from each other. To equate these two offences would make the disciplinary offence conditional on the imposition of a judicial punishment, which would be inconsistent with the purpose of the disciplinary offence and the values it aims to protect. Therefore, the disciplinary offence of carrying out propaganda activities on behalf of criminal organizations must be subject to an autonomous evaluation within the framework of the security and discipline of penitentiary institutions (see *Abdulkadir Yurcu* [Plenary], no. 2018/35713, 26 January 2023, § 24).

37. Law no. 5275 regulates the disciplinary offence of disseminating propaganda on behalf of criminal organizations within penitentiary institutions, encompassing not only the propaganda of terrorist organizations but also all types of criminal organizations. The criminal organization in question may be armed or unarmed. From this perspective, it is impossible to restrict the scope of the disciplinary offence of disseminating propaganda on behalf of criminal organizations

solely to the legitimization or glorification of the violent and threatening methods of a terrorist organization or the encouragement of such methods. It must be acknowledged that this offence covers all kinds of activities which aim at strengthening organizational morale, ensuring commitment to the organization, instilling hope for the organization's success, spreading its intimidating power, glorifying its activities, and praising its founders, leaders, or members; which threaten the security and discipline of penitentiary institutions; and which contradict the goal of rehabilitating inmates (see *Abdulkadir Yurcu*, § 25).

38. The applicants were accused of disseminating propaganda on behalf of the PKK, a terrorist organization responsible for nearly forty years of violence resulting in the deaths of numerous civilians and security forces, particularly in the Eastern and South-eastern regions of the country. The PKK was active at the material time and has been still carrying out its activities. Therefore, the PKK represents a severe, intense, and real threat to society (see, for similar assessments, *Metin Birdal* [Plenary], no. 2014/15440, 22 May 2019, § 74).

39. A key consideration, in similar cases, to be taken into account is the fact that propaganda often takes the form of symbolic acts. Symbols can shape perceptions and feelings, provide meaning and associations, attract attention, remembered easily, influence and direct, differentiate, and serve to either be noticed or go unnoticed. They also help organize and encode perception. Thus, it should be remembered that the hunger strike carried out by the applicants had a symbolic value, given that it was performed to honour the leader of an organization (see *Figen Yüksekdağ Şenoğlu and Others*, no. 2016/39759, 30 March 2022, § 81).

40. Since the imprisonment of A.Ö., the leader of the PKK terrorist organization, it has been observed that members of the organization have continuously engaged in collective hunger strikes for nearly twenty years, driven by the same reasons. In the present case, the applicants, detained or convicted of various terrorist offences, recently engaged in collective hunger strikes to protest their leader's isolation and to demand its cessation.

41. Considering that the prisoners taking part in the impugned act were detained or convicted for terrorist offences and that they collectively organized a hunger strike about a matter non-related to their own individual case, it has been assessed that the hunger strike was organized to honour a person who was an indisputable symbol for the existence, raison d'être and acts of the terrorist organisation; and aimed at strengthening organizational motivation; glorifying the founder of the organization; familiarising the persons in the penitentiary institution about the organisation, its founder, and the organization of hunger strikes and disseminating the doctrine associated with the said leader (see, for similar assessments, *Şükrü Yıldız*, no. 2015/18720, 9 May 2018 § 27; *Burcu Çelik Özkan*, § 31). Therefore, it has been concluded that the assessment of the penitentiary institution that the said act had constituted the offence of disseminating propaganda on behalf of the terrorist organization was not arbitrary and, in this regard, the disciplinary sanctions imposed on the applicants were lawful.

42. Additionally, it is imperative to examine whether the applicant's hunger strike constituted an action likely to disrupt the security or discipline of the institution or impede the orderly life therein.

43. The Court has previously underscored that hunger strikes are a highly sensitive and exceptional method of expression of thought. In such cases within penitentiary institutions, the state's obligation to ensure security and order entails the protection of the health of individuals who are under its absolute control and who are compulsorily held in these institutions. Moreover, the State's margin of appreciation must be interpreted more broadly in instances of hunger strikes that do not pertain to the personal situation of prisoners and where there is reasonable suspicion that they are orchestrated at the call of terrorist organizations or are intended to maintain organizational allegiance (see *Şükrü Yıldız*, § 21; *Murat Karayel (5)*, § 46; and *Cihat Özdemir*, § 22).

44. Considering that penitentiary institutions are designated areas under the strict control of the state, and acknowledging the state's duty to safeguard the safety and health of inmates while maintaining discipline, it is evident that convicts and detainees do not possess unrestricted

freedom to engage in protests as they wish within these institutions (see the Court's decision no. E.2013/6, K.2013/111, 10 October 2013; and *Barış İnan (2)*, no. 2018/38006, 17 November 2021, § 24).

45. It is evident that the hunger strikes organized by a lot of people, similar to the one in the present case, inherently require extraordinary measures to be taken in terms of the health of the individuals and security of the institution and undermine orderly life in the penitentiary institutions. Accordingly, interferences with such protests should be considered reasonable to re-establish order in the penitentiary institution and prevent never-ending hunger strikes (see *Burcu Çelik Özkan*, § 30).

46. Having regard to the grounds relied on by the applicants to justify resorting to an exceptional means such as hunger strike, the Court has concluded that the applicants did not act in accordance with the responsibility expected of them during the period they are held in the penitentiary institution. It has been concluded that the disciplinary sanction imposed on the applicants met a pressing social need and a fair balance was struck between the interest sought to be achieved as a result of hunger strikes and the aim of ensuring discipline in the penitentiary institution. Furthermore, considering the margin of appreciation afforded to the penitentiary institution administration, it has been accepted that the disciplinary sanction of solitary confinement was proportionate, and the interference in question was not contrary to the requirements of the order of a democratic society.

47. In the light of the foregoing, it must be held that there was no violation of the applicants' freedom of expression, safeguarded by Article 26 of the Constitution.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 24 May 2023 that

A. The request 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 NOT VIOLATED; and

D. As the payment of the litigation costs by the applicants would be unjust pursuant to Article 339 § 2 of the Code of Civil Procedure no. 6100 of 12 January 2011, the applicants be COMPLETELY EXEMPTED from payment of the litigation costs.

RIGHT TO HOLD MEETINGS AND DEMONSTRATION MARCHES (ARTICLE 34)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

DENİZ YAVUNCU AND OTHERS

(Application no. 2018/5126)

23 February 2023

On 23 February 2023, the Plenary of the Constitutional Court found violations of the freedom of expression and the right to hold meetings and demonstration marches, safeguarded by Articles 26 and 34 of the Constitution, in the individual application lodged by *Deniz Yavuncu and Others* (no. 2018/5126).

(I-IV) SUMMARY OF THE FACTS

[1-6] The applicants were tried in different criminal proceedings on the grounds that their participation in meetings organised on various dates and their expression of thoughts had constituted offences falling under criminal law and that they had committed the imputed offences on behalf of a terrorist organisation. The applicants were sentenced for the offences prescribed in the criminal laws corresponding to the acts imputed on them and they were imposed various amounts of punishments.

V. EXAMINATION AND GROUNDS

7. The Constitutional Court ("the Court"), at its session of 23 February 2023, examined the application and decided as follows:

A. Request for Legal Aid

8. 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 has accepted the request for legal aid by the applicants Ersin Ekmekçi, Sinan Ekmekçi, Mehmet Salim Çaçan, Güven Aydın, Ercan Ekmekçi, İlyas Alak, Diyaeddin Alak, Emrah İşler, Mazlum Konur, Burak Yiğit, İbrahim Koçer, Bilal Erol, Ömer Güner, Mustafa Kılıcı, Musa Akın and Erdinç Eroğlu, who have been found to be unable to afford the litigation costs without suffering a significant financial burden, for not being manifestly ill-founded.

B. Alleged Violations of the Freedom of Expression and the Right to Hold Meetings and Demonstration Marches

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

9. The applicants claimed that their freedom of expression and right to hold meetings and demonstration marches, had been violated, stating

that they had been convicted of committing an offence on behalf of a terrorist organisation without being a member of it on the grounds of their participation in a demonstration march or expression of thought.

10. In its observations, the Ministry noted that the grounds relied on in the trial court's decision should be evaluated within the scope of the case-law of the Court and the European Convention on Human Rights ("the Convention") regarding the right to hold meetings and demonstration marches.

2. The Court's Assessment

11. Article 34 §§ 1 and 2 of the Constitution, titled "*Right to hold meetings and demonstration marches*", read as follows:

"*Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*

The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others."

12. The Court is not bound by the legal qualification of the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The applicants essentially complained about their conviction for having participated in a meeting and demonstration march or having expressed their thoughts. Therefore, their complaints will be examined as a whole within the scope of the freedom of expression and right to hold meetings and demonstration marches (see *Hamit Yakut* [Plenary], no. 2014/6548, 10 June 2021, § 63; *Metin Birdal* [Plenary], no. 2014/15440, 22 May 2019, § 44; and *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 30).

a. Admissibility

13. The application 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

14. In the present case, it has been acknowledged that there was an interference with the applicants' right to hold meetings and demonstration marches as well as their freedom of expression on the grounds that they were punished as a result of their participation in or expression of thought during a meeting and demonstration march.

ii. Whether the Interference Constituted a Violation

15. The aforementioned interference would constitute breaches of Articles 26 and 34 of the Constitution unless it has satisfied the conditions set out in Article 13 of the Constitution, titled "*Restriction of fundamental rights and freedoms*". 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.*"

16. In the case of *Hamit Yakut*, which is similar to the present case, the Court examined the claim of the applicant, who was sentenced for committing an offence on behalf of a terrorist organisation without being a member of it on account of his participation in a demonstration organised upon the call of the PKK terrorist organisation, that there was an interference with his right to hold meetings and demonstration marches (see § 69 thereof). It the relevant judgment, the Court made detailed explanations on the structure of the act of committing an offence on behalf of a terrorist organisation without being a member of it, and examined extensively whether Article 220 § 6 of Law no. 5237, which regulates the said offence, prevented arbitrary actions of authorities exercising public power and whether it was accessible, foreseeable and definitive to the extent that would enable individuals to be familiar with the law, as required by Article 13 of the Constitution (see *ibid.* §§ 70-115).

17. In the light of all its assessments in the case of *Hamit Yakut*, the Court concluded, in brief, that Article 220 § 6 of Law no. 5237 did not comply with the requirement of certainty in terms of its content, purpose and scope, that it did not afford the applicant legal protection against the arbitrary interference with his constitutional right safeguarded by Article 34 of the Constitution, and that the impugned interference, which stemmed from the application of Article 220 § 6 of Law no. 5237, did not satisfy the requirement of lawfulness (see *ibid.* § 116). The relevant of the aforementioned judgment is as follows:

"88. At the beginning of the assessments concerning the foreseeability of Article 220 § 6 of the Law no. 5237, it must first be noted that the law does not contain any explanation as to what is meant by the expression "offence committed on behalf of an organisation". In addition, the Court of Cassation also makes its assessments regarding this expression in view of the particular circumstances of each case. However, in its decision dated 4 March 2008 and in its subsequent decisions, the Court of Cassation elaborated the meaning of the aforementioned expression and, in general, the meaning of Article 220 § 6 of the Law no. 5237 in the context of demonstrations.

89. In its decisions concerning the meetings and demonstration marches held solely upon the call of an organisation, the Court of Cassation considered sufficient the existence of a call, albeit being of general nature, to acknowledge that the offence had been committed on behalf of the organisation. In addition, it appears that in some of the decisions of the Court of Cassation, the meetings and demonstration marches held in connection with the days and events deemed important by the organisation were considered to fall within the scope of the offence at issue, even in the absence of a call. This approach of the Court of Cassation causes an indefinite extension of the criteria introduced by the judicial case-law in relation to an offence involving a considerably severe charge and penalty. In the practice based on the case-law of the Court of Cassation in relation to Article 220 § 6 of the Law no. 5237, an individual's mere participation in a demonstration held upon a call of an armed terrorist organisation and his clear manifestation of a positive attitude towards the said organisation are considered as a sufficient indication of his having committed an offence on behalf of an organisation. This allows the person concerned to be sentenced like a real member of the organisation albeit the application of a certain reduction in his sentence.

90. According to the said provision, an individual, if considered to have committed an offence on behalf of an organisation, is deemed to be a member of the organisation and punished for the offence of membership of the organisation. This constitutes another aspect of the provision which causes uncertainty. Pursuant to Article 2 of the Law no. 3713, those who commit an offence on behalf of a terrorist organisation without being a member of it shall be considered as terrorist offenders. In the legislative intent of Article 220 § 6 of the Law no. 5237, it is noted that a person who commits an offence on behalf of an organisation without having a hierarchical relationship within it must be considered as a member of the said organisation and thus be held responsible in this regard. Likewise, in the legislative intent of the amendment introduced by the Law no. 6352, it is emphasised that a person who commits an offence on behalf of an organisation without being a member of it is "considered as a member of the said organisation". The Court of Cassation has also noted that a person who commits an offence without being a member of it is "therefore a member of the said organisation".

91. For a person to be convicted beyond any doubt for the offence of membership of a terrorist organisation under Article 314 of the Law no. 5237, the continuity, diversity and intensity of his acts must be taken into consideration, and it must also be sufficiently proven that the person concerned has knowingly and intentionally been involved in the hierarchical structure of the organisation (see Metin Birdal, § 67). A person's activities, each of which indicates a part concerning the membership of a terrorist organisation and which are accepted as evidence, must be examined together to understand the overall circumstances of the case. As a result of the collective examination of the evidence indicating a person's involvement in the hierarchical structure of a terrorist organisation, the validity of the pieces of evidence must be tested and each of them must be assessed in view of the aim of the terrorist organisation, its nature, its level of recognition, the type and intensity of the violence used by it as well as other relevant circumstances of the case. The activities of persons, which are considered as evidence, must be tested against each other and verified to establish whether they complement each other and whether they contain any contradiction (see Metin Birdal, § 72).

92. As is seen, for a person to be convicted for the offence of membership of a terrorist organisation, his acts and conducts during a certain period of time are examined and a detailed assessment is made to establish his involvement in

the hierarchical structure of an armed terrorist organisation. In other words, pursuant to Article 314 of the Law no. 5237, for a person to be sentenced like a member of a terrorist organisation, the continuity, diversity and intensity of his acts must be taken into consideration. It must also be demonstrated that the person concerned has an organic link with the said terrorist organisation and acts knowingly and intentionally within the hierarchical structure of the organisation. However, as in the applicant's case, when Article 314 of the Law no. 5237 is applied on the basis of Article 220 § 6 thereof, the issue of whether a person acts within a hierarchical structure is excluded from the assessment, and a person is convicted of membership of an armed organisation where he is merely considered to act on behalf of the PKK terrorist organisation.

93. In brief, certain conditions required for the existence of the offence of membership of a terrorist organisation are not sought in respect of an individual who is not a member of the organisation but commits an offence on behalf of it. However, the individuals in both categories are punished as members of the organisation. In such case, individuals face severe penalties for committing an offence alleged to have connection, albeit weak, with a terrorist organisation. Besides, where the offence concerns the exercise of fundamental rights, as in the present case, an overly broad interpretation of the expression "on behalf of an organisation" would have a strong deterrent effect on the fundamental rights such as the freedom of expression, the right to hold meetings and demonstration marches, the freedom of association and the freedom of religion and conscience. It is obvious that the conditions for conviction sought under Article 314 § 2 of the Law no. 5237, when applied in conjunction with Article 220 § 6 thereof, are extended indefinitely to the detriment of the persons alleged to have committed an offence on behalf of an organisation.

…

108. The range of offences considered to be committed on behalf of an organisation, as set out in Article 220 § 6 of the Law no. 5237 as currently in force, is so broad that the wording of the legal provision, including its extensive interpretation by the inferior courts, cannot afford sufficient protection against arbitrary interferences of public authorities and cannot prevent individuals from being additionally punished, in an unforeseeable manner, for the offence of committing an offence on behalf of an organisation besides their principal offences.

…

113. Moreover, in the present case, the first-instance court decided to suspend the pronouncement of the judgment as regards the offence of refusing to disperse of his own will despite the warning during an unlawful meeting and demonstration march. Pursuant to Article 231 § 5 of the Law no. 5271, the suspension of pronouncement of the judgment means that the judgment does not bear any legal consequences in respect of the accused person. Within this framework, the fact that the decision to suspend the pronouncement of the judgment, which would bear no legal consequences as provided for by the clear legal provision, was taken as basis for an offence giving rise to the applicant's conviction for the offence of membership of a terrorist organisation, as in the present case, is another issue indicating how extensively the offence under Article 220 § 6 of the Law no. 5237 was interpreted."

18. In its judgment in the case of *Hamit Yakut*, as explained above, the Court concluded that the applicant's right to hold meetings and demonstration marches was violated on the grounds that the applicant's conviction for the act of committing an offence on behalf of a terrorist organisation without being a member of it did not meet the requirement of lawfulness, and that the violation stemmed from a structural problem based on the wording of the legal provision itself and the broad interpretation of the law by the inferior courts. The Constitutional Court communicated a copy of the judgment to the legislature on the grounds that the legal provision giving rise to the violation must be subject to review in order to redress the violation and its consequences as well as to prevent similar future violations (see *Hamit Yakut*, §§ 131, 132).

19. In addition, the Court has implemented the pilot judgment procedure in order to ensure that similar applications be resolved by the relevant authorities rather than being examined and concluded with a judgment finding a violation, and that the structural problem be resolved through the elimination of the cause of the violation. Thus, the Court suspended the examination of similar applications, like the present one, as well as further applications to be lodged thereafter for a period of 1 year from the publication of the judgment in the Official Gazette pursuant to Article 75 § 5 of the Internal Regulations of the Court (see *Hamit Yakut*, § 134).

20. Undoubtedly, it is at the discretion of the legislature to make legal arrangements as an essential part of the state policy to be adopted in terms of the fight against terrorism. However, in the case of *Hamit Yakut*, having examined the impugned interference from the standpoint of the lawfulness criterion within the scope of its constitutional powers and duties, the Court clearly expressed that the interference based on Article 220 § 6 of Law no. 5237 was neither definite nor foreseeable, and therefore an amendment to the relevant legal arrangement was required.

21. The judgment of *Hamit Yakut* was published in the Official Gazette dated 3 August 2021 and numbered 31557, and the legislature was notified in order for the resolution of the structural problem. Within the prescribed period of time, no legislative amendment was made to Article 220 § 6 of Law no. 5237, nor did the legislature make an amendment to Article 220 § 6 of Law no. 5237, in compliance with the principles set out in the Court's judgment, which ensures its effectiveness in terms of preventing arbitrary actions of authorities exercising public power, as well as its accessibility, foreseeability and certainty, as required by Article 13 of the Constitution. This situation resulted in a situation whereby the requirements of the relevant pilot judgment of the Court were not fulfilled. Hence, the unlawful interferences with the applicants' freedom of expression and right to hold meetings and demonstration marches persisted in the suspended applications.

22. In the present case, the Court has found no reason to depart from the principles specified and the conclusion reached in the judgment of *Hamit Yakut*. Accordingly, the Court has concluded that the impugned interference with the applicants' freedom of expression and right to hold meetings and demonstration marches, which stemmed from the application of Article 220 § 6 of Law no. 5237, did not comply with the requirement of lawfulness.

23. Since it has been observed that the impugned interference did not satisfy the requirement of lawfulness, it has not been considered necessary to further examine whether the other safeguards were respected in terms of the interference in question.

24. In the light of the foregoing, it must be held that there were violations of the freedom of expression and the right to hold meetings

and demonstration marches, respectively safeguarded by Articles 26 and 34 of the Constitution.

C. Other Alleged Violations

25. Since it has already been found that the applicants' right to hold meetings and demonstration marches was violated, there is no need to make a separate examination on the admissibility and merits of their remaining complaints.

D. Application of Article 50 of Code no. 6216

1. Causes of the Violation and Means of Redress

26. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, insofar as relevant, provides 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 a 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."

27. In its judgment on the individual application of *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles concerning the redress of the violation. In another judgment, the Court 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).

28. Where a violation of any fundamental right is found within the scope of an individual application, the basic rule for redressing 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 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).

29. The cause of the violation must be established before deciding on the steps required to be taken so that the violation and its consequences can be redressed. Accordingly, the violation may result from administrative acts and actions, judicial acts or legislative acts. The establishment of the cause of the violation is of importance for the determination of appropriate means of redress (see *Mehmet Doğan*, § 57).

2. Redress of the Violation and its Consequences, which Stemmed from the Law

30. All of the applicants requested the Court to find a violation and order a retrial. Some of them also claimed pecuniary and/or non-pecuniary damages.

31. As stated above, in the case of *Hamit Yakut*, the Court indicated that Article 220 § 6 of Law no. 5237, did not satisfy the requirement of lawfulness, and applied the pilot judgment procedure. Thus, the Court suspended the examination of similar applications for a period of one year from the date of publication of the aforementioned judgment in the Official Gazette. The judgment was published in the Official Gazette dated 3 August 2021 and numbered 31557 and was also sent to the Grand National Assembly of Türkiye. However, the legislator failed to make any legal arrangement during the said period.

32. In consideration of the aforementioned constitutional principles, international legal instruments, judicial decisions and examples from comparative law, the main duty and responsibility for the statutory arrangements to be made in order to prevent similar violations falls to

the legislature. However, in the present case, it should be determined how the grievances suffered by the applicant will be redressed within the scope of the *principle of restitution*.

33. In its judgment in the case of *Hulusi Yılmaz* ([Plenary], no. 2017/17428, 1 December 2022), the Court has determined the general principles on how to redress the violation and its consequences, if the violation stemmed from the law. Accordingly, in the present case, the applicant's grievances must be redressed within the scope of the *principle of restitution* in accordance with Article 148 § 3 of the Constitution and Article 50 of Code no. 6216. Therefore, as mentioned above, it should be ensured that the original situation before the violation is restored as far as possible. Otherwise, the victim status of the applicant will not be terminated, and thus the consequences of the violation will not be redressed. Since the legislature has made no amendment regarding the legal provision applicable to the present case, which was found by the Court to have caused a violation, whether the consequences of the violation can be redressed so as to ensure restitution to the original state prior to the violation should be discussed within the framework of the constitutional provisions as well as the relevant provisions of the aforementioned Code (see *Hulusi Yılmaz*, § 62).

34. It is laid down in Article 50 § 1 of Code no. 6216 that in cases where a judgment finding a violation is rendered, the steps required to be taken for redress of the violation and consequences thereof shall be indicated. Therefore, in accordance with Article 148 § 3 of the Constitution, the aforementioned provision empowers the Court to ensure that the violation and its consequences are redressed and the previous situation is restored. Besides, it is stipulated in Article 50 § 2 of Code no. 6216 that if the determined violation originates from a court ruling, the file shall be sent to the relevant court for retrial to be held in order to eliminate the violation and its consequences. Thus, in cases where the violation stems from the law, whether there is a legal interest in conducting a retrial should be determined by considering all constitutional provisions on redress of the consequences of the violation (see *Hulusi Yılmaz*, § 63).

35. On the other hand, in the present cases, neither the courts of first instance nor the Court of Cassation did challenge the constitutionality

of the applicable legal provisions within the scope of Article 152 of the Constitution during the proceedings before the individual application. However, in the course of retrial, constitutionality of the provision applicable to the present case within the scope of the aforementioned constitutional provision can be challenged (see *Hulusi Yılmaz*, § 53).

36. In addition, if the provision applicable in the course of the retrial process contradicts international agreements on fundamental rights and freedoms, Article 90 *in fine* of the Constitution stipulating that a given dispute can be resolved relying on the provisions of international agreements may also be applicable (see *Hulusi Yılmaz*, § 54). However, as explained above, lodging an application to the Court, seeking the annulment of the allegedly unconstitutional provision pursuant to Article 152 of the Constitution appears to be a more reasonable remedy in the particular circumstances of the case.

37. Hence, there is a legal interest in conducting a retrial for redressing the violation found and consequences thereof. In this sense, the judicial authorities to which the judgment is remitted are expected to initiate retrial proceedings and issue a new decision that eliminates the reasons underlying the Court's judgment finding a violation and complies with the principles specified in the violation judgment. Since no decision can necessarily be rendered in accordance with a legal provision determined by the Court not to prevent unconstitutional interferences with fundamental rights;

- During the retrial process, the courts should challenge the constitutionality of the legal provision before the Court under Article 152 of the Constitution, or resolve the dispute by relying on international agreements, in accordance with Article 90 *in fine* of the Constitution.

38. Considering the nature of the violation, the applicants should be awarded the amounts indicated in the annexed table, which were calculated to cover their non-pecuniary damages. Besides, some of the applicants, who claimed to have suffered pecuniary damages, failed to demonstrate the existence of a causal link between their alleged damages and the violation found, therefore their claims for pecuniary compensation must be dismissed.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 23 February 2023 that

A. The applications listed in column (B) of the annexed table be MERGED with the individual application no. 2018/5126;

B. The request for legal aid by the applicants Ersin Ekmekçi, Sinan Ekmekçi, Mehmet Salim Çaçan, Güven Aydın, Ercan Ekmekçi, İlyas Alak, Diyaeddin Alak, Emrah İşler, Mazlum Konur, Burak Yiğit, İbrahim Koçer, Bilal Erol, Ömer Güner, Mustafa Kılıcı, Musa Akın ve Erdinç Eroğlu be GRANTED;

C. The alleged violations of the freedom of expression and right to hold meetings and demonstration marches be DECLARED ADMISSIBLE;

D. The freedom of expression and the right to hold meetings and demonstration marches, respectively safeguarded by Articles 26 and 34 of the Constitution, were VIOLATED;

E. A copy of the judgment be REMITTED to the courts of first instance listed in the annex for retrial to be conducted to redress the consequences of the violations of the freedom of expression and right to hold meetings and demonstration marches;

F. The amounts listed in column (G) of the annexed table be REIMBURSED to the applicants for non-pecuniary damages, and the remaining claims for compensation be REJECTED;

G. The counsel fees incurred by the applicants represented by a lawyer be REIMBURSED JOINTLY as indicated in the annexed table for those represented by the same lawyer and RESPECTIVELY for the others, and the fees listed in column (D) be REIMBURSED as specified in the annexed table;

H. 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

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

RIGHT TO PROPERTY
(ARTICLE 35)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

AMELIA KUKUTARA AND OTHERS

(Application no. 2019/7923)

27 April 2023

On 27 April 2023, 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 *Amelia Kukutara and Others* (no. 2019/7923).

(I-IV) SUMMARY OF THE FACTS

[1-27] Eight immovable properties registered in the name of the applicants' testator were identified and registered in the name of the Treasury in accordance with the cadastral records finalised on 2 December 1953, and afterwards, they were transferred to the İstanbul Municipality. Some of these properties were subsequently registered in the name of third parties. The action brought by the applicants seeking the rectification of the registry as regards six of these properties was dismissed due to the expiry of limitation period.

Subsequently, the applicants brought two separate actions against the Treasury and the İstanbul Metropolitan Municipality before the 2nd Chamber of the Civil Court (civil court), for the rectification of the registration, as well as being awarded compensation regarding eight immovable properties. One of the cases concerned three immovable properties, while the other concerned five immovable properties. The civil court dismissed the cases on the grounds that the limitation period had expired. Two different chambers of the Court of Cassation, which examined the applicants' requests for appeal, upheld the civil court's decisions, and the applicants' subsequent requests for rectification of the decisions were also dismissed by the relevant chambers.

V. EXAMINATION AND GROUNDS

28. The Constitutional Court ("the Court"), at its session of 27 April 2023, examined the application and decided as follows:

A. Alleged Violation of the Right to Property

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

29. As regards the rejection of their claim for compensation as being time-barred, the applicants referred to the judgment in the case of

Günaydın Turizm ve İnşaat Ticaret A.Ş. v. Türkiye and asserted that the European Court of Human Rights ("ECHR") declared the application admissible despite being lodged out of time and ultimately found a violation. The applicants maintained that they were deprived of the right to property by virtue of an administrative decision, which had not been notified to the owners, and alleged that any claim for compensation could not be dismissed on any grounds involving the forfeiture of rights, which are laid down in domestic law, citing the ECHR's judgment in the case of *Ocak v. Türkiye*. They accordingly maintained that their right to property had been violated.

30. In its observations, the Ministry referred to the Court's judgments *Yaşar Çoban* ([Plenary], no. 2014/6673, 25 July 2017) and *Adil İbrahim Çeyrek and Others* (no. 2017/15166, 18 June 2020). As regards the present case, the Ministry noted that the action for compensation had been brought nearly 2 years, 4 months and 22 days after 18 November 2009, the date when the judgment was issued by the General Assembly of Civil Chambers of the Court of Cassation, and argued that the application must be declared inadmissible in line with the principles laid down in these judgments. It also maintained that the application fell outside the Court's jurisdiction *ratione temporis*, pointing out that the action was brought about 59 years after the finalisation of the cadastral records in 1953. It also emphasised that the interpretations by the inferior courts as to the limitation period were not arbitrary. It also requested the Court to take into consideration the opinions and respective documents submitted by the Ministry of Treasury and Finance, the Directorate General of Land Registry and Cadastre, as well as by the Directorate General of National Estate.

31. In the letter submitted by the Ministry of Treasury and Finance to the Court through the Ministry, it is indicated that the application should be declared inadmissible in accordance with the Court's judgment *Bayram Hasan Özer and Rüses Özer* (no. 2017/17513, 3 June 2020). The Directorate General of Land Registry and Cadastre provided the cadastral records and annexes regarding the immovable properties in question.

32. In their counter-statements, the applicants stated that the reason for their failure to bring an action within two years following 18 November 2009 is the prolongation of their obtaining a certificate of inheritance. They also argued that as the immovable properties were subject to an annotation that they were leased in the name of the Sultan Mahmut Han Sani Foundation, the limitation period would not start to run.

2. The Court's Assessment

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

a. Admissibility

34. Given the nature of the application, the Court's jurisdiction *ratione temporis* must first be discussed.

35. Article 148 § 3 of the Constitution and Article 45 § (1) of the Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court of 30 March 2011 ("Code no. 6216") provide that any person may apply to the Court on the grounds that the public authorities have violated any of his/her fundamental rights and freedoms guaranteed by the Constitution, which fall within the scope of the European Convention on Human Rights ("Convention") and its additional protocols to which Türkiye is a party. Provisional Article 18 of the Constitution provides that individual applications shall be accepted from the date of entry into force of the implementing law, and Article 76 § 1 of Code no. 6216 provides that Articles 45 to 51 of the Code shall enter into force on 23 September 2012.

36. In order to make an accurate determination as to the Court's jurisdiction *ratione temporis*, it is necessary to accurately designate the finalisation date of the impugned proceedings and decisions, as well as the date of the alleged interference. In making such determination,

the events constituting the interference as well as the scope of the right allegedly infringed should be assessed together (see *Zeycan Yedigöl* [Plenary], no. 2013/1566, 10 December 2015, § 31).

37. In the present case, according to the records in *mudevvere* ledger (the land registry ledger kept during the Ottoman era), the immovable properties owned by the applicants' testator were registered in the name of the Treasury through the cadastral records finalised on 2 December 1953. Although it is disputed whether the records in *mudevvere* ledger are in the form of title deed registry, they are undoubtedly documents confirming the entitlement to disposition and possession over properties. In this sense, it is clear that the records in *mudevvere* ledger are strong evidence pointing to the existence of ownership. There is no dispute that the applicants' testator lost the ownership rights based on the records in *mudevvere* ledger by 2 December 1953 when the cadastral process was finalised.

38. The Court has further indicated that, as a rule, an interference with the right to property -in the form of deprivation of property- is a momentary act and does not constitute a continuing interference (see *Agavni Mari Hazaryan and Others*, no. 2014/4715, 15 June 2016, § 114). However, the Court would make its assessments by taking note of whether the public authorities examined and issued a decision on the substantial aspect (merits) of the interference or whether there was any compensation remedy or a similar remedy accorded in respect of the interference, on condition of falling within its jurisdiction *ratione temporis* (see *Varvara Arnavut*, no. 2014/7538, 13 September 2017, § 48; and *Agavni Mari Hazaryan and Others*, §§ 111-120).

39. In the present case, the applicants filed actions for rectification of the registries, invoking Article 12 of the Land Registry Act no. 3402 ("Law no. 3402"). There is no justified reason to consider that the actions filed by the applicants were not an effective remedy for the rectification of the registries that were made on the basis of erroneous cadastral findings. As a matter of fact, the civil court dismissed the actions not on this basis, but on the ground of not being filed within the limitation period. In this respect, the court noted that these actions should have been filed within

one year as from 9 October 1987, the effective date of Law no. 3402, in consideration of Article 12 § 3 and Provisional Article 4 § 3 thereof, and that the actions for rectification of registries brought many years after the specified date were considered to be out of time.

40. In this regard, the question whether the present application falls within the Court's jurisdiction *ratione temporis* may be resolved on the basis of the determination of the exact time when the impugned act giving rise to loss of property (cadastral process) became final in respect of the applicants. As the question whether the cadastral process became final in respect of the applicants is closely related to the merits of the application, the Court found it more reasonable to examine the admissibility -regarding the jurisdiction *ratione temporis*- and merits of the case together.

41. The alleged violation of the right to property must be declared admissible -insofar as it concerns the jurisdiction *ratione temporis*- for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. Existence of Property

42. A person who claims that his/her right to property has been infringed must first prove that he/she is entitled to that right. For this reason, it is necessary, first and foremost, to assess the legal status of the applicant with regard to whether he/she has an interest in the property that 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).

43. There is no finding by the inferior courts to the effect that the disputed immovable properties were not registered in Sarıyer *mudevvere* ledger no. 38/2. It is not for the Court to determine the nature of *mudevvere* ledger records. However, in ascertaining whether there exists a property or a legitimate expectation of obtaining such possession within the meaning of Article 35 of the Constitution, the Court takes into

consideration the relevant statutory provisions and jurisprudence within the framework of the rules of property law. In this sense, the meaning of *mudevvere* ledger records within the meaning of the respective legislation and jurisprudence must first be clarified. Accordingly, it has been concluded that it is disputed whether such records are in the nature of a title deed registry; however, they are capable of certifying the entitlement to disposition and possession. Considering that it is possible to obtain entitlement to an immovable property through *mudevvere ledger records* given the above-defined capacity of such records and on condition of the fulfilment of other respective conditions, the Court has concluded that the applicants had an interest needed to be protected under Article 35 of the Constitution.

ii. Existence of an Interference and Its Type

44. 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).

45. In the light of Article 35 of the Constitution, read together with other provisions relating 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

provisions 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).

46. The immovable properties in question were subject to cadastral process in 1953, at the end of which they were registered in the name of the Treasury, thus setting aside the previous legal status with respect thereto. It is therefore indubitable that the impugned cadastral process constituted an interference with the applicants' right to property. The Court found it appropriate to examine the impugned interference, given its nature and aim, within the framework of the provision regarding the deprivation of property.

iii. Whether the Interference Amounted to a Violation

47. 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."

48. 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).

(1) Lawfulness

49. 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 taken into account in interferences with the right to property is whether the interference is based on the law (see *Ford Motor Company*, no. 2014/13518, 26 October 2017, § 49).

50. The immovable properties concerning which the applicants raised a claim of possession were registered in the name of the Treasury as a result of the cadastral process carried out on 2 December 1953 on the basis of Law no. 2613. The said Law embodies comprehensive provisions regarding the demarcation, determination and registration of the immovable properties. Therefore, it is evident that the impugned registration of the immovable properties in the name of the Treasury in the present case was based on accessible, precise and foreseeable statutory provisions.

(2) Legitimate Aim

51. According to Articles 13 and 35 of the Constitution, the right to property may be restricted only in the public interest. The concept of public interest serves both as a restrictive instrument, allowing the imposition of restrictions on the right to property where the public interest so requires, and as an effective protective mechanism, setting limits to restrictions by preventing the imposition of any restrictions on the right to property outside the public interest. The concept of public interest brings along the discretionary power of the public authorities and must be assessed on a case-by-case basis, since it does not correspond to a single objective definition (see *Nusrat Külah*, no. 2013/6151, 21 April 2016, § 53, 65; and *Yunis Ağlar*, no. 2013/1239, 20 March 2014, §§ 28, 29).

52. The purpose of the cadastral process is to demarcate the boundaries of immovable properties on the land and map based on the

cadastral or topographical cadastral map of the country according to the country's coordinate system and to determine their legal status, thereby establishing a secure land registry system. The immovable properties in dispute were also subject to the cadastral process in order to achieve this purpose and were finally allocated and registered in the name of the Treasury. Therefore, it appears that their registration in the name of the Treasury was in the public interest.

(3) Proportionality

53. Proportionality, which is one of the criteria to be taken into account when restricting rights and freedoms under Article 13 of the Constitution, derives from the principle of the rule of law. Since the restriction of rights and freedoms is an exceptional power in a state governed by the rule of law, this power can only be justified to the extent required by the situation. It would be incompatible with the rule of law to restrict the rights and freedoms of individuals beyond the extent that the concrete circumstances require, since this would mean exceeding the powers conferred on the public authorities (see the Court's decision no. E.2013/95, K.2014/176, 13 November 2014).

54. The principle of proportionality laid down in Article 13 of the Constitution consists of three sub-principles: *suitability*, *necessity* and *commensurateness*. *Suitability* requires that the intended interference is suitable for achieving the objective (aim) pursued; *necessity* requires that the interference is indispensable for achieving the objective pursued, in other words that the objective pursued cannot be achieved by a less severe interference; and *commensurateness* requires that a reasonable balance be struck between the interference with a given right and the objective pursued by the interference (see the Court's decisions 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*, § 38).

55. The existence of procedural safeguards may play an important role in the assessment of commensurateness. In this context, the absence of legal remedies enabling an individual to challenge the lawfulness of an interference or to seek compensation for the pecuniary and non-pecuniary damage caused by the alleged interference may be

considered, in certain cases, as a factor aggravating the burden imposed on the individual. 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).

56. It is very important to determine the legal status of immovable properties by demarcating their boundaries on land and maps and thus to establish a land registry in order to ensure the reliability of the land registry. The cadastral process is a compulsory process in terms of achieving the aforementioned objectives. However, it is a requirement of the constitutional obligations regarding the protection of the right to property to provide the opportunity to make use of judicial remedies in order to rectify cadastral acts that are considered to be erroneous.

57. The prolongation in the finalisation of cadastral surveys may lead to hesitations regarding the ownership of immovable property, legal uncertainties and delayed access of right holders to their rights. It appears that the legislator's aim in envisaging that the notification of cadastral determinations to those concerned through announcement is to put an end to the uncertainties regarding the ownership of immovable properties as soon as possible (in the same vein regarding the forest cadastre, see the Court's decision no. E.2018/33, K. 2018/113, 20 December 2018, § 29).

58. However, it should be taken into account that the regulations regarding the notification by announcement are justified by the idea that the persons who will claim rights on the immovable properties subject to cadastral survey reside in the region where the immovable properties in question are located, or have the means to be informed of the process even if they do not reside there. Indeed, the owners or possessors of the immovable properties subject to cadastral survey generally use the immovable properties directly themselves or make them available to the persons to whom they have transferred the power of disposition through a legal relationship. In both cases, it is almost certain that the owner or possessor will be aware of the cadastral process. However, it is very difficult for a person residing abroad, for example, to be informed of the cadastral announcement also in the event of exceptional circumstances

that sever the connection with the immovable property. In such cases, the automatic commencement of the ten-year period for filing an action upon the expiry of the announcement period constitutes a disproportionate interference with the right to property, as it may lead to irrecoverable damages in terms of the right to property.

59. It should be also noted that, in the context of the procedural guarantees inherent in the right to property, the time-limits for filing an action should not be interpreted in a strict and formalistic manner that would eliminate or make it excessively difficult to have recourse to the remedy in question (for the judgments finding a violation of the right of access to a court, see *Songül Akça and Others* [Plenary], no. 2015/2401, 19 July 2018, §§ 46, 49; and *Yaşar Çoban* §§ 40-42). The excessively strict and formalistic interpretation of the time-limits set for filing an action may infringe not only the right of access to a court but also the procedural safeguards of the material rights.

60. In the present case, there is no information in the inferior courts' decisions to the effect that the applicants and their testator, who are Greek citizens, resided in Türkiye at the time of the cadastral survey and afterwards. It can therefore be considered reasonable that the applicants were not aware of the announcement of the cadastral records. Furthermore, although an action was filed by eleven heirs of Ayzer Zetya at the 2nd Chamber of the Sarıyer Civil Court on 19 July 1993, the court acknowledged that these were the heirs other than the parties to the present individual application. Accordingly, the incumbent court cannot be said to demonstrate that the administrative act leading to the loss of property had been duly finalised in terms of the applicants. In this respect, given the particular circumstances of the present case, the Court has considered that the legal process regarding the loss of property had not become final before the Court had jurisdiction *ratione temporis*. Considering that the actions filed by the applicants for the rectification of the registry became final within the Court's jurisdiction *ratione temporis*, the Court has concluded that the application falls within its jurisdiction *ratione temporis*.

61. In the light of all the circumstances of the present case, it has been considered that the commencement of the time-limit for filing an

action as from the period of notification through announcement -without investigating whether there is an exceptional situation in the present case in which it can be considered reasonable to expect that the applicants or their descendants, whose residence in Greece is within the court's knowledge, were not aware of the cadastral process- amounts to a strict and formalistic interpretation. The court's decision to start the time-limit for filing an action as of the end of the notification of the cadastral records rendered it impossible for the applicants to file an action for the alleged unlawfulness of the cadastral process. This is because at the time when the applicants became aware of the cadastral process -according to the court's interpretation- the time-limit for bringing an action had already expired. This interpretation, which makes it impossible for the applicants to bring an action, cannot be considered compatible with the procedural safeguards of the right to property, unless the incumbent court could demonstrate reasons to justify its acknowledgement that the applicants or their testator, who are known to have lived in Greece, were aware of the cadastral survey.

62. Despite the undeniable significance of the public interest in the finalisation of land registry records, the applicants' interest in the protection of their right to property should not be ignored. In the present case, the commencement of the time-limit for bringing an action automatically as from the date when the cadastral records became final, by employing an excessively strict and formalistic interpretation, regardless of the fact that the applicants were residing in Greece, upset the balance that had to be struck between public interest and the applicants' individual interest in the protection of their right to property, thus placing an excessive burden on the applicants. Therefore, the interference with the applicants' right to property was disproportionate.

63. In the light of the foregoing, it must be held that there was a violation of the right to property safeguarded by Article 35 of the Constitution.

Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ, Mr. İrfan FİDAN and Mr. Muhterem İNCE dissented from this opinion.

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

1. The Applicants' Allegations

64. The applicants maintained that their right to a trial within a reasonable time had been violated due to the failure to conclude the proceedings within a reasonable period of time.

2. The Court's Assessment

65. In Provisional Article 2 added to the Law no. 6384 on the Settlement of Certain Applications Lodged with the European Court of Human Rights through Payment of Compensation, dated 9 January 2013, it is set forth that individual applications lodged with the Court due to excessive length of the proceedings, delayed or incomplete execution or non-execution of judicial decisions, and pending before the Court by the date of entry into force of this provision shall be examined by the Human Rights Compensation Commission of the Ministry of Justice ("Compensation Commission"), upon an application to be filed within three months as from the notification of the inadmissibility decision issued for non-exhaustion of the legal remedies.

66. The date indicated in Provisional Article 2 § 1 of Law no. 6384 was amended as 9 March 2023 by Article 40 of Law no. 7445 dated 28 March 2023.

67. In its judgment *Ferat Yüksel* (no. 2014/13828, 12 September 2018), the Court has concluded that the examination of the present application lodged without the exhaustion of the available remedy before the Compensation Commission, which is accessible at first sight and is considered to have the capacity to offer a prospect of success and to provide adequate redress, was incompatible with the *subsidiary nature* of the individual application mechanism. The Court has accordingly declared this part of the application inadmissible for non-exhaustion of the available remedies.

68. In the present case, there is no circumstance which requires the Court to depart from the conclusions in its *Ferat Yüksel* judgment.

69. Consequently, this part of the application must be declared inadmissible for *non-exhaustion of legal remedies* without any further examination as to the other admissibility criteria.

C. Redress

70. Article 50 of 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 a 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."

71. The applicants requested the Court to find a violation and to order a re-trial or otherwise to award them compensation on account of the violation of their right to property, as well as to award them compensation insofar as it concerns the violation of their right to a trial within a reasonable time.

72. In its judgment *Mehmet Doğan* ([Plenary], no. 2014/8875, 7 June 2018), the Court set out the general principles concerning the redress of the violation. In another judgment, the Court 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).

73. Accordingly, if a fundamental right is found to have been violated in an individual application, the basic rule for redressing the

violation and the consequences thereof is to ensure, as far as possible, restitution, that is to say, the restoration of the original situation prior to the violation. To this end, it is primarily necessary to identify the cause of the violation and then to put an end to the continuing violation, to revoke the decision or act which gave rise to the violation, to redress the consequences thereof, to compensate the pecuniary and non-pecuniary damages resulting from the violation, and to take any other measures deemed appropriate in this context (see *Mehmet Doğan*, §§ 55, 57).

74. In cases where the violation results from a court decision or where the court could not provide redress for the violation, the Court holds that a copy of the judgment be remitted to the relevant court for a re-trial with a view to redressing the violation and the consequences thereof pursuant to Article 50 § 2 of Code no. 6216 and Article 79 § 1 (a) of the Internal Regulations of the Constitutional Court. The relevant legal regulation, as different from the similar legal norms set out in the procedural law, provides for a remedy specific to the individual application and giving rise to a re-trial for the redress of the violation. Therefore, in cases where the Court orders a re-trial in connection with its judgment finding a violation, the relevant inferior court does not enjoy any margin of appreciation in acknowledging the existence of a ground for a re-trial, as different from the practice of reopening of the proceedings set out in the procedural law. Thus, the inferior court to which such decision is notified is legally obliged to take the necessary steps, without awaiting a request of the person concerned, to redress the consequences of the continuing violation in line with the Court's judgment finding a violation and ordering a re-trial (see *Mehmet Doğan*, §§ 58 and 59; and *Aligül Alkaya and Others (2)*, §§ 57-59, 66 and 67).

75. In the present case, the Court found a violation of the right to property due to the dismissal of the action as the limitation period had expired. Therefore, it has been concluded that the violation arose out of the court decision.

76. In that case, there is a legal interest in conducting a re-trial in order to redress the consequences of the violation of the right to property. A re-trial to be conducted in this context is aimed at eliminating the violation

and its consequences in accordance with Article 50 § 2 of Code no. 6216, which contains a provision specific to the individual application mechanism. In this regard, the procedure to be followed is to hold a re-trial and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation. For this reason, a copy of the judgment must be remitted to the relevant court to conduct a re-trial.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 27 April 2023:

A. 1. UNANIMOUSLY that the alleged violation of the right to property be DECLARED ADMISSIBLE;

2. UNANIMOUSLY that the alleged violation of the right to a trial within a reasonable time be DECLARED INADMISSIBLE for *non-exhaustion of legal remedies*;

B. BY MAJORITY and by the dissenting opinion of Mr. Kadir ÖZKAYA, Mr. Recai AKYEL, Mr. Yıldız SEFERİNOĞLU, Mr. Selahaddin MENTEŞ, Mr. İrfan FİDAN and Mr. Muhterem İNCE, that the right property safeguarded by Article 35 of the Constitution was VIOLATED;

C. That a copy of the judgment be REMITTED to the 2nd Chamber of the İstanbul Civil Court (E.2012/179, K.2015/458; E.2012/180, K.2015/457) for a re-trial;

D. That the total litigation costs of 10,711.50 Turkish liras (TRY), including the court fee of TRY 811.50 and the counsel fee of TRY 9,900, be JOINTLY REIMBURSED to the applicants;

E. 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

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

DISSENTING OPINION OF VICE-PRESIDENT KADİR ÖZKAYA AND JUSTICES RECAİ AKYEL, YILDIZ SEFERİNOĞLU, SELAHADDİN MENTEŞ, İRFAN FİDAN AND MUHTEREM İNCE

1. As regards the present application, the majority of the Court found a violation of the right to property. We, however, dissent from the majority judgment for the following reasons:

2. The applicants maintained that their right to property had been violated on the grounds that they were the heirs of Amalya (Ameliye) Fitriyadu having died in 1941, who was the child of Ayzer (Ayiza) Zetya who had died in 1883 (their original testator), that some immovable properties in the province of İstanbul had been registered in the name of their original testator in the Sarıyer *Mudevvere* Ledger, but they were then registered in the name of the Treasury during the cadastral surveys finalised in 1953, that their claims for annulment and registration of title deeds had been rejected due to the expiry of limitation period, and that their claims for compensation were dismissed for being time-barred.

3. In its assessment, the majority acknowledged that the applicants had an interest (property) within the meaning of Article 35 of the Constitution as their claims were based on the Sarıyer *Mudevvere* Ledger, and that there was an interference with their property due to the registration of the immovable properties in question in the name of the Treasury as a result of the cadastral surveys conducted. The majority found the impugned interference, albeit having a legal basis and pursing a legitimate aim, disproportionate for the dismissal of the action brought by the applicants for the annulment and registration of the title deeds due to the expiry of the limitation period.

4. As regards the present case, in determining whether there was an interference with the applicants' right to property, it is of great importance to ascertain the nature of the records in the Sarıyer *Mudevvere* Ledger. The majority stated that it was disputed whether these records were in the nature of a deed, but they were among the documents certifying the entitlement to disposition and possession on the immovable property, and accordingly concluded that there was an

interest needed to be protected in the context of the right to property by acknowledging that it was possible to acquire property provided that other conditions be satisfied.

5. However, in order to ascertain the existence of a property or an interest within the scope of the right to property, the nature of these records should be clearly revealed. In this context, it should be determined whether they are title deed records, and if they are of such nature, it should be clarified under which conditions they can constitute a legal basis for the acquisition of property. However, it is not within the scope of the individual application examination to make this determination in relation to the resolution of disputes concerning immovable property law. Therefore, it is necessary to take into account the approach adopted by the relevant judicial authorities in determining the meaning and value our legal system attributes to the records in question. As such, it is necessary to examine the decisions and assessments of the appellate authorities, which are the final place of resolution of the disputes as to the merits, and to examine whether these decisions and assessments involve a clear arbitrariness or a manifest error of judgment.

6. In one of its judgments, the 7th Civil Chamber of the Court of Cassation set significant principles concerning which types of records kept in the pre-Republican period should be considered as title deed records. Accordingly, a record issued in the old period may be considered as a title deed record only when the following four conditions are fulfilled:

a) The ledger and its contents indicate the right of ownership and disposition of real estate;

b) Changes in ownership and disposition rights were carried out through that ledger;

c) At the relevant time when those ledgers were kept, the land registry offices were not authorised to do so, and those who kept the records were authorised to formalise the processes of circulation and transfer; and

d) Upon the termination of the power exercised by those keeping the ledgers, the ledger must have been transferred to the title deed administrations within the prescribed period of time (judgment of the 7th Civil Chamber of the Court of Cassation no. E.2562, K.4752, dated 15 July 1964; and Süleyman Sapanoğlu, B. (2014*). Zilyetlikten Kaynaklanan Tescil Davaları "Registration Cases Arising from Possession"* (p. 16).

7. In another judgment of the Court of Cassation - in its assessment based on the above-mentioned principles - it indicated that *"... it is not possible to accept the mudevvere ledger as title deed record, but it is possible to characterise it as a document attesting the disposition, in other words, certifying the possession."* (judgment of the 8th Civil Chamber of the Court of Cassation no. E.1989/6720, K.1989/9538, dated 10 October 1989).

8. Accordingly, it is inferred that, in the practice of the Court of Cassation, the records in *mudevvere* ledgers are not considered to be in the nature of title deed records. Considering the subsidiarity nature of the individual application mechanism, it reveals that the Court cannot substitute its own assessments for that of the Court of Cassation and thereby conclude that the records in these ledgers are title deed documents. In fact, this is one of the fundamental principles inherent in the individual application mechanism.

9. More importantly, since these records are not documents indicating the ownership of immovable properties, they do not alone have any capacity to ensure the acquisition of plots of land by the owners. They have a legal significance only as long as they are combined with the act of possession. This is also clearly inferred from Article 14 of Law no. 3402. In the present case, the applicants have no proof, or even claim, that their original testator Ayzer or their immediate testator Amalya had possession of the immovable properties in question in or before 1953 when the impugned cadastral surveys were carried out.

10. Therefore, it is not possible to accept the records of the Sarıyer Mudevvere Ledger relied on by the applicants as documents that enable the acquisition of ownership of the immovable properties. In other words, the applicants cannot be said to have a legitimate expectation in terms of acquiring the immovable property on the basis of the existence

of these records, which are not in the nature of title deed records and have no legal value in the absence of possession. Therefore, under the particular circumstances of the present case, there is no property, in the constitutional context, in terms of the applicants.

11. In this sense, we dissented from the majority's conclusion that the applicants had the right to property over the said immovable properties and that there was an interference with the exercise of that right.

12. On the other hand, even if it is accepted that the dismissal of the action filed by the applicants for the annulment of title deed and registration of the immovable properties in their names due to the limitation period constitutes an interference with their right to property, it is not reasonable to find appropriate the conclusion reached by the majority that this interference was disproportionate, given the scope of the file and the characteristics of the present case. In this framework, it would be useful to briefly touch upon the litigation processes for obtaining a better insight into the case.

13. In two separate actions filed against the İstanbul Metropolitan Municipality and the Treasury in 2012, the applicants maintained that eight separate immovable properties belonging to their original testator had been allocated to the Treasury during cadastral surveys and then registered in the name of the İstanbul Municipality through legal transfer, and thus sought the annulment of the title deeds of the immovable properties and their registration in their names in proportion to their inheritance shares. If their requests were dismissed, they requested the issuance of a decision whereby they could collect the value of the immovable properties.

14. At the end of the proceedings, the court dismissed both actions on the grounds that they were filed upon the expiry of the ten-year limitation period stipulated in Article 12 § 3 of Law no. 3402. According to the court, the legal ground on which the applicants based their request for annulment of the title deeds and their registration in their names (the claim that the immovable properties had been registered in the name of their original testator in the Sarıyer *Mudevvere* Ledger) concerns the pre-cadastral period and is therefore subject to the ten-year limitation

period indicated in the statutory provision. The court rejected the claims for compensation on the grounds of the expiry of limitation period. The decisions rendered in both actions were finalised upon the appellate review by the Court of Cassation.

15. On the other hand, it appears that another action filed by some of the heirs of the testator based on the same legal reason was dismissed by the 2nd Chamber of the Sarıyer Civil Court by the decision no. E.1993/437, K.1995/640, once again on account of the expiry of the limitation period.

16. It would be therefore appropriate to first provide some general information about the manner how cadastral surveys are conducted, and then to make some explanations about the "limitation period" set forth in Article 12 § 3 of Law no. 3402, which is the underlying reason for the rejection of both actions.

17. Cadastre refers to the whole process of determining the location and position, area, boundaries, owners and their values, rights and obligations on all kinds of land and properties in a country or region on the earth and arranging them through plans and records by the State (Decision of the General Assembly of Civil Chambers of the Court of Cassation no. E.2017/1219, K.2021/791, dated 17 June 2021).

18. The purpose of cadastre (as stated in Article 1 of Law no. 3402) is to indicate, on the land and on the map, the boundaries of immovable properties in the country so as to determine the legal status of immovable properties, and thus to establish a sound land registry. In this context, when cadastral surveys conducted in a place are completed, the boundaries of all immovable properties located there will have been determined both on the land and on the map on a coordinate basis, and the legal nature and status of each immovable property will also have been determined.

19. According to the Court of Cassation, Law no. 3402 has three main objectives: the demarcation of the boundaries of immovable properties on land and maps, the determination of their legal status, and the establishment of the land registry as stipulated by the Turkish Civil Code. The cadastre has two aspects, one geometric and the other legal. In the geometric sense, cadastre is to determine the type, boundary and surface

area of each immovable property in a country by way of technique and science and to demarcate its boundaries. The legal aspect consists of determining the rights and identification of right holders over these geometrically demarcated immovable properties. With the finalisation of the cadastral surveys, the ownership status on the immovable properties, to whom they belong, the limited real rights on them and their owners will be determined; and afterwards, each immovable property will be registered in the land registry with the indication of the identity information of the respective owners (Decision of the General Assembly of Civil Chambers of the Court of Cassation no. E.2017/1219, K.2021/791, dated 17 June 2021).

20. In this respect, the conduct and completion of cadastral surveys is of vital importance for ensuring that all immovable properties in the country be recorded in the land registry in terms of their *de facto* status and legal nature, and thus resolving legal disputes regarding immovable properties to a great extent.

21. As a matter of fact, the Court affirms the indisputable importance of the land registry system for the protection of immovable property within the framework of the positive obligations of the State (see *Ahmet Yazı and Others*, no. 2016/13545, 23 October 2019, § 43). The Court has also emphasized that the clarity of the real rights on immovable properties through the land registry ensures trust and sustainability (see the Court's decision no. E.1993/21, K.1993/30, 21 September 1993). According to the Court, the role and importance of cadastre in the clarification of the real rights relating to immovable properties and the establishment of the land registry institution, which is the guarantee of the protection of these rights against everyone, are indisputable (see the Court's decision no. E.1973/13, K.1973/23, 3 May 1973). In this context, it should be noted that the legislator aimed to establish a modern land registry based on the plan through cadastral surveys, and one of the purposes sought to be attained through this system is to indicate accurately and clearly the locations and boundaries of immovable properties on the land. Accordingly, within the scope of its positive obligations, it is for the State to ensure the reliability of the information in the land registry (see *Sefa Koşar*, no. 2015/18352, 10 May 2018, § 51).

22. Considering this nature of cadastral surveys, the legislator, has introduced several provisions in Law no. 3402 that differ from the provisions in other legislation regarding immovable property law. Some examples of these distinctive regulations are acquisition of a part of the private-registered immovable property or a nominal share thereof through possession, attaching importance to non-titled sharing, indication of the encumbrances in the declarations section, the possibility of filing an action against a dead person, and the validity of the assignment of the private-registered immovable property through a means other than the title deed.

23. Besides, when the general systematics of Law no. 3402 and these exceptional provisions are taken into consideration as a whole, the said Law may be possibly qualified as a kind of liquidation law. Within this framework, it is intended to enable the clarification, as soon as possible, the *de facto* and *de jure* situation created through the completion of the cadastral surveys, which is shown on the map and in the registry, and it is also aimed to bring the claims and allegations concerning the pre-cadastral period before the judicial authorities within a certain period of time and to resolve them as soon as possible.

24. In fact, these characteristics of cadastral surveys are also emphasised in the decisions of the Court of Cassation. In one of its decisions, the Grand General Assembly of the Court of Cassation for Unification of Jurisprudence has stated that *"... achieving the objective envisaged in the Law through cadastral surveys requires the renewal of the title deeds of the private-registered immovable properties, the issuance of title deeds for the immovable properties without title, and the determination of the status of public properties. It should be noted that the Cadastral Law is a special and provisional law envisaging liquidation. The Cadastral Law aims to legalise the de facto situation and includes provisions that give weight to possession ..."* and drew attention to the distinctive nature of Law no. 3402. In the decision, it is also emphasised that given its function, nature and characteristics, the Cadastral Law contains some provisions which differ from, and contrary to, the general provisions (Decision of the Grand General Assembly of the Court of Cassation for Unification of Jurisprudence, no. E.1994/5, K.1997/2, 6 June 1997).

25. In places where cadastral surveys are carried out for the first time, it is often not possible to determine which record belongs where or whether there is more than one record that can be applied to an immovable property, since the boundaries of the existing property documents such as title deed records are often not based on a coordinate. Similarly, it is also difficult to determine whether there are any documents which are not title deed records but may be relied on by the owners, and if there are, to determine their boundaries. This is because these documents are generally issued on the basis of declarations, and their boundaries and surface areas may be incompatible with each other.

26. For all these reasons, the Law has introduced the method of making certain announcements concerning the region and the area to be surveyed before and after the cadastral survey. In the implementation of the Cadastral Law, the places within the administrative boundaries of the central district of each province and other districts are qualified as *"region"*, and each village within the region and each neighbourhood within the municipal boundaries are qualified as *"surveying area"*. In order to carry out cadastral activities in the region and in the surveying area, the necessary announcements must first be made.

27. Within this framework, pursuant to Article 2 § 3 of Law no. 3402, the regions to be subject to cadastral survey shall be announced at least one month in advance in the Official Gazette, Radio or Television, in the regional centre and in the province where the region is located, in a local newspaper and on an internet news site. It shall also be made public by conventional means. Subsequently, pursuant to Article 4 § 2 of the Law, the cadastral director announces the neighbourhood or village where cadastral surveys will be carried out at least 15 days in advance by means of conventional means in the regional centre, the surveying area and the surrounding villages, neighbourhoods and municipalities. This announcement shall indicate the day and time on which the determination of the surveying boundaries will commence. Pursuant to Article 6 of the Law, cadastral technicians shall announce the locations or islands subject to cadastral surveys at least seven days in advance by means of conventional means in the relevant village or neighbourhood. The announcement shall be renewed in the event of any suspension of work for more than three months.

28. When the cadastral surveys are finally completed, pursuant to Article 11 § 1 of the Law, the cadastral director shall, on the basis of the determinations made according to the cadastral records, prepare the announcement tables, have these tables and sheet samples announced for 30 days at the directorate and also at the mukhtar's office, and state that those who have objections may file an action before the Cadastral Court within the announcement period.

29. In this respect, it can be said that there is a four-stage announcement process regarding cadastral surveys. First, the region (district) to be surveyed, then the surveying area (village/ neighbourhood), then the locations and islands to be surveyed are announced, and when the surveying process is completed, the survey findings are announced. In the fourth (last) paragraph of Article 11, the legislator clearly points to the legal significance of these announcements by stating that *"The announcements made pursuant to this Law shall be deemed to have been personally notified to the relevant real persons, public and private legal entities"*.

30. The publicising, through announcements, of the process of cadastral surveys and the results of the findings and determinations made upon the completion of the process is a necessity given the nature of the process. This is because, prior to the cadastral survey, there is uncertainty as to the boundaries of the immovable properties in the surveying area, the surface area of the immovable properties, and the real or personal rights the persons living in the surveying area or elsewhere have in relation to these immovable properties. In this respect, since it is not possible for the authorities conducting cadastral surveys to know exactly the addressees of the cadastral process, it is not possible to notify those concerned. In other words, making notifications by announcement in cadastral surveys is a necessity arising from the liquidating and constructional nature of cadastral process.

31. The legislator has envisaged two separate facilities of filing an action in order to achieve the purpose of liquidation by considering the explained nature of the cadastral activity on the one hand, and on the other hand, to enable the respective individuals to exercise their

rights regarding immovable properties that may be infringed due to cadastral process. In this context, pursuant to Article 12 § 1 of Law no. 3402, an action may be filed before the cadastral court to challenge the demarcations and determinations in the cadastral records within the thirty-day announcement period. These actions are referred to as *"challenge against cadastral determinations"* in practice. If no action is filed within the prescribed period, the records shall become final. However, pursuant to the third paragraph of the aforementioned article, it is possible to file an action before ordinary courts (civil courts) within 10 years as from the date of finalisation of the records regarding the rights, demarcations and determinations (in the same vein, see *Ayşe Türk and Others*, no. 2018/1906, 21 April 2021, § 26).

32. In other words, as laid down in Article 12 § 3 of Law no. 3402, any challenge or action may be raised or brought -based on legal grounds prior to the cadastral survey- with respect to the rights, demarcations and determinations in the cadastral records within a ten-year limitation period. According to the Law, this period starts to run from the finalisation of the records. In addition, the limitation period is applicable only to actions filed on the basis of legal grounds prior to the cadastral survey. The limitation period does not apply to the actions filed in relation to legal situations arising after the cadastral survey.

33. In one of its decisions, the Court examined the constitutionality of the ten-year period stipulated in Article 12 of Law no. 3402. The Court firstly emphasized that the period stipulated in the provision was in the nature of a "limitation period" and that the legislator intended to protect the cadastral procedures, which are related to public order, and to establish an orderly land registry. The Court also emphasised that *"Since the 'limitation period', which restricts the right to legal remedies, has the function of ceasing or setting aside that very right, the right cannot be said to exist upon the expiry of the prescribed period. Through the limitation period, the right automatically ceases to exist if an action is not filed within the period specified in the law. Since the limitation period is a condition for the action to be heard, the judge must take the limitation period into consideration automatically."* (see the Court's decision no. E.1991/9, K.1991/36, 8 October 1991).

34. In its examination on the merits, the Court stated, in terms of the constitutionality of the contested provision under Article 2 of the Constitution, that *"... In introducing a ten-year limitation period for the purpose of public interest, providing those who have previously lost their property rights with the opportunity to request the recognition of this right again would be unjust, and it would also impair the rights of those who have gained property rights. In this respect, the regulation is not incompatible with the concept of a democratic society and the general principles of law, and since it is in pursuance of the public interest, it does not contradict the concept of the rule of law"*.

35. In its constitutionality review under Article 23 of the Constitution, the Court stated that *"... The commencement of cadastral surveys is announced through all means of communication. The law is intended to liquidate and is of a provisional nature as it will cease to apply upon the discontinuation of the implementation. The relevant rule stipulates the consequence of the failure of the persons -who are not interested in the legal status of their immovable property during and after the cadastral process in the places where cadastral surveys are carried out- to apply to the relevant authority within the limitation period prescribed by the law. Therefore, since the said rule does not contain a provision forcing persons to reside in the place where the immovable property is located, it is not, in any aspect, contrary to Article 23 of the Constitution"*. The Court found constitutional the process whereby cadastral surveys were notified through announcement.

36. In its constitutionality review under Article 35 of the Constitution, the Court stated that *"... Considering the conditions and periods stipulated in the law in conjunction with other provisions that facilitate the exercise of the rights of those concerned, it should be accepted that the limitation of the right of litigation with a ten-year limitation period is in accordance with the concept of public order and that the prescribed period is convenient for the exercise of the right. It is also unreasonable to consider that the aim pursued by these provisions is for the State to be the right holder"*. Consequently, the Court dismissed the request for annulment, finding constitutional Article 12 § 3 of Law no. 3402 (see the Court's decision no. E.1991/9, K.1991/36, 8 October 1991).

37. As regards the individual applications related to the actions that were dismissed for not being filed within the limitation period stipulated in Article 12 § 3 of Law no. 3402 following the cadastral findings and determinations, the Court concluded that there was no violation of the right of access to a court, finding that it did not place a heavy burden on the applicants (see *Ayşe Türk and Others*, § 30; and *Hasan Kalender*, no. 2017/31122, 18 June 2020, § 46).

38. In the light of these explanations, there is no doubt -as emphasized in the majority opinion- that the dismissal of the actions filed by the applicants for the annulment and registration of the title deed due to the expiry of the limitation period as of the date of actions has a legal basis and serves a legitimate aim. However, the majority is of the opinion that the dismissal of the actions due to the expiry of the limitation period was not proportionate. This assessment is generally based on the fact that the applicants do not reside in the region where the immovable properties subject to cadastral survey are located. According to the majority, it is very difficult for a person residing abroad to be informed of the cadastral announcement, provided that there are exceptional circumstances that sever the tie with the immovable property. In such cases, the automatic commencement of the ten-year limitation period stipulated in Article 12 § 3 of the Law no. 3402 upon the finalisation of the cadastral records would constitute a disproportionate interference with the right to property.

39. It is clear that this approach is incompatible with the nature and characteristics of cadastral surveys as explained in detail above. This is because, as emphasised in the decisions of the Court and the Court of Cassation, cadastral surveys are constitutive and terminating processes aimed at determining the actual and legal status of immovable properties in the country. These surveys are announced through various means in three stages. The results are announced after the completion of the surveys, and the ten-year limitation period starts to run thereafter.

40. The possibility that those concerned may not become aware of the announcements is not confined to persons living abroad. Nowadays, individuals may own immovable properties in several places. A significant portion of the country's population now lives in metropolitan

cities or urban centres. These persons may also be unaware of the cadastral activities related to their immovable properties. As a matter of fact, in practice, it has been observed that a great majority of the persons who cannot file an action within the ten-year limitation period due to not being aware of the cadastral surveys are those who live within the borders of our country, even in the cities where the immovable property is located.

41. In this respect, it is difficult to say that the exceptional approach adopted by the majority regarding the commencement of the ten-year limitation period stipulated in Article 12 § 3 of Law no. 3402 for persons living abroad is based on any legal or social grounds. Moreover, such an approach carries the risk of hampering, to a significant extent, the aim of cadastre, which is to determine and record the *de facto* and *de jure* status of immovable properties and to establish a sound, reliable and foreseeable land registry for individuals. In fact, this approach cannot be said to be compatible with the nature of the limitation period.

42. Therefore, in the present case, it is pursuant to the explicit statutory provision that the incumbent first instance court and the Court of Cassation determined the start-day of the limitation period for filing an action on the basis of the date when the cadastral records became final. In addition, this approach consists of the application of the well-established and long-lasting jurisprudence of the Court of Cassation to the present case. In this case, it does not seem possible to argue that the impugned judgment and practice are unpredictable or based on a strict interpretation in the context of the procedural safeguard inherent in the applicants' right to property.

43. Besides, the majority states that there is no information in the court decisions that the applicants, who are citizens of another country, reside in Türkiye. However, given the individual application forms, it is seen that the applicants do not claim that they have never lived in, or have no ties to, Türkiye. More importantly, the applicants do not base the alleged violation on the fact that they are in a disadvantageous position -in terms of being informed about cadastral surveys- for not living in Türkiye or having no ties thereto. The basis of the applicants' allegation is the

publicising of the results of the cadastral survey through announcement and the absence of any separate notification to be submitted to them.

44. In addition, the address declared by Okan Hemşinlioğlu, one of the applicants, in his individual application form is also in İstanbul. Besides, an in-depth examination of the power of attorneys reveals that some of the children of Amalya, who was the applicants' immediate testator and died in 1941, were born and lived in İstanbul.

45. In this case, it has been observed that the majority found a violation in the applicants' case by accepting, as a probable fact, an assertion that had not been mentioned by the applicants and that was not indeed proven to exist. In fact, the absence of a separate notification of the cadastral surveys to the applicants that were publicised through an announcement, -the underlying ground of the applicants' allegation-, is a practice applicable to the addressees of all cadastral surveys in the country. In this sense, there is no phenomenon that distinguishes the applicants' case from that of other persons.

46. Besides, the applicants brought the proceedings, subject-matter of the individual application, approximately 60 years after the finalisation of the cadastral survey of the given immovable properties, claiming that these properties had been in the possession of their original testator Ayzer, who died in 1883. Moreover, another action brought in 1993 by some other heirs of Amalya, the applicants' immediate testator, on the same legal grounds, was dismissed by a decision rendered in 1995 on the ground that "the action was brought after the expiry of the limitation period". Accordingly, there is also a period of nearly 30 years between the date of the decision adjudicating the aforementioned action and the date when impugned action in the present case was filed.

47. Therefore, the applicants cannot be said to have acted diligently and fulfilled the obligations for the exercise of their respective rights in all these processes.

48. Finally, it does not seem possible to accept that the characteristics of the case in the ECHR's judgment *Elif Kızıl v. Türkiye*, which is referred to in this judgment, fully overlap with the applicants' case. In finding

a violation in the said judgment, the ECHR relied on the fact that the applicant was abroad at the time of the announcement, that the title deed was never officially infringed, that the applicant continued to pay real-estate taxes on the immovable property, and most importantly, that the applicant continued to use the immovable property for a very long time, 28 years, without worrying for any interference by the public authorities, believing that it had always been her property. None of these factors are present in the applicants' case.

49. For these reasons, we dissent from the majority's opinion and conclusion, since we consider that there was no violation of the applicants' right to property.

RIGHT TO A FAIR TRIAL (ARTICLE 36)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

SENEM ESEN

(Application no. 2020/14769)

19 January 2023

On 19 January 2023, the First Section of the Constitutional Court found a violation of the right to counsel under the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Senem Esen* (no. 2020/14769).

(I-IV) SUMMARY OF THE FACTS

[1-22] Within the framework of the investigation into the alleged offence of being a member of the Fetullah Terrorist Organisation/Parallel State Structure, the applicant's defence was carried out in the presence of the counsel at the police station, at the Chief Public Prosecutor's Office and at the interrogation where she was referred for a judicial control decision. As a result of the completed investigation, an indictment was issued against the applicant for the alleged offence. During the interrogation, the applicant did not request the appointment of a counsel. At the conclusion of the hearing, the court observed that the applicant's spouse was being prosecuted in a separate case within the same judicial jurisdiction and thus determined that the case against the applicant should be merged with that against the applicant's spouse, given the existence of a legal connection between the two cases. During the trial, which was conducted over the course of three hearings following the joinder decision, the applicant was present at all hearings. The court did not inquire as to whether the applicant sought the appointment of a counsel to represent her, and the applicant proceeded to present her defence without requesting such representation. At the conclusion of the trial, the court imposed an imprisonment sentence on the applicant for the imputed offence.

The applicant lodged an appeal against the impugned decision, citing financial constraints as the reason for her inability to request a lawyer and asserting that she was not provided with a counsel by the judicial authorities throughout the proceedings. The regional court of justice dismissed the applicant's appellate request on the merits following its examination of the file. Upon the applicant's subsequent appeal, the Court of Cassation upheld the decision of the regional court of appeal.

V. EXAMINATION AND GROUNDS

23. The Constitutional Court ("the Court"), at its session of 19 January 2023, examined the application and decided as follows:

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

24. The applicant claimed that, she should have been assigned a defence counsel by the court in the proceedings where she was tried for the offence of being a member of a terrorist organization, even if she had not requested one, due to the severity of the sentence prescribed by the legislation for the alleged offence. The applicant therefore maintained that her right to a fair trial had been violated by the failure of the court to provide her legal assistance through a defence counsel, despite her not having requested one during the trial, and by continuing the trial without a defence counsel, ultimately imposing a conviction upon her.

25. In its observations, the Ministry indicated the following:

i. The mandatory appointment of a defence counsel was not required due to the length of the sentence prescribed in the legislation for the imputed offence.

ii. By citing the decision of the General Criminal Assembly of the Court of Cassation, according to which it was not required to appoint a defence counsel for a defendant who had not requested one in a trial for membership of an armed terrorist organisation, and it was pointed out that the applicant, who had been reminded of her rights during the trial, had not requested the appointment of a defence counsel at any of the hearings. In addition, the applicant did not claim that the court had failed to appoint counsel despite her request to do so or that her defence was conducted under pressure.

iii. In conclusion, it was indicated that the circumstances of the present case and the case-law of the Court of Cassation should be evaluated together in the assessment of the alleged violation.

B. The Court's Assessment

26. The Constitutional Court is not bound by the legal qualification of

the facts by the applicants and it makes such assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The Court accordingly examined the applicant's allegations within the scope of the right to counsel.

1. Admissibility

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

2. Merits

a. General Principles

28. Securing the right to defence in criminal proceedings is one of the fundamental principles in a democratic society (see *Erol Aydeğer*, no. 2013/4784, 7 March 2014, § 32). Defence ensures the fair functioning of the criminal justice system. Unless a person is provided with the opportunity to put forward her defence against an allegation, a trial cannot be conducted in accordance with the principles of equality of arms and of adversarial proceedings, nor can the material truth be revealed (see *Yusuf Karakuş and Others*, no. 2014/12002, 8 December 2016, § 69).

29. It is insufficient to merely grant the suspect or the accused the right to defence. In making her defence, the suspect and the accused must have access to the *legitimate means and procedures* specified in Article 36 of the Constitution. The most significant of these *legitimate means and procedures* referred to in Article 36 of the Constitution for the suspect and the accused is the exercise of the right to legal assistance. In other words, the right to legal assistance falls within the scope of the notion of legitimate means and procedures specified in Article 36 of the Constitution. In this respect, it is clear that the right to legal assistance is integral to the right to a fair trial and is an inherent consequence thereof. Hence, under the right to a fair trial, the person accused of an offence has the right to personally defend himself or to avail himself of the legal assistance of a defence counsel of his own choice (see *Yusuf Karakuş and Others*, § 72).

30. On the other hand, it is understood that the purpose of adding this term to Article 36 of the Constitution is to safeguard the *right to a fair trial* as enshrined in the Convention to which Türkiye is a party. In fact, Article 6 § 3 (c) of the European Convention on Human Rights ("the Convention") stipulates that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of a defence counsel of his own choosing or, if he has not sufficient means to afford legal assistance, to be given it free when the interests of justice so require (see *Yusuf Karakuş and Others*, § 73).

31. This right must, in principle, be afforded to the suspect by the time when he is questioned for the first time by the law-enforcement officers. Providing the suspect with legal assistance of a lawyer by the time of her first interrogation by the law-enforcement officers is necessary not only as a requirement of the privilege against self-incrimination and the right to remain silent, but also ensure the right to a fair trial offers an effective protection in general. That is because the evidence obtained at this stage sets the framework for how the impugned offence will be considered throughout the proceedings. As the legislation concerning criminal proceedings become more complicated notably during the stages when evidence is collected and used, the suspects may find themselves vulnerable at this very stage of the criminal proceedings. Such vulnerability may be duly offset merely through legal assistance of a defence counsel (see *Aligül Alkaya and Others* [Plenary], no. 2013/1138, 27 October 2015, §§ 118, 135; and *Sami Özbil*, no. 2012/543, 15 October 2014, § 64).

b. Application of Principles to the Present Case

32. In the present case, the Court reminded the applicant of her rights by enumerating them in points, without specifying the content of all of them prior to the interrogation. In relation to the right to counsel, without explicitly mentioning this right, the Court stated that "*If, in the future, the request for a lawyer is found to be unjustified other than the mandatory defence counsel, she shall be charged the amount specified in the tariff as a litigation cost*". The applicant was not again reminded of her rights during the proceedings which persisted following the joinder decision and the

applicant merely stated that she would present her defence in person at the first hearing. She presented her defence and objections at all hearings without the assistance of counsel. However, in her appellate request, the applicant complained that she should have had the appointment of a counsel.

33. In this regard, the first question to be assessed is whether the applicant explicitly waived her right to counsel as a whole.

34. It is evident that the applicant was interrogated without being properly informed of any rights in the three hearings following the joinder decision. According to the minutes of the hearing, the applicant was only provided with the provisions concerning legal rights without explicit clarification as to their content and scope. Moreover, the explanation regarding the right to counsel emphasised the applicant's potential future financial responsibility for the collection of the litigation costs (see § 6). It is thus deemed that the applicant was not explicitly informed of her right to counsel. Conversely, despite the applicant's claim in the Minutes of the Hearing that she would present her defence personally and indeed did so at all hearings without requesting the appointment of a defence counsel, she subsequently stated that she had been unable to afford legal assistance due to financial constraints following the conviction decision. The applicant also explicitly expressed her objection to the court that a defence counsel should be appointed to represent her. In this case, given that the Court did not explicitly remind the applicant of her right to counsel and that the applicant raised her objection in this respect during the appellate examination that could be conducted by assigning a legal counsel to the applicant and opening a hearing, it cannot be concluded that the applicant explicitly waived her right to counsel.

35. Nevertheless, the Chamber dismissed the appeal on the basis of the case file due to its failure to assess the applicant's objection despite the applicant's explicit demand for compulsory legal counsel in her appellate request. This failure to provide the applicant with the opportunity to benefit from this right could have been rectified by convening a hearing during the appellate examination. In this instance, the Chamber did not

implement a procedure with adequate counter-balancing safeguards to mitigate the adverse impact brought forth by the applicant. The Court of Cassation upheld the Chamber's decision without providing any explanation despite the appellate request containing similar complaints. Accordingly, by considering the proceedings as a whole, it has been found that the applicant's right to counsel has been violated.

36. For these reasons, the Court found a violation of the right to counsel under the right to a fair trial safeguarded by Article 36 of the Constitution.

C. REDRESS

37. The applicant requested the Court to find a violation, order a retrial and award him compensation for her non-pecuniary damage.

38. There is a legal interest in conducting a retrial in order to redress the consequences of the violations identified in the application. In this respect, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial procedures and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation (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; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

39. It is incumbent on the inferior courts to evaluate the available evidence in a particular case and to decide whether the relevant evidence is related to the case (see *Orhan Kılıç* [Plenary], no. 2014/4704, 1 February 2018, § 44). In this regard, it is not within the duties of the Constitutional Court to ascertain whether the applicant is a member of an armed terrorist organisation. It is important to note that the violation decision of the Constitutional Court does not necessarily imply acquittal of the defendant. Furthermore, it does not stipulate that the defendant must be acquitted at the end of the retrial in order to fulfil the requirements of the violation decision. In the assessment to be made subsequent to the implementation of the requisite remedial measures to redress the

consequences of the violation, it is possible for the court to arrive at a similar or disparate conclusion, contingent upon the manner in which the evidence is evaluated.

40. 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.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 19 January 2023 that

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

B. The right to counsel 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 Artvin Assize Court (E.2018/8, K.2018/201) for retrial to redress the consequences of the violation of the right to counsel;

D. The applicant's claim for non-pecuniary compensation be REJECTED; and

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

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

ZİYNET BENLİ

(Application no. 2019/23977)

15 February 2023

On 15 February 2023, the Plenary of the Constitutional Court found violations of the right of access to a court and the right to a trial within a reasonable time falling under the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Ziynet Benli* (no. 2019/23977).

(I-IV) SUMMARY OF THE FACTS

[1-31] The applicant's spouse, O.B., died as a result of a fire breaking out at the shopping mall where he had been working. Reserving her right to a surplus, the applicant then lodged an action for pecuniary and non-pecuniary compensation before the incumbent civil court. Upon the decision of lack of jurisdiction issued by the incumbent civil court, the file was referred to the 1st Civil Court. The action for compensation brought by O.B.'s mother, father and siblings before the 5th Civil Court was joined to that of the applicant.

The relevant civil court, concluding that the disputed incident fell under the scope of the Social Insurance Law no. 506 and was an occupational accident, ruled that it lacked jurisdiction to hear the case and referred it to the competent labour court. In the present case, the labour court dismissed the claim for pecuniary damages, on the basis of the expert reports obtained, since the pecuniary damages had been reimbursed by the relevant institution, but accepted the claim for non-pecuniary damages. On appeal, the decision of the labour court was ultimately quashed by the Court of Cassation due to the discrepancy between the expert reports. The labour court then ordered a new expert examination of the impugned incident. Upon the expert examination, the applicant submitted a petition to the court, seeking a rectification for an increase in the amount of claim for pecuniary damages. The labour court accepted the request for rectification. This decision was, however, quashed by the Court of Cassation in accordance with the decision of the Court of Cassation General Assembly on the Unification of Case Law ("the Court of Cassation General Assembly"), on the ground that a claim could not be rectified following the quashing decision. Thereupon, the labour court awarded compensation for pecuniary and non-pecuniary damages, taking into consideration the amounts originally claimed

before the request for rectification. This decision, which was appealed, was ultimately upheld by the Court of Cassation.

V. EXAMINATION AND GROUNDS

32. The Constitutional Court ("the Court"), at its session of 15 February 2023, examined the application and decided as follows:

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

1. The Applicant's Allegations

33. The applicant claimed that the decision on the lack of jurisdiction was rendered seven years after the application was lodged, that the first decision to obtain an expert opinion was taken eight years following the submission of the application, i.e. ten years after the incident, and that the claim for pecuniary compensation was time-barred while the damage suffered had not yet been determined. The applicant also indicated that the lawsuit was initially filed as a partial action, as there was no unquantified debt at the time of lodging the application, and that the period for filing an additional lawsuit expired on the date when the material damage was determined by the expert report. Accordingly, the applicant further claimed that her right of access to a court had been violated in that she had also been deprived of her right to bring an additional action and that she had suffered damage as a result of the dismissal of her action in respect of the rectified part on the grounds that she could not request a rectification following the quashing decision.

2. The Court's Assessment

34. 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."

a. Admissibility

35. 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 an Interference and its Type

36. 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 Öz*bakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti.*, no. 2014/13156, 20 April 2017, § 34).

37. It has been observed that the applicant's right of access to a court had been violated by the dismissal of the application for rectification on the ground that rectification is not applicable following the annulment decision.

ii. Whether the Interference Amounted to a Violation

38. Article 13 of the Constitution, titled "*restriction of fundamental rights and freedoms*", 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."

39. The aforementioned interference amounts to a violation of Article 36 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 the requirements of a democratic society order, which are relevant for the present application and laid down in Article 13 of the Constitution.

40. Article 84 of the repealed Law no. 1086 allowed for rectification until the conclusion of the investigation, and Article 177 of Law no. 6100 allowed for rectification until the conclusion of the investigation, and in the decision of the Court of Cassation dated 4 February 1948 on the consolidation of case-law, it was established that the investigation was considered to be concluded upon the decision of the inferior court, and accordingly, the case-law indicated that rectification could not be exercised. The decision of the General Assembly on the Unification of Judgments of the Court of Cassation dated 6 May 2016 stipulated that no rectification could be sought following a quashing decision and that it deemed unnecessary to rectify the decision of the General Assembly on the Unification of Judgments of the Court of Cassation dated 4 February 1948. Furthermore, the decision of the General Assembly on the Unification of Judgments of the Court of Cassation dated 4 February 1959 has established the case-law that in cases dismissed for grounds such as lack of jurisdiction without examination on the merits, if the merits of the case are examined by the inferior courts following the quashing decision of the Court of Cassation, the investigation shall proceed upon quashing and rectification may be permissible. It has also been noted that the chambers of the Court of Cassation adopt differing decisions depending on the specific circumstances of each case.

41. Subsequently, following the lodging of the individual application, the legislator introduced a regulatory amendment to Article 177 of Law no. 6100, as amended by Article 18 of Law no. 7251. The amendment specifies that, in the event of an action is resumed by the inferior court following the quashing decision of the Court of Cassation or the revocation decision of the regional court of appeal, the rectification may be sought until the conclusion of the proceedings.

42. The decision of the General Assembly on the Unification of Judgments of the Court of Cassation dated 6 May 2016 -ruling that there is no need to rectify the decision of the General Assembly

on the Unification of Judgments of the Court of Cassation dated 4 February 1948-, referred to the application of *Suzan Tekin (Kavurkacı) and Others* (no. 2013/1932, 17 July 2014), in which the Constitutional Court addressed the allegation regarding the inability to rectify upon quashing. In the relevant decision, the Constitutional Court ruled that the applicants' right of access to a court was not violated by pointing out that there was a right to bring an additional action. Consequently, the Court concluded that there were no grounds or the view substantiating that the prohibition of rectification upon quashing violated the right to a fair trial.

43. In the application of *Suzan Tekin (Kavurkacı) and Others*, the applicants' claimed that their right to a fair trial had been violated due to the dismissal of their rectification requests on the grounds that rectification upon quashing could not sought. In this decision, the Court examined the applicants' claim within the scope of the right of access to a court. The Court has indicated that the inability to request for a rectification upon quashing are grounded in the doctrine as the protection of procedural vested rights. Following the explanation of the legitimate aim, the Court, in light of the precedent set by the Court of Cassation, ruled that there is no legal or practical uncertainty regarding the possibility of rectification upon quashing. In conclusion, the Court held that the right of access to a court had not been violated, stating that the applicant, who was represented by an legal counsel, should have been aware that the rectification request would be likely dismissed in the circumstances, and that the applicant could have pursued the legal remedy of initiating an *additional action* instead of seeking rectification (see *Suzan Tekin (Kavurkacı) and Others*, §§ 32-54).

44. It is important to note that this is the precedent-setting occasion on which the Plenary of the Constitutional Court has considered the matter of whether a rectification can be sought subsequent to a quashing decision. In the decision of *Suzan Tekin (Kavurkacı) and Others*, in which the relevant matter was previously discussed, it was stated that there was no legal and practical uncertainty as to whether the rectification upon quashing could be pursued, taking into account the current practice of the Court of Cassation; however, the different opinions of the chambers

of the Court of Cassation as to how the rectification request should be handled following the quashing decision and the latest developments on the issue should also be considered. It is therefore deemed necessary to review the decision in *Suzan Tekin (Kavurkacı) and Others* and to examine whether there is a legal ground for the interference with the right of access to a court by dismissing the request for rectification on the grounds that the rectification could not be pursued subsequent to the quashing decision.

(1) General Principles

45. 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 that 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).

46. 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).

47. 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 provisions that are set

forth as the legal basis for the violation of the right of access to court. 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 right of access to court lacks a legal basis (see *Ziya Özden,* no. 2016/67737, 19 November 2019, § 59).

(2) Application of Principles to the Present Case

48. In the present case, the subject matter of the individual application is whether it is possible to request rectification of the judgment in the event that the inferior court takes an action regarding the proceedings upon quashing.

49. The last sentence of Article 87 of the repealed Law no. 1086, which reads as "*The applicant may not increase the claim by way of rectification*", was examined by the Court upon request and it was determined that the disputed provision, which prevents the plaintiff from increasing the claim by way of rectification after the action has been filed, imposes undue difficulty in obtaining a right. In addition, the Court annulled the provision on the grounds that it restricted the rights of argument and defence, which are the two most important elements of the right to legal remedies, compelled the plaintiff to bring a second action, prevented the plaintiffs from obtaining their rights promptly and cost-effectively, was incompatible with the requirements of a democratic social order, as it significantly complicated the right to legal remedies, and prevented cases from being concluded cost-effectively and in a timely manner (see the Court's decision no. E.1999/1, K1999/33, 20 July 1999).

50. Article 84 of the repealed Law no. 1086, which was in force at the relevant time provided that the rectification could be sought until the conclusion of the investigation in cases subject to investigation and until the conclusion of the judgment in cases that are not subject to investigation. Article 177 § 1 of the Law no. 6100 stipulates that the rectification may only be conducted until the conclusion of the investigation. Although the general rules on the application of this provision and on whether the rectification can be made following the quashing have been established by case law, there are different opinions

among the chambers of Court of Cassation on this matter, which arise from the characteristics of specific cases and have persisted for many years. As a matter of fact, this very reason has prompted the Court of Cassation to unify case law on the matter on numerous occasions.

51. Following the individual application, the legislator deemed it necessary to enact a regulatory framework addressing the possibility of rectifying errors following the quashing process, given the extensive debate surrounding this issue within the doctrinal and practical spheres. The grounds for enacting the regulation stated that the main subject of the contention concerns the question of whether rectification is applicable in the event that the inferior court takes action for an investigation after an inferior court's decision is quashed or revoked as a result of an appellate examination. The phrase "*until the conclusion of the investigation*" in paragraph one of the same Law has given rise to considerable discussion in the doctrine and practice, particularly in determining circumstances under which rectification can be made following the appellate remedy. In this regard, Article 177 § 2 of Law no. 6100 envisages that *if the inferior court undertakes investigative actions* subsequent to the quashing decision of the Court of Cassation or the revocation decision of the regional court of appeal, the rectification may be made until the conclusion of the investigation.

52. In the present case, following the death of the applicant's spouse, O.B., on 29 March 2000 as a result of a fire breaking out at the shopping mall where he had been working, the applicant lodged an action on 11 January 2002, requesting TRY 100,000 in pecuniary and TRY 100,000 in non-pecuniary compensation, reserving her right to a pursue additional amounts to be determined. In the course of the proceedings, the court's decision dismissing the applicant's claim for pecuniary compensation and upholding the claim for non-pecuniary compensation was quashed. Accordingly, following an expert report drafted pursuant to the said quashing, the case was accepted upon the submission of a rectification request. Subsequently, pursuant to the decision of the General Assembly on the Unification of Judgments of the Court of Cassation dated 4 February 1948 and numbered E.1944/10, K.1948/3, the decision was quashed once more by the relevant Chamber on the grounds that it

was not possible to make a rectification subsequent to the quashing of the impugned decision. The court duly complied with the quashing decision, ruling TRY 100,000 as a pecuniary damage and TRY 100,000 as a non-pecuniary compensation in favour of the applicant. In doing so, the court adhered to the amount initially requested in the application, given that it was not possible to carry out a rectification following the quashing decision and the decision became final.

53. In the present case, the trial court refused to accept the applicant's request for rectification on the grounds that, subsequent to the quashing decision, it was not possible to submit a rectification in accordance with the decision of the General Assembly on the Unification of Judgments of the Court of Cassation dated 4 February 1948. Furthermore, the Court confined itself with the amount requested in the application and awarded pecuniary damages be paid. In the aforementioned decision of the Court of Cassation, which constitutes the basis for the reasoning of the incumbent court's decision, it is stated that Article 84 of the repealed Law no. 1086 indicates that the rectification is permissible only during the investigation and trial phase, i.e. until the investigation is completed and the judgment is rendered, and it is understood that the parties cannot exercise this right once the investigation and trial phase has been concluded.

54. In the disputed proceedings, the Court's decision dated 18 June 2012 was quashed upon the Chamber's decision of 14 January 2014 on the grounds that the findings in the expert report on the basis of which the judgment was made was inconsistent with the findings in the expert report for quantification fault rates drafted as a part of the compensation action; that the matter should be re-examined by a competent expert committee specialised in occupational health and safety; that the contradiction between the expert reports for quantification fault rates should be eliminated; that the drafted report should be evaluated together with the information and documents in the file; and that a decision should be made based on these results. Upon the quashing decision, the trial court complied with the quashing decision and the material damage of the applicant was assessed through further expert examinations, which constitute *acts concerning the investigation*.

55. The repealed Law no. 1086 and the relevant articles of Law no. 6100 do not contain any explicit or implicit provision that rectification is not applicable upon quashing. As previously outlined, the prevailing legal principle that no rectification can be carried out subsequent to a quashing decision has been established by the case-law. In the decision of the General Assembly on the Unification of Judgments of the Court of Cassation dated 4 February 1948, while interpreting the legal principle as to the inability to pursue for rectification following a quashing decision, the investigation phase was restricted to the trial process prior to the quashing decision at the inferior court. No evaluation was made regarding the nature of the procedures for the investigation carried out after the quashing decision, despite the fact that the rectification in question was carried out subsequent to the quashing decision.

56. In the present case, there is no explicit legal provision in the court decisions indicating that no rectification can be made subsequent to a quashing decision, even in instances where an investigation remains ongoing. To the contrary, Article 177 § 1 of the Law no. 6100 stipulates that the rectification may be carried out until the conclusion of the investigation. It is understood that the decisions of the General Assembly on the Unification of Judgments of the Court of Cassation, which established the case-law subject to the interference, are predicated on the reasonable aim of not eliminating the legal situations that arise by complying with the quashing decision. Additionally, pursuant to the same decisions, it is unforeseeable, in terms of the constitutional principle of lawfulness, that a rectification cannot be carried out in cases where the investigation continues after the quashing decision. In cases where the parties lack sufficient information and documentation, or where the full extent of damages and the claimable receivable could not be determined at the time of initiating the action, the law-maker has provided for an increase in the amount through rectification during the proceedings. The rectification procedure introduced by this regulation is also in line with the requirements 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. The right of access to a court requires, within the framework of the principle of the proper administration of justice, the

possibility to increase the amount by rectification or other means during the proceedings in these very circumstances. It can be concluded that the inability or difficulty of rectification would place an excessive burden on individuals in the absence of a mechanism for striking a balance. This would amount to a serious interference with the right of access to a court. Although the purpose of the prohibiting rectification after a quashing decision is to preserve the legal consequences of the quashing decision, in order not to place an excessive burden within the framework of the right of access to a court, a rigid categorical approach should be avoided. Instead, in accordance with the objectives of the rectification institution, the specific circumstances of each case should be considered when the investigation continues even after the quashing decision with a view to determining the extent of the damage or claim in question.

57. It is also important to acknowledge that the power of the courts to interpret rules of law is contingent upon their obligation to interpret them in a manner that is consistent with the provisions of the Constitution. Accordingly, the courts are obliged to interpret the provisions of the legislation applicable to the dispute before them in compliance with the constitutional principles and safeguards. In instances where a legislative provision can be subjected to multiple interpretations, the constitutional supremacy principle mandates that an interpretation that contradicts the Constitution be eliminated. In other words, the principle of interpretation in accordance with the Constitution represents the extent of the judge's discretion in the interpretation of legal rules. Consequently, the judge's failure to duly consider the Constitution and the principles enshrined therein when determining the meaning and scope of a provision renders the Constitution's position at the pinnacle of the hierarchy of norms devoid of any meaningful substance. In this regard, Constitution is not merely a text formulated as a document, but rather a legal living instrument, which steers the legal system and is to be taken into consideration in case of all public acts and actions performed (see *Mehmet Fatih Bulucu* [Plenary], no. 2019/26274, 27 October 2022, § 76).

58. In the present case, the investigation phase is constrained to the trial process preceding the quashing decision of the inferior court.

There is no distinction or exception for cases where the investigation procedures are conducted subsequent to the quashing decision, which is based on the precedent set by the General Assembly on the Unification of Judgments of the Court of Cassation. It can therefore be argued that the categorical interpretation that the courts are unable to carry out rectification upon a quashing decision in respect of all disputes significantly restricts the right of access to a court. In other words, the relevant legal provision has been interpreted by the courts in a manner that restricts fundamental rights and freedoms. As a matter of fact, with the amendment dated 28 July 2020, the law-maker has explicitly provided that in the event that the inferior court takes an action regarding the proceedings, rectification may be carried out until the conclusion of the proceedings.

59. In light of these considerations, it has been concluded that, although the legislation in force at the material time does not explicitly prohibit requesting rectification during the judicial proceedings even after a quashing decision has been issued and the subsequent investigation is conducted accordingly, the courts' categorical interpretation that rectification is not permissible in any case following a quashing decision, without considering exceptions is unforeseeable and does not align with the constitutional principle of lawfulness.

60. Consequently, it has been concluded that the interference with the applicant's right of access to a court, by refusing to grant the applicant's request for rectification due to the prohibition of rectification after the quashing decision, lacks legal basis especially given that the applicant's case had returned to the investigation stage following the quashing decision as acts pertaining to the investigation had been carried out in accordance with the quashing decision. In light of the foregoing, it was deemed unnecessary to assess whether the interference had pursued a legitimate aim or whether it was proportionate.

61. For these reasons, it has been concluded that the right of access to a court under the right to a fair trial, safeguarded by Article 36 of the Constitution, was violated.

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

1. The Applicant's Allegations

62. The applicant alleged that her right to a trial within a reasonable time had been violated due to lengthy proceedings.

2. The Court's Assessment

a. Admissibility

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

b. Merits

64. In determining the duration of the proceedings regarding disputes related to civil rights and obligations, the date of filing of the action shall be taken as the starting date of the duration, and the date of the end of the proceedings, frequently including the execution phase, shall be taken as the date of the end of the duration. As regards the cases which have not been concluded yet, the date when the Court rendered a judgment on the complaint regarding the alleged violation of the right to a trial within a reasonable time shall be taken as the date of the end of the duration (see *Güher Ergun and Others*, §§ 50-52).

65. In assessing whether the duration of proceedings before the labour courts is reasonable, the complexity of the proceedings and the number of phases, the attitude of the parties and the competent authorities during the proceedings, and the nature of the applicant's interest in a speedy conclusion of the proceedings are taken into account (see *Nesrin Kılıç*, no. 2013/772, 7 November 2013, § 58).

66. In light of the aforementioned principles and the decisions of the Constitutional Court in pertinent cases, it must be concluded that the 17-year and 3-month trial period is not reasonable.

67. 1. In view of the foregoing reasons, it must be held that the right to a trial within a reasonable time under the right to a fair trial, safeguarded by Article 36 of the Constitution, was violated.

C. Application of Article 50 of Code no. 6216

68. 52. The applicant requested the Court to find a violation, and award her compensation.

69. 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; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100).

70. On the other hand, it is clear that the finding of a violation of the right to a trial within a reasonable time in the present case would be insufficient for the redress of the damages sustained by the applicant. Thus, for the redress of the violation together with all its consequences, the applicant must be paid a net amount of TRY 144,000 in respect of non-pecuniary damages which cannot be compensated merely by the finding of a violation due to the interference with her right to a trial within a reasonable time.

71. Since it has been understood that a retrial would provide sufficient redress for the elimination of the violation of the right of access to a court and its consequences and a non-pecuniary compensation for the elimination of the violation of the right to a trial within a reasonable time, the remaining compensation claims of the applicant must be dismissed.

72. The total litigation costs of TRY 10,264.60 including the court fee of TRY 364.60 and counsel fee of TRY 9,900 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 15 February 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 ADMISSIBLE;

B. 1. The right of access to a court under the right to a fair trial, safeguarded by Article 36 of the Constitution, was VIOLATED;

2. The right to a trial within a reasonable time under the right to a fair trial, safeguarded by Article 36 of the Constitution, was VIOLATED;

C. A copy of the judgment be SENT to İstanbul 6th Labour Court (Concerning the case file of the decision numbered E.2017/218, K.2017/505) for retrial for the redress of the consequences of the violation of the right of access to a court;

D. A net amount of TRY 144,000 be PAID to the applicant in compensation for non-pecuniary damage, and the remaining compensation claims be REJECTED;

E. The total litigation costs of TRY 10,264.60 including the court fee of TRY 364.60 and the counsel fee of TRY 9,900 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 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 timelimit 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

AYŞE FAHRİYE TOSUN

(Application no. 2021/17663)

23 February 2023

On 23 February 2023, the Plenary of the Constitutional Court found no violation of the right to a fair hearing within the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Ayşe Fahriye Tosun* (no. 2021/17663).

(I-IV) SUMMARY OF THE FACTS

[1-30] The applicant, a university professor, applied for a licence to practise in order to be able to freely exercise her profession after her work shifts. The Directorate of Health dismissed the impugned application on the grounds that the applicant was a faculty member and was subject to the Higher Education Law no. 2547. The action brought by the applicant was dismissed by the inferior courts. The applicant's appeal on points of law and fact and subsequent appeal on points of law were also dismissed.

V. EXAMINATION AND GROUNDS

31. The Constitutional Court ("the Court"), at its session of 23 February 2023, examined the application and decided as follows:

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

32. The applicant claimed that she had to close her private clinic due to legal obstacles and that it was contrary to the principle of equality to grant the right to continue self-employment activities to those who actually had an operational practice on 18 January 2014, when Law no. 6514 entered into force. The applicant further maintained that the Directorate of Health's decision dismissing her request to open a private clinic, along with the rulings of the inferior courts concerning the judicial review of the impugned decision were unlawful, the court decisions lacked sufficient and relevant grounds and accordingly, the principles of equality and the right to a fair trial were violated.

33. In their observations, the Ministry has identified several pertinent considerations, which are outlined below:

i. The complaints brought forward by the applicant relate to the inferior courts' appreciation of the rules of law and evidence and concern the appellate remedy.

ii. In the present application, the judicial authorities substantiated their assessment of the facts and circumstances and evidence in the case, the interpretation and application of the rules of law, the conclusion they reached on the relevant dispute and the grounds for the discretionary power they exercised.

iii. Since the disputed decision was not among the decisions subject to appeal, the Regional Administrative Court decided to dismiss the case with final effect following the appellate examination.

iv. In the absence of a concrete basis for evaluating the allegations of a violation of the principle of equality under Article 10 of the Constitution and the prohibition of discrimination under Article 14 of the European Convention on Human Rights ("the Convention"), it is essential to consider these claims in conjunction with other fundamental rights and freedoms enshrined in the Constitution and the Convention.

B. The Court's Assessment

34. Article 36 § 1 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."

35. 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). It has been concluded that the alleged violation in the present case in essence relate to the court decisions finding the procedure regarding the dismissal of her request for a private practice licence to be lawful. Therefore, the application must be examined within the scope of the right to a fair hearing under the right to a fair trial.

1. Admissibility

36. The complaint concerning an 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.

2. Merits

a. General Principles

37. The right to a fair trial guaranteed under Article 36 of the Constitution includes safeguards aimed at securing formal justice and not material justice. From this perspective, the right to a fair trial does not offer a guarantee for the conclusion of the proceedings in favour of either party. The right to a fair trial essentially ensures that the trial process and its procedure are conducted in a fair manner.

38. In Article 148 § 4 of the Constitution, it is set out that the complaints concerning *the issues to be examined in appellate review* cannot be subject to an examination through individual application. Accordingly, in principle, any question with respect to the establishment of impugned facts, the assessment of the evidence, the interpretation and implementation of provisions of law as well as the fairness of the conclusion reached with respect to the dispute cannot be subject-matter of an individual application. However, the findings and conclusions constituting an interference with the rights and freedoms falling under the scope of individual application and involving a manifest error of judgment or manifest arbitrariness are excluded from this rule (see, among many other judgments, *Ahmet Sağlam,* no. 2013/3351, 18 September 2013).

39. However, in cases where there is an interference with the fundamental rights and freedoms, it is the Court that will assess the effect of the inferior courts' decisions and assessments on the safeguards provided for in the Constitution. In this respect, any examination to be made, by taking into account the safeguards provided for in the Constitution, as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated cannot be regarded as "*an assessment of an issue to be considered in appellate review*" (see *Şahin Alpay (2)* [Plenary], no. 2018/3007, 15 March 2018, § 53).

40. Besides, the Court may, in very exceptional cases, examine a complaint with respect to the issues to be assessed in appellate remedy, which is not directly related to the fundamental rights and freedoms,

without being subject to the above-cited restriction. In very exceptional cases where the fairness of the proceedings has been undermined to a great extent due to manifest arbitrariness and the procedural safeguards inherent in the right to a fair trial have thereby become dysfunctional, this situation - indeed related to the outcome of the proceedings - turns into a procedural safeguard itself. Therefore, the Court's examination as to whether the inferior courts' assessments rendered the procedural safeguards dysfunctional and whether the fairness of the proceedings was impaired to a great extent due to manifest arbitrariness does not mean that the Court has dealt with the outcome of the proceedings. As a result, the Court may interfere with the inferior courts' assessments concerning evidence only in the existence of a practice which is manifestly arbitrary and has rendered dysfunctional the procedural safeguards inherent in the right to a fair trial (see *Ferhat Kara* [Plenary], no. 2018/15231, 4 June 2020, § 149; and *M.B.*, [Plenary], no. 2018/37392, 23 July 2020, § 83).

41. The right to a fair trial does not guarantee that the interpretation of provisions of law which would ensure a favourable conclusion for the applicant be taken as a basis. Interpreting the provisions of law applicable to the dispute fall, as indicated above, within the discretion of the inferior courts. That being said, the inferior courts must interpret the rules of law in the light of the principle of the rule of law - one of the characteristics of the Republic as listed in Article 2 of the Constitution -. In fact, the rule of law is a principle that must absolutely be taken into consideration in the interpretation of all articles of the Constitution. In this context, the requirements of the rule of law must be respected when interpreting the scope and content of the right to a fair trial under Article 36 of the Constitution (see *M.B.*, § 84).

42. In this regard, the principle of legal security is one of the requirements of the rule of law (see the Court's decisions no. E.2008/50, K.2010/84, 24 June 2010; and no. E.2012/65, K.2012/128, 20 September 2012). Aimed at ensuring the legal safety of persons, the principle of legal security requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the state avoids using any methods which would undermine this trust in their legislative

acts. The legal certainty principle means that legislative acts must be sufficiently clear, non-ambiguous, comprehensible and applicable not to allow any hesitation or doubt on the part of both the administration and individuals and they must include safeguards against arbitrary practices of public authorities (see the Court's decision no. E.2013/39, K.2013/65, 22 May 2013).

43. Since the interpretation of provisions of law applicable to the civil rights of the applicants in a manifestly arbitrary manner or in a way that avoids reinstatement of the right (i.e. in defiance of justice) would render the procedural guarantees ineffective, it would be possible to speak of a breach of the right to a fair trial. In such cases, the inferior court's interpretation cannot be foreseen by the applicant and the unforeseeable interpretation of legal norms would prejudice the rule of law. The broad interpretation of provisions restricting rights and freedoms, in particular, leads to arbitrariness and leaves individuals with a sense of insecurity before the law (see *M.B.*, § 86).

44. In the following cases, it may be deemed appropriate to conclude that a circumstance that is demonstrably associated with the result of the proceedings is itself transformed into a procedural safeguard:

i. Failure to rely on any acceptable interpretation of the rules of law that have been applied or are required to be applied in the present case

ii. Existence of unacceptable reasoning or illogical deductions relied on to establish a link between the evidence and the fact, which is sought to be proven

iii. Using manifestly inaccurate factual findings as the basis for a judgment

iv. Failure to take account of the evident specific circumstances of the present case

v. The manifestly arbitrary disregard of evidence which is undoubtedly probative of a particular matter

vi. Reliance on assumptions that cannot be proven otherwise in the determination of the material event and that would render the defence devoid of meaning.

The circumstances in which the matters relating to the outcome of the proceedings become a procedural safeguard are not limited to those mentioned above. In similar cases, the Court may also conduct an examination within the framework of an individual application. Nevertheless, for these inadequacies to constitute a breach of the right to a fair trial, it must additionally be demonstrated that they undermine the fairness of the proceedings.

45. In the case of *Kenan Özteriş* (no. 2012/989, 19 December 2013), the Court held that the interpretation of the Supreme Military Administrative Court ("the SMAC") was in contravention of the clear provision in Article 95 of the former Turkish Criminal Code (Law no. 765 of 1 March 1926) and found a violation of Article 36 of the Constitution because, despite the existence of an explicit provision of law with respect to the consequences of suspension of the conviction imposed on the applicant and the obvious nature of how that provision was to be interpreted, the Second Chamber of the SMAC had drawn an unusual meaning from the clear provision of law and had applied it accordingly. The Court deemed SMAC's decision as unforeseeable and considered it to contain a manifest error of discretion, finding a violation of Article 36 of the Constitution.

46. Similarly, in the case of *Mehmet Geçgel* (no. 2014/4187, 18 April 2019), the Court found a violation of the applicant's *right to a fair hearing* due to *the manifest error of judgment* in the administrative court's decision because the latter had rejected the applicant's claim for compensation as a result of an assessment as if there had been an actual conviction even though there had not been a conviction according to the principles of criminal law since the applicant's sentence had been suspended within the scope of the Law on Conditional Release and Suspension of the Proceedings and Sentences as regards the Offences Committed before 23 April 1999 (Law no. 4616 of 21 December 2000).

b. Application of Principles to the Present Case

47. In the present case, the applicant, who is a professor at the University's Department of Child Neurology, Department of Pediatrics, and Department of Child Health and Diseases, requested to obtain a private practising license in order to practise her profession freely outside of her contracted hours. The Directorate of Health concluded that the request be declined on the basis that the applicant was a faculty member subject to the provisions of Law no. 2547. Furthermore, the applicant's challenge to this decision and subsequent appeal were both dismissed by the inferior courts on similar grounds. In this case, the Court must determine whether the interpretation of the inferior courts subsequent to the Directorate of Health's dismissal of the applicant's request pursuant to Law no. 2547 constitutes a manifest error of appreciation or arbitrariness that effectively renders the procedural safeguards devoid of meaning.

48. Article 36 of Law no. 2547, entitled 'Working principles', which constitutes the basis for the dismissal of the applicant's request, a faculty member seeking to practise her profession freely in her private clinic outside of her contracted hours, sets forth the procedures and principles governing the work of faculty members. The provision sets out the rules governing the specific manner and conditions under which faculty members may engage in professional activities outside the teaching institution while retaining their title. Furthermore, the same provision stipulates that in instances where no legal framework exists therein the provisions set forth in Article 28 of Law no. 657, which prohibits civil servants from engaging in trade and other income-generating activities, shall prevail. Additionally, the second sentence of the first paragraph of the aforementioned article delineates that civil servants are precluded from establishing commercial entities, such as offices, for the purpose of pursuing self-employment activities.

49. Pursuant to Article 36 of Law no. 2547 and the Constitutional Court's annulment decision, the inferior courts deemed it lawful to dismiss the applicant's request to open a private clinic on the grounds that the applicant did not hold the title of associate professor or professor

on 18 January 2014, when Law no. 6514 entered into force, and thus was not among those permitted to operate a medical clinic prior to this date.

50. In accordance with the provisions set forth in Law no. 1219 and the Fundamental Law on Healthcare Services no. 3359 of 7 May 1987, the authority and responsibility of the health directorates include the examination of the physical conditions of the practice office designated by the physician for patient admission, as well as the assessment of compliance with the relevant regulations in a number of essential areas. Additionally, the directorates are tasked with ensuring that individuals seeking to engage in self-employment possess a valid diploma and specialisation certificate in the relevant field. It has been established that the administration considered the aforementioned legislation, in addition to other pertinent legal regulations, in reaching its decision. The reasoning provided by the Constitutional Court in its decision dated 7 November 2014 concerning the applicant, who has been a faculty member since 2010, was also considered.

51. In this regard, in accordance with the Law no. 2547 and the reasoning part of decision of the Constitutional Court, the inferior courts decided that the applicant, who on 18 January 2014, the effective date of Law no. 6514, held the title of a faculty member but did not have an operational clinic on that date, could not claim a legitimate expectation that this status would continue for a certain period of time, thereby enabling him to carry out work and activities after hours on the basis of judicial decisions.

52. In light of the provisions of Law no. 2547 and the reasoning of the Court's judgment, it cannot be considered that the opinion of the trial courts that the applicant, who was not one of the persons who had an operational clinic before 18 January 2014, had not been entitled to self-employment did not entail a manifest arbitrariness or manifest error of judgment. Accordingly, in the present case, the dismissal of the request of the applicant, who sought to carry out her professional activities freely in his private clinic after working hours, in accordance with Law no. 2547 and Article 28 of Law no. 657 referred to by that Law, did not prejudice the impartiality of the proceedings.

53. For these reasons, it must be held that there has been no violation of the right to a fair hearing under the right to a fair trial safeguarded by Article 36 of the Constitution.

Mr. Kadir ÖZKAYA and Mr. Selahaddin MENTEŞ expressed a dissenting opinion in this respect.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 23 February 2023:

A. UNANIMOUSLY that the alleged violation of the right to a fair trial be DECLARED ADMISSIBLE;

B. BY MAJORITY and by dissenting opinions of Mr. Kadir ÖZKAYA and Mr. Selahaddin MENTEŞ, that the right to a fair trial safeguarded by Article 36 of the Constitution, was NOT VIOLATED;

C. That the litigation costs be COVERED by the applicant; and

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

DISSENTING OPINION OF VICE-PRESIDENT KADİR ÖZKAYA AND JUSTICE SELAHADDİN MENTEŞ

1. The applicant, who closed his clinic on 31 August 2001 for various reasons, suspended his professional practice and worked as a lecturer in the field of paediatrics at a university, applied to resume self-employment after working hours as of 6 March 2020, but was not granted. Thereupon, the Court ruled by majority that the applicant's right to a fair hearing had not been violated within the framework of the right to a fair trial safeguarded by Article 36 of the Constitution, in the context of the claim that the right to a fair trial had been violated due to the dismissal of the action for annulment of the impugned act.

2. In light of the reasons elucidated below, we are unable to concur with the decision that has been reached on the basis of the majority opinion.

3. Article 36 of the Higher Education Law no. 2547 has long since established the operational principles governing the employment of academic staff on the basis of part-time and full-time work. Furthermore, it permits professors and associate professors to be employed on a part-time basis. In the relevant article, the regulations set forth in Article 3 of Law no. 5947, published in the Official Gazette on 30 January 2010 and numbered 27478, commonly referred to as the "Full Day Law" in public discourse, effectively terminated the partial status of professors and associate professors. The legislation envisaged that all academic staff employed in higher education institutions would henceforth be employed on a permanent basis in universities.

4. The provisional Article 57 added to Law no. 2547 by the same Law (no. 5947) provides that faculty members who are working in partial status on the date of publication of this article shall be transferred to permanent status if they request it within one year from the date of publication of the Law; those who do not request it within this period shall be deemed to have resigned.

5. The relevant provisions were annulled by the decision of the Constitutional Court dated 16 July 2010 and numbered E:2010/29,

K:2010/90. (Although the request for the annulment of certain parts of the regulations was dismissed, the stipulation that all academic staff members are to be employed on a permanent basis in universities was revoked.) The decision was published in the Official Gazette on 4 December 2010 (no. 27775) with an implementation date of nine months from publication.

6. The decision indicated that in accordance with Article 130 of the Constitution, universities established for the purpose of developing human capital in alignment with the national and regional needs and based on modern education and training principles are granted public legal personality and scientific autonomy. This institutional autonomy ensures that faculty members and researchers are free to conduct and publish in any scientific works as they deem appropriate. The decision also highlighted that the rationale behind Article 130 of the Constitution and emphasised that any issues left to the discretion of the law should be regulated in accordance with the principle of 'scientific autonomy'. However, in the relevant decision, it is indicated that, pursuant to the Constitution, universities are institutions designed for conducting scientific studies are teaching, and they are subject to a different consideration from other public institutions by having scientific and administrative autonomy, and in this respect, faculty members (although being public officials) are granted a distinct place in the general classification, it is stated that faculty membership is a professional classification with its own importance and value, and that faculty members cannot be assessed under the same criteria as other public officials due to this position.

7. The Court has held that the law-maker has the discretion to determine the working conditions of academic staff by imposing certain limitations in accordance with their title and status in order to develop higher education in line with the principles set out in the Constitution and to resolve problems related to health in this context. However, the Court ruled that these restrictions should not hinder scientific activities in universities as a requirement of freedom of science and scientific autonomy, and that the provision sought to be annulled prevented universities from fulfilling their duties such as disseminating scientific

data, supporting national development and progress, and serving the country and humanity.

8. The Court further determined that the aforementioned regulation imposed a blanket prohibition on professional activities in public or private institutions after working hours, even if unpaid, without differentiation between lecturers, instructors, teaching assistants, and academically qualified faculty members (professors and associate professors) employed at universities. The Court decided that this set of circumstances was in breach of Article 130 of the Constitution. Furthermore, the Court ruled that faculty members working in partial status under the pre-amendment regulation had a legal guarantee that this status could not be terminated before the expiry of the two-year period, except upon their own request.

9. In the relevant judgment of the Court, it was lastly stated that if the professors and associate professors working in partial status as lecturers in universities do not convert to permanent status, they shall be deemed to have resigned before the expiry of the period recognised by the law, which would be incompatible with the principles of certainty and legal security, which are the requirements of the rule of law.

10. Following the annulment decision of the Court, a new regulation was enacted by the law-maker with the promulgation of the Decree Law no. 650 in the Official Gazette dated 26 August 2011 and numbered 28037, taking into account the "specific status of faculty members" emphasised in this decision.

11. The relevant Decree Law establishes that academic personnel are subject to Article 28 of the Law no. 657 on Civil Servants; however, an exception has been introduced for faculty members, enabling them to engage in professional activities outside of working hours in places other than higher education institutions and to practice their profession or art freely, provided that they satisfy the conditions stipulated in the Law.

12. However, this provision was also annulled by the Court's decision dated 18 July 2012 and numbered E:2011/113, K:2012/108, on the grounds that the Law granting the issuance of the Decree Law no.

650 did not include authorisation for Articles 36, 37, 38, 39, 40 and 41 of the Decree Law, and that these articles were not within the scope of the Empowering Law.

13. Following the publication of the decision in the Official Gazette of 1 January 2013, number 28515, no regulation was enacted for a long time and finally, with Law no. 6514, published in the Official Gazette of 18 January 2014, number 28886, Article 36 of Law no. 2547 was again amended. With the said amendment, the sixth paragraph of the article, which was annulled by the Court, has been reformulated and new paragraphs have been added to the article.

14. The amendment to the legislation on medical specialisation now prohibits physicians, dentists and academic staff who are specialists from engaging in self-employment activities and working in private health institutions outside of their contracted hours with the certain exceptions outlined in the aforementioned article. This is contrary to the regulations set out in Decree Law no. 650 and the reasoning part and the conclusion of the Court's decision dated 16 July 2010 and numbered E:2010/29, K:2010/90.

15. Furthermore, Provisional Article 64, as incorporated into Law no. 2547 by Article 14 of Law no. 6514, stipulates that faculty members engaged in self-employment activities outside of their professional duties or employed by private organisations as of the effective date of this article must cease these activities within three months from the date of publication of this article. Failure to comply will result in termination of their contractual relations with their respective universities.

16. An application was submitted to the Constitutional Court seeking the annulment of the provisions in question. In its decision, dated 9 April 2014 and numbered E:2014/61, K:2014/6, the Court initially ordered the suspension of the execution of the aforementioned Provisional Article 64 until a decision had been reached on the merits of the case. In the subsequent examination on the merits, the Court rendered a decision on 11 July 2014, numbered E:2014/61, K:2014/166. This decision differed from the Court's previous ruling on 16 July 2010, numbered E:2010/29, K:2010/90. In its previous decision, the Court had determined that

the provision prohibiting faculty members from engaging in self-employment activities and working in private health institutions outside of their regular working hours was unconstitutional. The Court's subsequent decision did not find this rule to be unconstitutional and dismissed the request for the annulment of the provision.

17. The decision highlighted the necessity for lecturers to fulfil their duties without interruption, given their status as public officials. It was also stated that the legislature is empowered to establish the working conditions of lecturers by imposing limitations in accordance with their title and status, with the aim of advance higher education in line with the principles set out in the Constitution and of addressing health-related issues. It has also been emphasised that the contested provision establishes the working conditions of faculty members with the objective of enhancing the quality of education and health services provided. The provision takes into account the academic titles and status of faculty members while imposing certain limitations on their professional activities. It should be noted that the rule does not impede the faculty members' capacity to engage in scientific and academic activities in accordance with the principles of academic autonomy. Accordingly, the regulations set out by the law-maker concerning the working conditions of the faculty members are deemed within the scope of the discretionary power of the law-maker. These regulations are not contrary to the principle of scientific autonomy. The service in question is different from other services due to the nature and importance of the health service. Given the specific nature and significance of healthcare services, a comparison of equality between faculty members who became dentists or medical specialists under the current medical specialisation legislation, and other lecturers is not reasonable. It is within the discretionary power of the law-maker to impose different limitations on the faculty members in this regard.

18. However, in light of the aforementioned decision, Provisional Article 64, which was previously subject to criticism for giving rise to numerous issues in practice in the period following its introduction, some of which were attributable to the grounds set out in the relevant annulment decision, some to the interpretation of these grounds, and some to the rule itself, was revoked.

19. The annulment decision does not address whether a legal void will arise as a result of the annulment of the provision. Consequently, the issue of the annulment provision entering into force following a specified period of time, beginning with the publication of the decision in the Official Gazette, in accordance with the third paragraph of Article 153 of the Constitution, remains unresolved. In light of the aforementioned considerations, it is evident that paragraph (3) of Article 66 of Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court necessitates the enactment of a new regulation that would stipulate a reasonable period of time to address the legitimate expectations of those concerned, while also ensuring compliance with the principle of legal security.

20. In the reasoning part of the annulment decision regarding Provisional Article 64, it is stated that the provision in question stipulates that faculty members who are physicians, dentists, or specialists under the legislation on specialisation in medicine, who are engaged in self-employment activities outside of their working hours or who are employed in private institutions, must terminate their activities within the specified period; otherwise, they shall be dismissed from the university and deemed to have resigned. Following an assessment of the content of the pertinent provision, the Court determined that the principle of respect for acquired rights constitutes one of the general principles of law. The acquired right may be defined as the protection of the subjective right arising for individuals by implementing objective legal rules that are suitable to provide a right in the fields of private and public law. In order for a right to be considered acquired, it must have been obtained in accordance with the prevailing provisions and regulations at force prior to the enactment of the new legislation. Additionally, an acquired right may be defined as a right that has been established based on an individual's status and has reached a definitive stage, becoming a personal entitlement. In light of these findings, the Court, in its assessment, reasoned that rights anticipated to be acquired in the future based on a particular status do not constitute acquired rights. Consequently, it is not possible to speak of the existence of acquired rights for academic staff who were engaged in self-employment

activities or working in private institutions outside of working hours prior to the enactment of the Law. In its statements regarding acquired rights, the Court noted that there could be no claim to an acquired right for faculty members. Additionally, the Court examined the situation of academic staff from the perspective of the principles of legal security and legal certainty. In this context, the Court highlighted that one of the requirements of the rule of law is the principle of legal security, which necessitates not only the foreseeability of legal norms but also the necessity for individuals to be able to trust the state in all their acts and actions. Furthermore, it requires the state to avoid methods concerning its legal regulations that could undermine this trust. The Court also emphasised that safeguarding the expectations of individuals who orient their lives and engage in legal acts based on trust in the continuity of the legal framework is a fundamental requirement of the principle of legal security. On the other hand, it was emphasised that the principle of legal certainty requires that the legal regulations must be absolutely clear, comprehensible and applicable to both individuals and public authorities. This clarity is necessary to avoid arbitrary state actions.

21. In this regard, it has been emphasised that for an expectation to be afforded legal protection, it must attain the level of a legitimate (justifiable) expectation. The standard for assessing the legitimacy of an expectation is the principle of "*equity*", as articulated in Article 4 of the Turkish Civil Code ("Law no. 4721"). This provision implies that, where judicial discretion is permitted, judges are required to exercise their discretion in a manner that is congruent with the specifics of the case and adhere to the principles of fairness. The principle of equity, as enshrined among the general principles of law, must also be considered within the framework of constitutional jurisdiction. Furthermore, both law-makers and judiciary are bound to observe equity in their discretionary decision-making. The Court has consistently affirmed the "*consideration of the equity standard*" as an essential element of the rule of law. Consequently, it is imperative to evaluate whether the contested provisions, which did not uphold the expectations of faculty members engaged in self-employment activities or employed in private institutions outside regular working hours at the time of the enactment, conform to the equity standard.

22. The Court, based on these explanations and in its final assessment, has determined that, considering the relevant legal, judicial, and administrative processes, there was a prevailing opinion that full-time faculty members, following judicial decisions, would be able to engage in self-employment activities outside of their official working hours. It was noted that, due to this formed belief and expectation, these faculty members had planned their self-employment activities outside the university and shaped their economic and social lives around these conditions. The Court observed that, as a result of their reliance on the continuation of the existing situation, these faculty members had organized their activities and undertakings accordingly, and the legal status that arose from these activities was imperilled by the contested provisions, which forced them to terminate their endeavours (facing significant legal consequences such as being deemed to have resigned or dismissed if they failed to comply). The Court found that this was contrary to the principles of fairness. Consequently, the Court held that, while this status does not constitute an acquired right, it nonetheless creates a legitimate expectation that such statuses would continue for a certain period and that this expectation must be safeguarded under the principle of legal security. Additionally, the Court noted that the legislature's enactment of multiple laws on the same issue has caused ambiguity and confusion regarding the legal status of these faculty members. Accordingly, the Court annulled the contested provisions on the grounds that they violated the principles of legal certainty and legal security, which are fundamental to the rule of law.

23. The relevant decision was published in the Official Gazette dated 19 June 2015 and numbered 29391. Following its publication in the Official Gazette, no further legal regulation was enacted. The practice has since evolved in accordance with the developing legal and judicial processes, as well as the interpretation of the Court's reasoning by administrative and judicial authorities.

24. In this context, pursuant to the prevailing legal practice (notwithstanding that, in the specific instance at hand, the applicant was denied a license to operate a private clinic despite having closed such a practice on 31 August 2001, while in the cases of other individuals), a physician who, after graduating from the Faculty of

Medicine (commonly referred to as a general practitioner in colloquial terms), briefly opened and subsequently closed a private clinic while concurrently employed in a healthcare unit before the enactment of Law no. 5947, and who assumed an academic position shortly before the enactment of Law no. 6514, may be eligible to open and operate a private clinic due to the circumstances arising under Provisional Article 64. Conversely, faculty members who had been serving in academic positions prior to the enactment of Law no. 6514 and who, despite having the legal right to open a private practice at the time, did not exercise this right for various reasons during the period preceding the enactment of Law no. 6514, are now precluded from establishing a private practice.

25. In the same vein, among two faculty members who graduated from the Faculty of Medicine on the same date, received their academic titles simultaneously, and were appointed to faculty positions at the same university, the faculty member who established a private clinic shortly before the enactment of Law no. 6514 was permitted to continue their clinical operations without hindrance. In contrast, the other faculty member, having not established a private practice prior to the enactment of Law no. 6514, found themselves legally precluded from engaging in such private clinical activities.

26. As a matter of fact, following the enactment of Law no. 6514 (and the subsequent publication in the Official Gazette of the Constitutional Court's decision dated 7 November 2014, numbered E:2014/61, K:2014/166), a significant number of faculty members, despite not having an operational private clinic, submitted applications to the administrative authorities, asserting their entitlement to such a right based on their titles of professor or associate professor. In instances where their requests were denied, these individuals brought actions for annulment. Following judicial review by the Council of State, certain faculty members were granted the right to open private clinic and engage in self-employment activities outside of their official working hours (as reflected in the decisions of the 10th Chamber of the Council of State dated 25 November 2020, 7 December 2020, 10 December 2020, and 21 January 2021).

27. Majority's opinions indicated that the subject-matter to be examined by the Court in the present case is limited to assessing whether the interpretation by the inferior courts, following the Health Directorate's dismissal of the applicant's request based on Law no. 2547, involved a manifest error of judgment or arbitrariness to an extent that would render procedural safeguards ineffective. After considering the provisions of Law no. 2547 in conjunction with the reasoning provided in the relevant decision of the Constitutional Court, it was concluded that, although the applicant held the title of faculty member on 18 January 2014, the date of the enactment of Law no. 6514, the applicant did not have an operational private clinic as of that date and, therefore, could not reasonably claim a legitimate expectation that this status would continue for a certain period, allowing her to engage in self-employment activities in private clinic after regular working hours based on judicial decisions. Consequently, it was determined that the decision of the inferior courts, which were deemed to include no manifest error of judgment or arbitrariness, could not be regarded as undermining the fairness of the proceedings. Therefore, it was concluded that the dismissal of the applicant's request to engage in self-employment activities in private clinic after working hours, pursuant to Law no. 2547 and Article 28 of Law no. 657, to which Law no. 2547 refers, did not undermine the fairness of the proceedings.

28. As stated above, the implementation regarding the issue has evolved in accordance with the developing legal and judicial processes, as well as the interpretation of the Constitutional Court's reasoning by administrative and judicial authorities. Consequently, there exists a circumstance that necessitates interpretation.

29. In Article 148 § 4 of the Constitution, it is set out that the complaints concerning *the issues to be examined in appellate review* cannot be subject to an examination through individual application. Accordingly, in principle, any question with respect to the establishment of impugned facts, the assessment of the evidence, the interpretation and implementation of provisions of law as well as the fairness of the conclusion reached with respect to the dispute cannot be subject-matter of an individual application. However, the findings and conclusions

constituting an interference with the rights and freedoms falling under the scope of individual application and involving a manifest error of judgment or manifest arbitrariness are excluded from this rule (see, among many other judgments, *Ahmet Sağlam,* no. 2013/3351, 18 September 2013).

30. Besides, the Court may, in very exceptional cases, examine a complaint with respect to the issues to be considered in appellate review, even when such matters are not directly related to the fundamental rights and freedoms, without being subject to the above-cited restriction. In very exceptional cases where the fairness of the proceedings has been undermined to a great extent due to manifest arbitrariness and the procedural safeguards inherent in the right to a fair trial have thereby become dysfunctional, this situation - indeed related to the outcome of the proceedings - turns into a procedural safeguard itself. Therefore, the Court's examination as to whether the inferior courts' assessments rendered the procedural safeguards dysfunctional and whether the fairness of the proceedings was impaired to a great extent due to manifest arbitrariness does not mean that the Court has dealt with the outcome of the proceedings. As a result, the Court may interfere with the inferior courts' assessments concerning evidence only in case of a practice which is manifestly arbitrary and has rendered dysfunctional the procedural safeguards inherent in the right to a fair trial (see *Ferhat Kara* [Plenary], no. 2018/15231, 4 June 2020, § 149; and *M.B.*, [Plenary], no. 2018/37392, 23 July 2020, § 83).

31. Furthermore, it is essential to emphasise that Article 36 of the Constitution fundamentally ensures that the right to a fair trial encompasses both the substantive and procedural aspects of judicial proceedings, stipulating that they be conducted in a manner that upholds fairness and procedural integrity (see *M.B.* [Plenary], no. 2018/37392, 23 July 2020, § 80). The right to a fair trial does not guarantee that the interpretation of provisions of law which would ensure a favourable conclusion for the applicant be taken as a basis. Interpreting the provisions of law applicable to the dispute fall, as indicated above, within the discretion of the inferior courts. That being said, the inferior courts must interpret the rules of law in the light of the principle of rule

of law - one of the characteristics of the Republic as listed in Article 2 of the Constitution - when interpreting provisions of law. In fact, the rule of law is a principle that must absolutely be taken into consideration in the interpretation of all articles of the Constitution. In this context, the requirements of the rule of law must be respected when interpreting the scope and content of the right to a fair trial under Article 36 of the Constitution (see M.B., § 84).

32. In this regard, the principle of legal security is one of the requirements of the rule of law (see the Court's decisions nos. E.2008/50, K.2010/84, 24 June 2010 and E.2012/65, K.2012/128, 20 September 2012). Aimed at ensuring the legal safety of persons, the principle of legal security requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the state avoids using any methods which would undermine this trust in their legislative acts. The certainty principle means that legislative acts must be sufficiently clear, non-ambiguous, comprehensible and applicable not to allow any hesitation or doubt on the part of both the administration and individuals and they must include safeguards against arbitrary practices of public authorities (see the Court's decisions no. E.2013/39, K.2013/65, 22 May 2013).

33. Since the interpretation of provisions of law applicable to the civil rights of the applicants in a manifestly arbitrary manner or in a way that avoids reinstatement of the right (i.e. in defiance of justice) would render the procedural guarantees ineffective, it would be possible to speak of a breach of the right to a fair trial. In such cases, the inferior court's interpretation cannot be foreseen by the applicant in such a case and the unforeseeable interpretation of legal norms would prejudice the rule of law. The broad interpretation of provisions restricting rights and freedoms, in particular, leads to arbitrariness and leaves individuals with a sense of insecurity before the law (see *M.B.*, § 86).

34. Moreover, it is pertinent to acknowledge that while divergences in administrative practices and judicial rulings on the same matter may, at times, reflect the law's adaptability and the capacity of administrative and judicial bodies to adjust their approaches to emerging

developments, significant discrepancies in both administrative and judicial decisions regarding the same issue within the same temporal framework require substantial justification. Such discrepancies necessitate comprehensive and persuasive explanations to ensure the consistency and coherence of legal practice. As in the present case, where the principles of equality and the prohibition of discrimination are at stake, this need for substantial justification becomes even more critical. Divergent outcomes in similar situations, whether in administrative practices or judicial decisions, without satisfactory reasoning, contradict the principle of the rule of law. Such practices undermine the trust that individuals are expected to place in the judiciary, judicial decisions, and administrative authorities.

35. Furthermore, Article 130 of the Constitution stipulates that universities, established with the aim of cultivating human resources in alignment with contemporary education principles and the needs of the nation and country, possess a separate public legal personality and scientific autonomy. The article also provides that faculty members and their assistants are entitled to engage freely in all forms of scientific research and publication. The reasoning part to this article emphasizes that matters left to legislation should be regulated with due regard to the principle of 'academic autonomy' (see the Court's decision, no. E:2010/29, K:2010/90, 16 July 2010).

36. Under the Constitution, universities are designated as institutions dedicated to the advancement of scientific research and the dissemination of knowledge, and are thus accorded scientific and administrative autonomy, setting them apart from other public institutions. Faculty members, while serving as public employees, are classified distinctly within the broader category of public servants, underscoring their unique professional status and significance. Given this particular status of faculty members, it is impermissible to equate their treatment with that of other public servants (see the Court's decision no. E:2010/29, K:2010/90, 16 July 2010).

37. The law-maker may impose certain limitations on academic staff in line with the titles and statuses to regulate working conditions

and address issues related to the health area, in accordance with the principles outlined in the Constitution. However, these limitations must not undermine the freedom of science and the scientific autonomy required within universities, and they cannot obstruct any form of scientific activity essential to academic freedom (see the Court's decision no. E:2010/29, K:2010/90, 16 July 2010).

38. In consideration of the foregoing factors, it is essential to acknowledge that, prior to the enactment of Law no. 6514, faculty members who were entitled to engage in self-employment activities in private clinic must be treated as being subject to the same legal provisions, regardless of whether they had an operational private clinic or not. Consequently, in terms of the ability to pursue independent professional activities outside of official working hours, it is legally requisite to accept that these faculty members were in an equivalent legal status. Accordingly, it is essential to acknowledge that faculty members who did not have an operational private clinic during the relevant period, like those who did, possess a legitimate expectation as articulated in the Court's reasoning. Therefore, within the scope of the principles of legal certainty and legal security, which are integral to the rule of law, it is necessary to safeguard this expectation and permit these faculty members to continue engaging in self-employment activities in private clinic following the enactment of Law no. 6514.

39. Consequently, physicians who did not have an operational private clinic before 18 January 2014 do not possess any particular "circumstance" justifying disparate treatment in this context, and given that they have a legitimate expectation of being treated on par with those who had an operational private clinic prior to that date. Accordingly, it must be acknowledged that the majority's decision, which fails to recognize such equivalence, include a manifest error of judgment in light of the aforementioned factual and legal circumstances.

40. As such, the approach in question has based its comparison on the factual situation of having an operational private clinic before 18 January 2014, rather than on status-based legal conditions such as "being a physician," "being a faculty member," or "having the right to establish

a private clinic". This approach relies on a factual circumstance shaped by choices rather than a status-based legal situation.

41. However, in the present case, the determining factor for status should be "**whether one possessed the right to establish a private clinic as of 18 January 2014**". The accuracy of this conclusion is further substantiated when the reasoning underlying the Court's dismissal of the annulment request concerning the pertinent provision of Article 36 of Law no. 6514 is evaluated in conjunction with the majority opinion that served as the basis for the annulment of Provisional Article 64. As such, the relevant section of the decision concerning Provisional Article 64 explicitly states that "***the enactment of successive laws by the law-maker on the same subject has created uncertainty regarding the legal status of the faculty members in question and has led to ambiguities. Consequently, the provisions at issue has infringed upon the principles of legal certainty and legal security, which are fundamental to the rule of law***."

42. In this regard, it should also be noted that the Court, in its aforementioned decision, upheld the constitutionality of the restriction imposed on individuals who would hold the status of faculty members as of the enactment date of Law no. 6514. However, the Court did not provide an assessment for those who, despite having the right to establish a private clinic as of that date, had not yet exercised it. Additionally, while annulling the temporary provision concerning those with operational private clinic as of that date, the decision introduced an element of ambiguity in its reasoning.

43.In annulling the provisional Article, the Court reasoned that compelling faculty members to terminate their planned activities and resulting legal statuses within a very short timeframe such as three months, based on the expectations and assumptions they held regarding the continuity of their existing situation, would be unjust. Such requirement would otherwise lead to severe legal repercussions, such as being deemed to have resigned or facing termination of their employment, which would be contrary to principles of fairness and justice. Furthermore, the decision contains reasoning that could be

interpreted as affirming that the right to engage in self-employment outside of official working hours—whether through operating a private clinic or working in private institutions—cannot be no longer revoked for certain faculty members once they have availed themselves of these provisions. Additionally, the decision fails to address the matter of implementing a delayed enforcement period following its publication in the Official Gazette.

44. In our assessment, this situation indicates that the Court's decision—by failing to address the status of those who had the right to establish a private clinic as of 18 January 2014 but had not exercised that right—implies that the relevant criterion for equality comparison is not the factual condition of having a private clinic as of that date, but rather the legal entitlement to establish a private clinic as of 18 January 2014. Indeed, this interpretation has been consistently applied in practice over a protracted period. Consequently, numerous faculty members holding the titles of professor or associate professor prior to 18 January 2014, despite lacking an operational private clinic as of that date, have secured the right to engage in private practice outside of official working hours as a result of judicial decisions.

45. In the present case, the approach adopted by the inferior courts and subsequently deemed constitutional by the majority of this Court has resulted in the formation of a privileged category among professionals engaged in the same occupation and holding the same legal status. Despite the absence of any legislative amendments, the extended period of unfavourable application for certain individuals, including the applicant, has led to a situation where they are precluded from establishing private clinics. This undermines the principles of equality and non-discrimination, as well as the principle of legal security, thereby impairing the principle of rule of law.

46. To reiterate, as indicated in the reasoning of the contested administrative action in the present case, the suspension of the enforcement of Provisional Article 64 by the Court has led to a situation where the continuation of self-employment activities for faculty members who were engaged in such activities outside official

working hours as of 18 January 2014 is affirmed. Nevertheless, this selective continuation, while excluding those in the same legal status who were not actively engaged in self-employment activities as of that date, constitutes a breach of the principles of equality and justice. Such differential treatment among individuals holding equivalent legal positions undermines these fundamental principles.

47. Therefore, given that the applicant, who was employed as a faculty member at a higher education institution and held the right to establish a private clinic prior to the enactment of Law no. 6514, should, in accordance with the principles of legal security, legal certainty and principle of equality be entitled to continue to be entitled to engage in self-employment activities following the law's effective date, the dismissal of the applicant's request for establishing a private clinic solely on the grounds of not engaging in such activities before 18 January 2014 constitutes a violation of the right to a fair hearing. This decision, which concluded the case based on the absence of private clinic on the specified date, improperly excluded the need to evaluate the application according to the relevant criteria for establishing a private clinic.

48. For these reasons, we are of the opinion that the applicant's right to a fair hearing within the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, has been violated. Consequently, we do not agree with the majority's assessment to the contrary.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

CİHANGİR AKYOL

(Application no. 2021/33759)

23 February 2023

On 23 February 2023, the Plenary of the Constitutional Court found no violation of the right to a fair hearing within the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Cihangir Akyol* (no. 2021/33759).

(I-IV) SUMMARY OF THE FACTS

[1-34] The applicant, a university professor, applied for a licence to practise in order to be able to freely exercise his profession after his work shifts. The Directorate of Health dismissed the impugned application on the grounds that the applicant was a faculty member and was subject to the Higher Education Law no. 2547. The action brought by the applicant was dismissed by the inferior courts. The applicant's appeal on points of law and fact and subsequent appeal on points of law were also dismissed.

V. EXAMINATION AND GROUNDS

35. The Constitutional Court ("the Court"), at its session on 23 February 2023, examined the application and decided as follows:

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

36. The applicant maintained that when he had started his medical residency as a research assistant in 2003, his preference for specialising in general surgery had been motivated by the prospect of opening a private clinic in the future. In this regard, he asserted that he had no difference compared to those who had established private clinics prior to 18 January 2014. He further asserted that he had been granted the right to open a private clinic by the Constitutional Court's decision of 7 November 2014, and that despite this, his request to open a private clinic had been unlawfully dismissed. The applicant also highlighted that the inconsistent provisions and practices within the current legislation and their implementation had led to confusion. He emphasised that the right to open a private clinic and to practise his profession freely is a right conferred upon all medical professionals under Article 5 of Law no. 1219, which governs the fundamental principles relating to the medical profession. He also argued that the rejection of his application for a

license had violated his right to a fair trial, the principle of legal security and foreseeability, and his freedom to work.

37. In its observation, the Ministry indicated as follows:

i. The objections raised by the applicant pertain to the evaluation of the statutory provisions and the evidence by the inferior courts and the Council of State and are essentially complaints regarding to an appellate remedy.

ii. Although the applicant asserts that different courts have rendered contradictory judgments on the same matter, such contradictions do not, in themselves, constitute a violation of the right to a fair trial. The grounds for reaching a different conclusion from previous decisions are described in detail in the Council of State's decision.

iii. The applicant maintained that the principle of equality was violated due to the difference in treatment between persons in similar circumstances. However, to substantiate an allegation of discrimination, the applicant must present reasonable evidence demonstrating that there is a difference in treatment between the applicant and other persons in a comparable position, and that this difference is based on discriminatory factors such as race, colour, sex, religion, or language, without a legitimate basis. In the present case, however, the applicant failed to provide such evidence.

iv. The applicant's claims concerning his freedom to work in the field of his choice do not fall within the scope of the common protection area.

38. In his counter-statements, the applicant reiterated statements similar to those made in his individual application petition and expressed his disagreement with the Ministry's stance.

B. The Court's Assessment

39. Article 36 of the Constitution, titled "*Freedom to claim rights*" 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."

40. 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 applicant's complaint concerns the court's dismissal of the action for annulment brought upon the refusal of his request to obtain licence for opening a private clinic by the administration. Therefore, the application must be assessed under the right to a fair hearing within the scope of the right to a fair trial.

1. Admissibility

41. 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.

2. Merits

a. General Principles

42. The right to a fair trial guaranteed under Article 36 of the Constitution includes safeguards aimed at securing formal justice and not material justice. From this perspective, the right to a fair trial does not offer a guarantee for the conclusion of the proceedings in favour of either party. The right to a fair trial essentially ensures that the trial process and its procedure are conducted in a fair manner.

43. According to Article 148 § 2 of the Constitution, it is set out that complaints concerning the issues to be examined in appellate review cannot be subject to an examination through individual application. Accordingly, in principle, any question with respect to the establishment of impugned facts, the assessment of the evidence, the interpretation and implementation of provisions of law as well as the fairness of the conclusion reached with respect to the dispute cannot be subject-matter of an individual application. However, the findings and conclusions constituting an interference with the rights and freedoms falling under the scope of individual application and involving a manifest error of judgment or manifest arbitrariness are excluded from this rule (see, among many other judgments, *Ahmet Sağlam,* no. 2013/3351, 18 September 2013).

44. However, in cases where there is an interference with the fundamental rights and freedoms, it is the Court that will assess the effect of the inferior courts' decisions and assessments on the safeguards provided for in the Constitution. In this respect, any examination to be made, by taking into account the safeguards provided for in the Constitution, as to whether the fundamental rights and freedoms falling into the scope of individual application have been violated cannot be regarded as "*an assessment of an issue to be considered in appellate review"* (see. *Şahin Alpay (2) [Plenary]*, no. 2018/3007, 15 March 2018, § 53).

45. Besides, the Court may, in very exceptional cases, examine a complaint with respect to the issues to be considered in appellate review, which is not directly related to the fundamental rights and freedoms, without being subject to the above-cited restriction. In very exceptional cases where the fairness of the proceedings has been undermined to a great extent due to manifest arbitrariness and the procedural safeguards inherent in the right to a fair trial have thereby become dysfunctional, this situation - indeed related to the outcome of the proceedings - turns into a procedural safeguard itself. Therefore, the Court's examination as to whether the inferior courts' assessments rendered the procedural safeguards dysfunctional and whether the fairness of the proceedings was impaired to a great extent due to manifest arbitrariness does not mean that the Court has dealt with the outcome of the proceedings. As a result, the Constitutional Court may interfere with the inferior courts' assessments concerning evidence only in case of a practice which is manifestly arbitrary and has rendered dysfunctional the procedural safeguards inherent in the right to a fair trial (see. *Ferhat Kara* [Plenary], no. 2018/15231, 4 June 2020, § 149; *M.B.* [Plenary], no. 2018/37392, 23 July 2020, § 83).

46. The right to a fair trial does not guarantee that the interpretation of provisions of law which would ensure a favourable conclusion for the applicant be taken as a basis. Interpreting the provisions of law applicable to the dispute fall, as indicated above, within the discretion of the inferior courts. That being said, the inferior courts must bear in mind the principle of a state governed by the rule of law - one of the characteristics of the Republic as listed in Article 2 of the Constitution -

when interpreting provisions of law. In fact, the rule of law is a principle that must absolutely be taken into consideration in the interpretation of all articles of the Constitution. In this context, the requirements of the rule of law must be respected when interpreting the scope and content of the right to a fair trial under Article 36 of the Constitution (see *M.B.*, § 84).

47. At this juncture, one of the critical tenets of the rule of law is the principle of legal security (see. the Court's decision no. E.2008/50, K.2010/84, 24 June 2010; and no. E.2012/65, K.2012/128, 20 September 2012). Aimed at ensuring the legal safety of persons, the principle of legal security requires that legal norms are foreseeable, that individuals can trust the state in all of their acts and actions, and that the state avoids using any methods which would undermine this trust in their legislative acts. The certainty principle means that legislative acts must be sufficiently clear, non-ambiguous, comprehensible and applicable not to allow any hesitation or doubt on the part of both the administration and individuals and they must include safeguards against arbitrary practices of public authorities (see the Court's decision, no. E.2013/39, K.2013/65, 22 May 2013).

48. Since the interpretation of provisions of law applicable to the civil rights of the applicants in a manifestly arbitrary manner or in a way that avoids reinstatement of the right (i.e. in defiance of justice) would render the procedural guarantees meaningless, it would be possible to speak of a breach of the right to a fair trial. Because the inferior court's interpretation cannot be foreseen by the applicant in such a case and the unforeseeable interpretation of legal norms would prejudice the rule of law. The broad interpretation of provisions restricting rights and freedoms, in particular, leads to arbitrariness and leaves individuals feeling insecure before the law (see *M.B.*, § 86).

49. In the following instances, a matter related to the outcome of the proceedings may itself transform into a procedural safeguard:

i. The failure to rely on any acceptable interpretation of the legal rules applied or required to be applied for the particular case.

ii. Existence of unacceptable reasoning or illogical deductions relied on to establish a link between the evidence and the fact, which is sought to be proven.

iii. Basing the judgment on clearly false facts.

iv. Failure to consider the clearly specific circumstances of the present case.

v. Arbitrarily disregarding evidence that unequivocally establishes a particular fact.

vi. Relying on unprovable assumptions in determining the material event, thereby rendering the defence meaningless.

These situations that transform outcome-related issues into procedural guarantees are not limited to the above-mentioned conditions. In similar cases, the Court may also review them within the scope of individual application mechanism. However, for these deficiencies to constitute a violation of the right to a fair trial, it must be demonstrated that they undermine the fairness of the proceedings.

50. In the case of Kenan Özteriş (no. 2012/989, 19 December 2013), the Court held that the interpretation of the Supreme Military Administrative Court ("the SMAC") was in contravention of the clear provision in Article 95 of the former Turkish Criminal Code (Law no. 765 of 1 March 1926) and found a violation of Article 36 of the Constitution because, despite the existence of an explicit provision of law with respect to the consequences of postponement of the conviction that had been rendered in respect of the applicant and the obvious nature of how that provision was to be construed, the Second Chamber of the SMAC had drawn an unusual meaning from the clear provision of law and had applied it accordingly, as a result of which the decision had become *unforeseeable* and involved a *manifest error of judgment*.

51. In a similar vein, in the case of Mehmet Geçgel (no. 2014/4187, 18 April 2019), the Court found a violation of the applicant's right to a fair hearing due to the manifest error of judgment in the administrative court's decision because the latter had rejected the applicant's claim for

compensation as a result of an assessment as if there had been an actual conviction even though there had not been a conviction according to the principles of criminal law since the applicant's sentence had been postponed within the scope of the Law on Conditional Release and Suspension of the Proceedings and Sentences as regards the Offences Committed before 23 April 1999 (Law no. 4616 of 21 December 2000). As a result, the Court concluded that the administrative court's decision had contained a *manifest error of discretion*, thereby violating the applicant's *right to a fair hearing.*

b. Application of Principles to the Present Case

52. In the present case, the applicant, a professor and general surgeon at a university, sought a license to open a clinic in order to practice his profession freely after working hours. The Directorate of Health rejected the applicant's request, citing his status as a faculty member subject to Law no. 2547. This decision was upheld by the appeal courts and the Council of State on similar grounds. Accordingly, the Court must determine whether the interpretations of the inferior courts and the Council of State, following the dismissal of the applicant's request by the Directorate of Health pursuant to Law no. 2547, exhibit a manifest error of assessment or clear arbitrariness that undermines the procedural safeguards.

53. In this context, the applicant, a professor wishing to practice his profession in his private clinic after working hours, requested the issuance of a license for this purpose, which was denied by the Directorate of Health by invoking Article 36 of Law no. 2547. This provision, titled "*Working Principles*", regulates the procedures and principles of faculty members' professional activities. The law details the conditions under which faculty members may engage in professional activities outside their teaching institution while retaining their academic title. Furthermore, the same provision states that, in the absence of a specific provision in Law no. 2547, Article 28 of Law no. 657, which prohibits civil servants from engaging in trade and other income-generating activities, shall apply. The second sentence of the first

paragraph of this Article stipulates that civil servants shall not establish offices, practices, bureaus, etc., to engage in self-employment activities.

54. Pursuant to Article 36 of Law no. 2547 and the Constitutional Court's annulment decision, the inferior courts and the Council of State deemed it lawful to dismiss the applicant's request on the grounds that the applicant did not hold the title of associate professor or professor on 18 January 2014, when Law no. 6514 entered into force. Consequently, the applicant was not among those permitted to operate a medical clinic prior to this date.

55. According to Law no. 1219 and the General Law on Health Services no. 3359 of 7 May 1987, it falls within the authority and primary duties of the health directorates to ensure that the physical conditions of medical clinics meet regulatory standards and that the practitioners possess valid diplomas and specialisation certificates. However, it is evident that the administration considered these two laws along with other relevant legal regulations when establishing the acts.

56. In this respect, it has been concluded that the interpretations of the inferior courts and the Council of State, relying on the provisions of Law no. 2547 and the reasoning in the Constitutional Court's decision, rightly determined that the applicant, who did not have a private clinic operational before 18 January 2014, was not entitled to self-employment. Therefore, it has been concluded that the relevant judicial decisions did not exhibit manifest error of assessment or arbitrariness. Therefore, in the present case, the dismissal of the applicant's request, a lecturer seeking to engage in self-employment in his private clinic after working hours, pursuant to Law no. 2547 and Article 28 of Law no. 657, which also referred to the former, did not compromise the fairness of the proceedings.

57. In the light of the foregoing, it must be held that there was no violation of the right to a fair hearing within the scope of the right to a fair trial, safeguarded by Article 36 of the Constitution.

Mr. Selahaddin MENTEŞ expressed a dissenting opinion in this respect.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 23 February 2023:

A. UNANIMOUSLY that the alleged violation of the right to a fair trial be DECLARED ADMISSIBLE;

B. BY MAJORITY and by the dissenting opinion of Mr. Selahaddin MENTEŞ, that the right to a fair trial, safeguarded by Article 36 of the Constitution, was NOT VIOLATED;

C. That the litigation costs be COVERED by the applicant; and

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

DISSENTING OPINION OF JUSTICE SELAHADDİN MENTEŞ

1. The applicant, a general surgeon, was denied his request to open a clinic practice for self-employment after working hours. He subsequently brought an action for annulment of this decision before the Administrative Court, claiming that his right to a fair trial had been violated due to the unpredictable interpretation of the law. However, the majority of the Court held that the right to a fair hearing had not been violated.

2. I dissent from the majority's opinion for the following reasons:

3. The request of the applicant, a lecturer at the Ankara University Faculty of Medicine, was dismissed by the Provincial Directorate of Health from engaging in self-employment activities after working hours, citing Circular no. 2014/5 issued by the Ministry of Health. This circular is based on the provisions of Law no. 6514 and the Constitutional Court's judgment dated 7 November 2014. In the relevant decision, the Court asserted that the state possesses broad discretionary power to regulate the professional activities of faculty members. Consequently, the Court found no unconstitutionality in prohibiting faculty members from engaging in professional activities outside their institutional duties, except for the limited exceptions listed in Law no. 6514. Despite reaching this conclusion, the Court annulled the rule requiring the closure of existing clinics within three months acknowledging that the medical practitioners holding the title of professor or associate professor on the effective date of Law no. 6514 legitimately expected the continuation of their existing situation, and that such expectations should be protected under the principle of legal security.

4. Following the Court's annulment decision, two different treatments have emerged among professors and associate professors regarding their right to freely exercise their profession. Specifically, faculty members who were accepting patients in their existing clinics on the effective date of Law no. 6514 can continue their activities, while those with the same titles but without a clinic in operation on that date are not afforded this right. Despite lacking operational clinics at the time the regulation came into effect, some faculty members from the second group submitted

applications to the administration, arguing that their academic, titles, namely professor or associate professor, granted them the same rights as their counterparts. Upon dismissal of their requests, the relevant faculty members brought actions for annulment. As a result of the appellate examination of the Council of State, in many similar decisions, the Council of State stated: "The plaintiff, who had been employed as a faculty member at a higher education institution and possessed the right to open a clinic before the effective date of Law no. 6514, should have been allowed to continue practising self-employment even after the law came into force, in accordance with the principles of legal security, legal certainty, and equality. Nonetheless, the plaintiff's request to open a clinic was dismissed on the grounds that he could not establish a clinic because he was not engaged in self-employment in his operational clinic before 18 January 2014. Such a dismissal does not align with legal standards." Following the annulment decisions, individuals in similar situations were granted the opportunity to engage in free professional activities in their clinics after working hours (The 10th Chamber of the Council of State rendered similar decisions dated 25 November 2020, 7 December 2020, 10 December 2020, and 21 January 2021).

5. In addition to the individuals who were already faculty members when Law no. 6514 came into effect, individuals who become faculty members after the law's effective date, including the applicant, also filed similar requests with the health directorates. The actions for annulment brought following the rejection of these applications were also dismissed, as in the present case. The applicant highlighted that some legal actions brought were decided in favour of the applicants having similar claims. He also referred to these favourable court decisions in his application.

6. It has become evident that contradictory results have arisen in practice for individuals holding the titles of professor and associate professor, despite the application of the same legal provisions. While the Plenary Session of the Administrative Law Chamber of the Council of State has partially clarified this ambiguity, a discrepancy remained. Accordingly, some university lecturers are granted the right to engage in free professional activities after working hours, whereas those who

obtained their titles after the enactment of Law no. 6514 are denied this right. Given the applicant's claim that his right to open a private clinic under Law no. 1219 is unlawfully restricted by the administration while other faculty members in similar positions have been granted this right, thus violating the principle of equality, it is essential to examine his complaint within this context.

7. The principle of equality set forth in Article 10 of the Constitution comes into play for those who are in the same legal position. This principle ensures equality before the law, not in actions. The purpose of the principle of equality is to guarantee that individuals in the same circumstances are treated equally under the law, preventing discrimination and privilege. This principle prohibits the violation of equality before the law by applying different rules to individuals or communities having the same circumstances. Equality before the law does not entail that everyone is subject to identical rules in every respect. The circumstances of the certain persons or groups in question may necessitate the application of different rules and practices. The constitutional principle of equality is upheld when identical legal situations are treated alike and distinct legal situations are treated differently (see the Court's decision, no. E.2009/47, K.2011/51, 17 March 2011).

8. The existence of a matter which may be examined by the Court under Article 10 of the Constitution in the individual application procedure presupposes the existence of a difference in treatment between individuals in the same or a relatively similar situation. The requirement to prove the existence of a similar situation does not require the groups being compared to be identical (see *Nuriye Arpa*, no. 2018/18505, 16 June 2021, § 55).

9. In light of the aforementioned considerations, a thorough examination of the present case reveals that Article 36 of Law no. 2547, which serves as the primary legislation governing the objectives, principles, organisation, functioning, duties, and powers of higher education institutions, as well as the rights and responsibilities of their faculty members, is binding upon all faculty members. This law

grants certain faculty members the legal entitlement to engage in free professional activities outside of their official working hours. However, this right has not been uniformly extended to all, including the applicant, who has faced with differential treatment despite holding equivalent titles under the same statutory framework. While the administrative and inferior courts have justified this differential treatment by citing the absence of an operational clinic of the faculty member on the date of entry into force of Law no. 6514, such an exception is not articulated in the text of the law itself. Furthermore, there is a lack of consistency in practice. Consequently, the outcomes vary depending on the discretion exercised by the administration, inferior courts, relevant session and chamber of the Council of State. In addition, there are no concrete grounds to justify subjecting the applicant to different treatment from counterparts who have acquired the right to engage in professional activities without restriction.

10. For these reasons, I do not agree with the majority's assessments to the contrary as I am of the opinion that the prohibition of discrimination, safeguarded by Article 10 of the Constitution, had been violated.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

HÜSEYİN VOLKAN KURT

(Application no. 2019/42687)

8 March 2023

On 8 March 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 *Hüseyin Volkan Kurt* (no. 2019/42687).

(I-IV) SUMMARY OF THE FACTS

[1-29] The applicant was sentenced, by the incumbent assize court, to imprisonment for murder with *dolus eventualis*. Upon appeal on points of facts and law, the criminal chamber of the regional court of appeal dismissed on the merits the applicant's request. Thereupon, the applicant's lawyer lodged an appeal on law through a petition of 5 November 2018 within the prescribed time-limit following the pronouncement of the verdict. On 22 November 2018, the criminal chamber served the reasoned decision on the lawyer, who then presented the additional petition setting out the grounds for appeal to the criminal chamber on 5 December 2018. The Court of Cassation dismissed the appellate request, stating that the petition setting out the grounds for appeal had not been submitted within the prescribed time-limit of seven days.

V. EXAMINATION AND GROUNDS

30. The Constitutional Court ("the Court"), at its session on 8 March 2023 examined the application and decided as follows:

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

31. The applicant maintained that his right of access to court within the scope of the right of a fair trial, safeguarded by Article 36 of the Constitution, had been violated due to the non-notification of possible dismissal of his appeal request if he would not submit his reasoned appeal petition within the 7-day statutory period starting from the notification date of the reasoned decision pursuant to Article 295 § (1) of the Law no. 5271.

32. According to the Ministry's observations, Article 295 of Law no. 5271 regulates that if the appellate request fails to address the grounds for appeal, an additional petition shall be submitted within seven days as of the notification of the reasoned decision. The Ministry further asserted that despite this explicit regulation, the applicant had submitted his additional

petition of grounds after the expiration of the 7-day statutory period. The applicant did not submit any counter-arguments to the Ministry's observations.

B. The Court's Assessment

1. Admissibility

33. 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. Scope of Right and Existence of Interference

34. 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).

35. 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).

36. Bringing a dispute concerning whether court decisions comply with the law before a judicial body is defined as to have recourse to a legal remedy (see. *Hasan İşten*, no. 2015/1950, 22 February 2018, § 37). The right of access to a court embodies not only the right to bring an action before the first instance court but also the right to resort to legal remedies such as appeals on points of law and/or fact (see *Ali Atlı*, no. 2013/500, 20 March 2014, § 49).

37. The right of access to a court is also applicable to disputes concerning an imputed criminal offence. Accordingly, the right of access to a court includes the ability of a person accused of a criminal offence to request a court decision to ascertain whether the accusation is justified and, if granted, the right to apply for legal remedies such as objection and appeals on points of law and/or fact (see, *mutatis mutandis*, Hasan İşten, § 36).

38. Article 6, which regulates the right to a fair trial, and Article 13, which concerns the right to an effective remedy, of the Convention do not include a safeguard stipulating that "*The State is obliged to indicate in its proceedings the legal remedies and authorities the persons concerned should apply to and the time limits for such applications*," as guaranteed under Article 40 of the Constitution. The aforementioned constitutional provision imposes an obligation on the State to specify the legal remedies and authorities to which the persons concerned may apply and the time limits thereof. In this respect, it has been observed that the safeguard in question, which falls outside the common protection area of the Constitution and the Convention, cannot be examined within the scope of individual application. Therefore, the safeguard in Article 40 § 2 of the Constitution cannot be dealt with as an independent safeguard within the framework of the individual application. Nonetheless, this matter does not preclude the Court from considering the aforementioned provisions—under the principle of the integrity of the Constitution—when evaluating alleged violations of rights, notably the right of access to a court (see *Özbakım Özel Sağlık Hiz. İnş. Tur. San. ve Tic. Ltd. Şti.*, § 32).

39. In the present case, it has been observed that the applicant's right of access to a court was violated due to the refusal of his additional petition, which set out the grounds for his previous appeal request against the decision of the criminal chamber, on the basis that it was submitted outside the statutory time limit.

b. Whether the Interference Constituted a Violation

40. 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 principle of proportionality."

41. 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.

42. 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

43. It has been observed that the refusal of the applicant's appeal requests for failure to communicate appeal grounds relied on Article 298 of Law no. 5271. Therefore, it is found that the interference with the applicant's right of access to a court had a legal basis.

ii. Legitimate Aim

44. The purpose of dismissing an appeal request for failure to submit a petition detailing the grounds of appeal within the statutory time limit is to ensure that appellate courts are not unduly burdened, thereby enabling them to discharge their function as courts of jurisprudence and to focus on substantial requests.

iii. Proportionality

(1) General Principles

45. Pursuant to Article 13 of the Constitution, proportionality, one of the criteria to be taken into consideration in restricting rights and freedoms, arises from the rule of law. As the restriction of rights and freedoms in a state of law is an exceptional authority, this authority could be justified provided that it is used to the extent required by the particular circumstance. Limitation of the rights and freedoms of individuals more

than the particular circumstances require is incompatible with the state of law, as it would mean exceeding the authority granted to public authorities (see the Court's judgment no. E.2013/95, K.2014/176, 13 November 2014).

46. The principle of proportionality consists of three sub-principles, which are *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.2013/66, K.2014/19, 29 January 2014; E.2016/16, K.2016/37, 5 May 2016; *Mehmet Akdoğan and Others,* no. 2013/817, 19 December 2013, § 38).

47. The means employed to restrict the righ 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).

48. In addition, interference with the right of access to a court must be commensurate. Commensurateness requires a fair balance between the aim and the means. Accordingly, there must be a reasonable commensurateness between the legitimate aim sought to be achieved by the restriction on right of access to a court and the individual interest in the applicant's exercise of this right. The burden imposed on the individual must not be excessive and disproportionate in relation to the public interest served by the achievement of the aim pursued (see *Mustafa Berberoğlu*, § 49).

49. Therefore, the courts should refrain from being excessively formalistic in applying procedural rules concerning the process of seeking legal remedies, as such rigidity may hinder plaintiffs' access to court or render the process unduly complicated. While the imposition of certain procedural requirements on individuals submitting their applications does not, in and of itself, impair the right of access to a court, if the applicant is unable to avail themselves of the procedural opportunities to compensate for the ambiguity regarding the appropriate legal remedies, authorities, or application processes, this may infringe upon their right of access to a court.

50. Furthermore, as required by 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 Constitutional Court examines whether the fundamental rights and freedoms safeguarded in the Constitution was violated. In this respect, it is not upon the Constitutional Court to ascertain the starting date of an application of a legal remedy. Rather, the Constitutional Court assesses whether the interpretations made by the lower courts regarding the starting date infringe on the right of access to a court, as guaranteed under the Constitution within the ambit of the right to a fair trial (see *Aydın Öztürk*, no. 2018/34309, 27 January 2021, § 43).

(2) Application of Principles to the Present Case

51. In the present case, the 1st Criminal Chamber of the Court of Cassation decided to dismiss the applicant's appeal request since he submitted his petition setting out grounds for the appeal upon the expiry of the seven-day time-limit pursuant to Article 298 of the Law no. 5271.

52. The issue to be examined in the first place in terms of proportionality assessment is whether the chosen method of interference achieves the aim pursued. It is understood that the dismissal of an appeal for failure to submit a statement of grounds within the statutory time-limit is intended to prevent the appellate courts from being overloaded with redundant work, thus enabling them to fulfil their role as judicial bodies and to concentrate on substantive applications.

53. The second aspect to be examined is to determine whether the impugned interference is *necessary*. Upon the introduction of three-tiered judicial system, the role of the Court of Cassation was intended to evolve into a court of jurisdiction. In line with this aim, rather than an established practice of reviewing appeals lacking grounds, imposing an obligation on the parties to explicitly state their reasons for appeal aims to urge applicants to file their appeal petitions thoroughly, to prevent unduly burden on the appellate courts and thus to enable the Court of Cassation to focus on substantial requests. Hence, the decision to dismiss the appeal for failure to submit petition of grounds within the prescribed time-limit is among the legislative means aimed at advancing this goal. Public authorities are better positioned to determine which measures will effectively achieve the pursued aim. Accordingly, establishing that their discretion in selecting these measures fails to adhere to the principle of *necessity* requires compelling justification to be set forth. In this respect, legislators should not be compelled to enact laws requiring the Court of Cassation, envisioned as a court of jurisdiction, to deal with unsubstantiated appeal requests. In consideration of the aforementioned matters, the dismissal of the appeal request due to the failure to submit its grounds in due time, was *necessary* in terms of achieving the pursued aim.

54. The third matter to be addressed is whether the impugned interference is proportionate. Pursuant to Article 291 of Law no. 5271, the statutory period stipulated for applying the appeal remedy shall be fifteen days as of the date when the decision is pronounced to the parties. If the decision is not pronounced at the trial, the statutory period in question shall commence from the date of the pronouncement of the decision. According to Article 294 of the Law no. 5271, the appellant must clearly state the reasons for the request for quashing, and these reasons must pertain to points of law. If these grounds are not included in the initial appeal petition, a supplementary petition must be submitted to the regional court of appeal, against which the appeal was filed, within seven days after the expiration of the appeal period or the notification of the reasoned decision.

55. In addition, there have been differing interpretations as to the appeal remedy in the new system between the decisions of the Criminal

Chambers the Court of Cassation and the General Assembly of Criminal Chambers of the Court of Cassation. In this regard, in instances where appeals are made against judicial decisions, the procedure, the statutory time limits and their consequences were communicated in an insufficient manner. Furthermore, there has been a lack of consistency in practice with regard to the precise starting time and conditions pertaining to the statutory time limits. This matter gives rise to uncertainty for all parties involved and may also be misleading due to inadequate communication. Accordingly, the General Assembly of Criminal Chambers of the Court of Cassation also agrees that the divergent decisions rendered by the judicial authorities undermine the foreseeability of the law.

56. It has been observed that the dismissal of the applicant's appeal request on the grounds that he failed/of his failure to submit his petition of the grounds for appeal within the prescribed statutory period amounted to a severe interference with his right of access to a court. The courts may adopt certain measures to strike a balance concerning this severe interference with the right of access to a court. For instance, informing the applicant of the consequences of failure to submit grounds of appeal before issuing a decision on an appeal request may strike this balance. In the present case, the Criminal Chamber served notice regarding the fifteen-day statutory period prescribed for the general time limit for appeal requests but failed to communicate notice concerning the seven-day statutory period for submitting an additional petition for the grounds of appeal starting from the communication date of the reasoned decision. In other words, the Criminal Chamber failed to assess the appeal process as a whole and inadequately informed the applicant of the requirement to submit an additional petition indicating the appeal grounds as of the communication date of the reasoned decision. Despite this procedural negligence, the 1st Criminal Chamber of the Court of Cassation dismissed the applicant's appeal request against the decision which inadequately informed the applicant concerning the appeal remedy, for submitting his grounds of appeal after the expiry of the seven-days of statutory period. In light of the circumstances, it is evident that the dismissal decision of the Court of Cassation without employing balancing measures was found disproportionate as it undermined the right of access to a court

and imposed an excessive burden on the applicant. Therefore, it has been concluded that the interference with the applicant's right of access to a court has been disproportionate.

57. For these reasons, it must be held that there has been a violation of the applicant's right of access to a court, safeguarded by Article 36 of the Constitution.

58. The applicant also alleged that his right to a fair trial had been violated due to the failure of authorities to consider the grounds he laid out in his short notice of appeal, which was submitted following the brief decision. Since it has already been found that the applicant's righ of access to a court was violated, the Court decided that there was no need to conduct a separate examination for this alleged violation.

C. Redress

59. The applicant requested the Court to find a violation and to award him 100,000 Turkish liras ("TRY") and TRY 100,000 in compensation for his pecuniary and non-pecuniary damages, respectively.

60. There is a legal interest in conducting a retrial for the redress of the violation of the right of access to a court and the consequences thereof. In this respect, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial procedures and to issue a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation (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; *Kadri Enis Berberoğlu (3)* [Plenary], no. 2020/32949, 21 January 2021, §§ 93-100, for the details of the retrial institution in relation to the individual application set out in Article 50 § 2 of Code no. 6216 on the Establishment and the Rules of Procedure of the Constitutional Court dated 30 March 2011).

61. The applicant's claim for compensation, on the other hand, must be rejected as the Court considers that ruling in favour of a retrial offers the applicant sufficient redress for the consequences of the violation. In

order for the Court to award compensation for pecuniary damage, there must be a causal link between the alleged pecuniary damage and the violation found. As the applicant has failed to provide any documents in this respect, his claims for compensation for pecuniary damage should be rejected.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 8 March 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. A copy of the judgment be REMITTED to the 8th Ankara Assize Court (E.2016/364, K.2017/387) for referral to the 1st Criminal Chamber of the Court of Cassation for retrial to redress the consequences of the violation of the right of access to a court;

D. The applicant's claim for compensation be REJECTED;

E. The total litigation costs of TRY 10,264.60 including the court fee of TRY 364,60 and the counsel fee of TRY 9,900 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 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.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

EMRE KUNT

(Application no. 2019/5577)

8 March 2023

On 8 March 2023, the Plenary of the Constitutional Court found a violation of the right to legal assistance within scope of the right to a fair trial, safeguarded by Article 36 of the Constitution, in the individual application lodged by *Emre Kunt* (no. 2019/5577).

(I-IV) SUMMARY OF THE FACTS

[1-41] The applicant, a former police officer, was dismissed from public service after the 15 July 2016 coup attempt in Türkiye. The Ağrı Chief Public Prosecutor's Office initiated an investigation into his alleged membership of the Fetullahist Terrorist Organisation/Parallel State Structure (FETÖ/PDY) following which he was detained on remand. The applicant was represented by a legal counsel *ex officio* appointed by the Ağrı Bar Association.

In the course of the proceedings, the applicant argued that no proper legal assistance was provided to him, indicating that he had attended the hearings remotely via the Audio-visual Information System (SEGBİS) without directly meeting with his legal counsel. He also complained about the assignment of a legal counsel from the Ağrı Bar Association despite being held in a different province. He claimed that he had no opportunity to consult with his legal counsel due to the geographic distance. He also argued that his initial statements had been taken under poor detention conditions and police pressure without the assistance of his legal counsel. Despite these arguments, the court relied on these statements, to convict him of membership of the FETÖ.

The applicant's subsequent appeals to the regional court of appeal and the Court of Cassation were dismissed. On 28 March 2019, the Court of Cassation upheld the applicant's conviction with final effect.

V. EXAMINATION AND GROUNDS

42. The Constitutional Court ("the Court"), at its session of 8 March 2023, examined the application and decided as follows:

A. Alleged Violation of the Right to Legal Assistance

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

43. The applicant asserted that despite being detained in the penitentiary institutions of Uşak and İzmir, the Chief Public Prosecutor's Office and the court had appointed legal counsel registered with the Ağrı Bar Association to represent him. Furthermore, his request for the appointment of a legal counsel from the İzmir Bar Association during the prosecution stage was denied. Consequently, he alleged that his right to a fair trial had been infringed upon due to his inability to meet with his appointed legal counsel, the lack of communication, and his deprival of legal assistance throughout the proceedings.

44. In its observations, the Ministry indicated the following:

i. In light of the relevant case-law of the European Court of Human Rights (ECHR) and the Constitutional Court, the present case is required to be evaluated by considering several key factors: whether the applicant, imputed with an offence, was able to present his defence to the judicial authorities without an in-person meeting with his legal counsel; whether he engaged in self-incriminating statements in the absence of his legal counsel; whether the court drew negative implications from his defences; whether any undue pressure was exerted upon him; and, broadly, whether the criminal proceedings against the applicant were conducted in a fair manner.

ii. It was stated that the applicant had been arrested in Uşak pursuant to an arrest warrant issued against him, and a lawyer was *ex officio* appointed to represent him. It was emphasized that it was stipulated in Article 156 § 2 of Law no. 5271 that a lawyer registered with the Ağrı Bar Association be appointed *ex officio*.

iii. The Court has discretion in determining whether the incumbent court bore the sole responsibility for the failure of the appointed lawyer to meet with the applicant, despite having access to his contact information both in the case file and from the applicant himself. Numerous ECHR judgments were cited and it was emphasised that

legal services, whether provided through private contract or state appointment, are independent from the state services. Thus, issues arising between the lawyer and the applicant during the proceedings -except under specific exceptional circumstances- do not constitute a violation of the state's obligations under the Convention.

iv. In conclusion, it was set forth that the applicant's allegations as to lack of a fair trial had been manifestly ill-founded on the grounds that the applicant had effectively defended himself in the presence of his legal counsel; that both the applicant and his lawyer had independently appealed against the detention; that the applicant had presented his defence against the indictment and evidence presented during the criminal proceedings; that he had contested the witness statements and identifications included in the case file during the proceedings; and that the statement of the applicant before the Chief Prosecutor's Office, which he had later denied, had not been relied upon as substantive evidence in the final judgment.

45. In his counter-statements, the applicant reiterated his allegations as stated in the application form.

2. The Court's Assessment

46. 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 lawful means and procedures."

47. The Constitutional Court is not bound by the legal qualification of the facts by the applicant and it conducts such an assessment itself (see *Tahir Canan*, no. 2012/969, 18 September 2013, § 16). The essence of the applicant's complaint concerns his conviction before having the opportunity to meet with his assigned legal counsel during the investigation and prosecution phases, which allegedly compromised the fairness of the proceedings. It has accordingly considered it appropriate to examine the applicant's complaints within the scope of the right to legal assistance.

a. Admissibility

48. The alleged violation of the right to legal assistance must be declared admissible for not being manifestly ill-founded and there being no other grounds for its inadmissibility.

b. Merits

i. General Principles

49. Securing the rights of defence in criminal proceedings is a fundamental principle of the democratic society (see *Erol Aydeğer*, no. 2013/4784, 7 March 2014, § 32). The right to defence is essential to ensuring that criminal justice is administered in a just manner. Without recognizing the right to defence against an allegation, it is impossible to conduct the adjudication process in line with the principles of equality of arms and adversarial proceedings, or to reach the material fact (see *Yusuf Karakuş and Others*, no. 2014/12002, 8 December 2016, § 69).

50. *Safeguards* afforded by the right to defence are fundamentally encompassed within the right to a fair trial. Article 36 of the Constitution explicitly enshrines the right to defence, affirming it as a requisite of the rule of law and a critical guarantee of the right to a fair trial. This provision asserts that everyone has the right to defence through legitimate means and procedures. Sentencing individuals without affording them the right to defence is also incompatible with the presumption of innocence, as protected under Article 38 of the Constitution. Consequently, a trial in which the right to defence is not upheld cannot be deemed fair (see *Yusuf Karakuş and Others*, § 70).

51. It is not sufficient to provide the suspect or the accused merely with the right to defence. In making his defence, the suspect and the accused must also avail of the *legitimate means* and *procedures* specified in Article 36 of the Constitution. Among these means is the ability to draw upon the technical knowledge and expertise of legal counsel. The most significant one of the legitimate means and procedures referred to in Article 36 of the Constitution for the suspect and the accused is the exercise of the right to legal assistance. In other words, the right to legal assistance falls within the scope of the notion of legitimate means and

procedures specified in Article 36 of the Constitution. In this respect, it is clear that the right to legal assistance is included within the scope and context of the right to a fair trial and is a natural consequence of this right (see *Yusuf Karakuş and Others*, § 72).

52. On the other hand, in the legislative intent in incorporating the phrase *fair trial* into Article 36 of the Constitution, it is stressed that the right to a fair trial, which is also guaranteed by the international conventions to which Türkiye is a party, was incorporated into the legal text. In fact, Article 6 § 3 (c) of the European Convention on Human Rights stipulates that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of a defence counsel of his own choosing or, if he has not sufficient means to afford legal assistance, to be provided with it freely when the interests of justice so require (see *Yusuf Karakuş and Others*, § 73).

53. So as to prevent the defence from being in a disadvantaged position compared with the prosecution, it may be required to provide legal assistance for the suspect and the accused, along with the opportunity of self-defence (in person). The need for legal assistance of the person accused of a criminal offence may arise from overcoming difficulties in having an access to the evidence, lack of legal knowledge or his psychological state. Within this context, the right to legal assistance, ensuring the effective exercise of the right to defence, is also a requirement of *the principle of equality of arms*, which constitutes another element of the right to a fair trial. In other words, the right to legal assistance ensures not only the effective exercise of the right to defence, but also functionality of the principle of equality of arms (see *Yusuf Karakuş and Others*, § 74).

54. Moreover, the right to defence must be provided to the accused not merely in form but in substance. This requires that the accused be granted adequate means for their defence, including sufficient time and necessary facilities (see *Ufuk Rifat Çobanoğlu*, no. 2014/6971, 1 January 2017, § 37). The Court has emphasized that allowing the accused to meet with their legal counsel is one of the essential facilities required for a proper defence (see *Ufuk Rifat Çobanoğlu*, § 45).

55. This right must be, in principle, afforded to the suspect by the time when he is questioned for the first time by the law-enforcement officers, ensuring the former to have legal assistance of a lawyer since the date of his first questioning by the law-enforcement officers, which is necessary not only as a requirement of the privilege against self-incrimination and the right to remain silent, but also in general for securing that the right to a fair trial could offer an effective protection. That is because the evidence obtained at this stage determines the framework in which the impugned offence will be considered during the proceedings. As the legislation concerning criminal proceedings become more complicated notably during the stages when evidence is collected and used, the suspects may find themselves vulnerable at this very stage of the criminal proceedings. Such vulnerability may be duly offset merely through the legal assistance of a defence counsel (see *Aligül Alkaya and Others* [Plenary], no. 2013/1138, 27 October 2015, §§ 118, 135; and *Sami Özbil*, no. 2012/543, 15 October 2014, § 64).

56. For the effective exercise of the right to legal assistance, it is paramount that meetings between the suspect and the legal counsel are conducted with a certain level of confidentiality. Confidentiality is critical for the suspect or defendant to freely communicate with their legal counsel. Any breach of confidentiality in these meetings would severely undermine the benefits of the legal assistance provided (see the Court's decision no. E.2016/205, K.2019/63, 24 July 2019, § 91).

57. The right to the assistance of counsel is not absolute and may be subject to restrictions in exceptional circumstances. Such restrictions are permissible only when there are compelling reasons to justify them. However, even in these exceptional cases, any restriction on the right to legal assistance must not undermine the fundamental rights of the suspect or accused as safeguarded within the scope of the principles of a fair trial (see *Aligül Alkaya and Others*, §§ 118, 137). The important point in regard to the right to legal assistance of a defence counsel was whether, -when the proceedings were considered as a whole- the suspect/accused person had effectively enjoyed access to the legal assistance of a defence counsel. However, if a restriction imposed on the access to a lawyer was redressed at the later stages of the proceedings, then the right of defence

would not be considered to have been violated (see *Yusuf Karakuş and Others*, § 78).

ii. Application of Principles to the Present Case

58. In the present case, after being arrested in Uşak as part of an investigation into the suspicion of the alleged membership of an armed terrorist organization, the applicant presented his defence both at the Chief Public Prosecutor's Office and before the judge through the SEGBİS. During his defence, the applicant admitted that a person named İ. had installed a communication program used by members of the organisation on his phone, but he claimed to have deleted the program without using it. E.Ö., a lawyer registered with the Ağrı Bar Association and *ex officio* appointed by the judicial authorities, was present during these statement-taking and interrogation processes in his capacity as the applicant's legal counsel.

59. During the investigation stage, it was observed that the applicant and his *ex officio* appointed legal counsel were located in distant cities. The statement and interrogation minutes do not indicate that the applicant was afforded the opportunity to meet privately with his legal counsel without a supervision of a third party before presenting his statements, nor do they suggest that any measures were taken to ensure the confidentiality of their communications.

60. Before the first session of the hearing, the applicant submitted a petition to the Court, requesting the appointment of a legal counsel registered with the İzmir Bar Association, citing his detention in İzmir and his required participation to the hearing via the SEGBİS. In his defence during the first session, the applicant claimed that he had been unable to meet or communicate with the legal counsel appointed by the Bar Association. The trial court, however, did not address the applicant's written and oral requests and proceeded with the proceedings, allowing the participation of A.N.K., the legal counsel appointed by the Ağrı Bar Association.

61. In the first hearing session, the applicant alleged that his statements during the investigation stage had been obtained under poor detention conditions and police pressure, and he denied all charges

imputed to him. At the end of the third session of the hearing, the applicant was convicted. In its reasoned decision, the incumbent court referred to the applicant's statement before the Chief Prosecutor's Office, considering it as a partial confession. As a result, the incumbent court dismissed the applicant's defence that he neither used ByLock nor was a member of the organisation.

62. In the present case, the incumbent court failed to address the applicant's request for the appointment of a legal counsel from the bar association of the location where he was detained. Furthermore, the incumbent court did not adopt any alternative measures to mitigate the challenges arising from the geographic distance between the applicant and his legal counsel during the preparation of his defence. It should be noted that, despite having the option to ensure the applicant's physical presence at the hearing, the incumbent court made no attempt to do so, and the applicant was required to deliver all his defence via the SEGBİS. Moreover, the minutes of hearing and the records obtained from the UYAP reveal that the court did not afford the applicant who participated in the hearing via SEGBİS, the opportunity to consult with his legal counsel in private, without third-party supervision, by implementing measures to ensure the confidentiality of their communications. Furthermore, it must be noted that the SEGBİS does not afford legal counsel the opportunity to engage in private communication with the suspect or defendant, as stipulated by the criteria established in the aforementioned ECHR judgments.

63. The applicant was unable to consult with his legal counsel at any stage of the proceedings, could not receive legal assistance before his statements were taken during the investigation and prosecution stages, and was deprived of the opportunity to prepare his defence with his legal counsel by discussing the evidence included in the case file. Despite these facts, the applicant was convicted. The applicant's objections in his appeal petition, emphasizing that his insistent requests during the proceedings were ignored and not responded to, and that he had been convicted without adequate legal representation, were not addressed during the appellate review on points of law and facts, which was conducted without a hearing. Consequently, it is evident that the

disadvantageous situation of the defence, arising from the first-instance court's approach, was not remedied at the appellate level.

64. Following the defendant's request for legal assistance due to the financial constraints preventing him from choosing his own legal counsel, the incumbent court *ex officio* appointed a legal counsel. The purpose of this appointment was not to satisfy the statutory requirements necessary for the conclusion of the proceedings. The appointment of legal counsel is fundamentally intended to ensure that the suspect or accused can effectively exercise their right to defence. For the accused to prepare an effective defence, he/she must not be placed at a disadvantage relative to the prosecution that is well-equipped. This effectiveness can only be achieved if the accused is able to genuinely benefit from the legal assistance provided by their counsel. In this regard, the appointment of a legal counsel should ensure that the right to legal assistance is provided in a substantive and effective manner, rather than merely in a formal sense. In the present case, it has been determined that the applicant, who was detained on remand and lacked the financial means to afford a defence counsel, was deprived of the opportunity to effectively benefit from legal assistance. Under these circumstances, it is evident that the approach adopted by the trial court did not align with the principles of equality of arms and adversarial proceedings, nor did it meet the requirements necessary for providing adequate time and facilities for the defence. The lack of effective legal assistance and failure to protect the applicant's right to legal assistance compromised the overall fairness of the proceedings. Additionally, it is apparent that adverse conclusions were drawn from the applicant's statement at the investigation stage, which was taken without a prior private consultation with his legal counsel, and these conclusions were relied on for his conviction.

65. Finally, the Ministry asserted that the incumbent court bore no fault in the legal counsel's failure to meet with the applicant, as the counsel could have travelled to the penitentiary institution where the applicant was detained. However, this argument cannot be taken seriously, as it indisputably imposes a disproportionate burden on the defence, thereby undermining the principle of equality of arms.

66. In the light of the foregoing, it must be held that there was a violation of the applicant's right to legal assistance safeguarded by Article 36 of the Constitution.

B. Alleged Violation of the Right to be Present at the Hearing

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

67. The applicant alleged that he had not been informed of his right to be present at the hearing and had been compelled to participate in all hearings via SEGBİS without his consent.

68. The Ministry, in its observations, asserted that the applicant had not expressed his wish not to present his statements via SEGBİS and that he had not requested to attend the hearings in person. Furthermore, it was maintained that the applicant had been afforded the opportunity to effectively present his defence without encountering with any technical difficulties, with the assistance of legal counsel.

69. In his counter-statements, the applicant reiterated his allegations as stated in the application form.

2. The Court's Assessment

70. The application was addressed within the framework of the right to be present at the hearing, as an integral aspect of the right to a fair trial.

71. The Court, in its judgments of *Şehrivan Çoban and Emrah Yayla* ([the Plenary], no. 2017/38732, 6 February 2020), established the principles governing the right to be present at the hearing. In its rulings, the Court initially determined that compelling individuals to participate in hearings via SEGBİS, contrary to their will, constitutes an interference with the right to be present at the hearing. The Court further clarified that such an interference must be scrutinized with respect to its lawfulness, the pursuit of a legitimate aim, and its proportionality. In the aforementioned judgments, the Court concluded that Article 196 of the Code of Criminal Procedure no. 5271 of 4 December 2004, satisfied the criterion of *lawfulness* and that the interference pursued a *legitimate aim*,

namely, the realization of procedural economy (see *Şehrivan Çoban*, §§ 72-104; and *Emrah Yayla*, §§ 58-86).

72. However, in the assessment of proportionality conducted in the aforementioned decisions, the Court found that the interference had not been justified on the grounds that there had been no compelling reason set forth for denial of the applicant's request to be physically present at the hearing and that the applicant had been compelled to attend the hearings via SEGBİS, where substantial acts had been taken.

73. It should be noted, however, that neither Article 36 nor any other provision of the Constitution explicitly prohibits individuals from waiving the guarantees afforded by the right to a fair trial. However, for a waiver of the safeguards of the right to a fair trial to be constitutionally valid, the waiving party's intent must be clear and the consequences thereof must be reasonably foreseeable. Moreover, the minimum procedural safeguards must be ensured, and there must be no overriding public interest that would render such a waiver illegitimate (see *Nurettin Balta*, no. 2016/10023, 28 December 2021, § 45).

74. The guarantees of the right to a fair trial may be waived either explicitly or implicitly. In both instances, the intent to waive must be so explicit as to leave no room for doubt, and it must not contravene the public interest. Furthermore, for an implicit waiver to be valid, it must be demonstrated that the party waiving the right could reasonably foresee the consequences of their actions. Consequently, competent judicial authorities should avoid making hypothetical assessments in this regard (see for similar assessments on the right to be present at the hearing, *Emrah Yayla*, § 75). Nevertheless, the willingness to waive the guarantees of the right to a fair trial may be inferred from circumstances indicating such a waiver or from the conduct and behaviours of the accused.

75. However, in its judgment in the case of *Ansar Onat* (no. 2019/14515, 15 June 2022), the Court held that there was no interference with the right to be present at the hearing when such a right had been waived. In this case, the applicant participated in four sessions of the hearing, held at routine intervals via SEGBİS, without raising any objection to this arrangement. Furthermore, the Court emphasized that

neither the minutes of the hearing nor the application form contained any claims or objections regarding issues with sound or image quality during the remote participation in the hearing. Although the applicant did not expressly state that he waived his right to be present at the hearing, the Court clarified that he was not compelled to attend the hearings via SEGBİS against his will. The decision noted that considering the applicant's failure to convey a request to attend the hearings in person to the incumbent court between sessions, it should be deemed that he had implicitly expressed his intention to waive this right. Additionally, it was observed that there was no concrete evidence suggesting that the applicant had been unable to reasonably foresee the consequences of his participation in the hearing via SEGBİS, nor was there any allegation in the application form that he had been deprived of the minimum procedural guarantees necessary for a valid waiver of the right to be present at the hearing. Additionally, it was determined that, under the specific circumstances of the present case, there had been no overriding public interest that would invalidate the presumption that the applicant had willingly waived his right to be present at the hearing. Consequently, the Court concluded that there had been no interference with the applicant's right to be present at the hearing (see *Ansar Onat*, § 23). Accordingly, there are no grounds in the present case requiring the Court to depart from the conclusion and principles reached in the aforementioned judgment.

76. Consequently, as it is evident that there was no violation of the right to be present at the hearing within the scope of the right to a fair trial as safeguarded under Article 36 of the Constitution, this part of the application must be declared inadmissible for *being manifestly ill-founded.*

C. Redress

77. The applicant requested the Court to find a violation and to award him compensation for his pecuniary and non-pecuniary damages.

78. There has been a legal interest in conducting a retrial in order to remedy the consequences of the violation. In this respect, the procedure to be followed by the judicial authorities to whom the judgment is remitted is to initiate the retrial procedures and to issue

a new decision eliminating the reasons that led the Court to find a violation, in accordance with the principles set forth in the judgment finding a violation (for the details of the retrial procedure in relation to the individual application set out in Article 50 § 2 of Code no. 6216, 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).

79. 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.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 8 March 2023 that

A. 1. The alleged violation of the right to legal assistance be DECLARED ADMISSIBLE;

2. The alleged violation of the right to be present at the hearing be DECLARED INADMISSIBLE for *being manifestly ill-founded*;

B. The right to legal assistance within the scope of 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 1st Chamber of Ağrı Assize Court (E.2017/341, K.2018/9) for retrial to redress the consequences of the violation of the right to legal assistance;

D. The applicant's claim for compensation be REJECTED; and

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

RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 40)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

DECISION

WISAM SULAIMAN DAWOOD EAQADAH

(Application no. 2021/2831)

15 February 2023

On 15 February 2023, the Plenary of the Constitutional Court found inadmissible the alleged violations of the prohibition of ill-treatment and the right to an effective remedy, in conjunction with the freedom of residence, within the scope of procedural safeguards inherent in the expulsion procedures, for being manifestly ill-founded in the individual application lodged by *Wisam Sulaiman Dawood Eaqadah* (no. 2021/2831).

(I-IV) SUMMARY OF THE FACTS

[1-41] The applicant, an Iraqi citizen, entered Türkiye legally with his wife and three children and began to live in Türkiye after obtaining a residence permit. The chief public prosecutor's office launched an investigation against a number of individuals including the applicant for membership of an armed terrorist organization. Thereupon, the governor's office ordered the applicant's expulsion as well as his administrative detention. Additionally, the applicant's residence permit was revoked due to the restriction code and expulsion order issued against him. Subsequently, the applicant brought an action before the administrative court, seeking the annulment of the expulsion order. In its interim decision, the administrative court requested from the defendant administration information about the grounds underlying the restriction code imposed on the applicant and requested information from the chief public prosecutor's office regarding the outcome of the investigation. The General Directorate of Security indicated that a restriction code had been issued against the applicant, while the chief public prosecutor's office stated that the investigation was still ongoing. The administrative court dismissed the action brought by the applicant with no right of appeal, and the chief public prosecutor's office issued a decision of non-prosecution.

V. EXAMINATION AND GROUNDS

42. The Constitutional Court ("the Court"), at its session of 15 February 2023, examined the application and decided as follows:

A. Request for Legal Aid

43. The applicant applied for legal aid, stating that he could not afford to pay the litigation costs.

44. 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 Prohibition of Ill-treatment

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

45. The applicant claimed that his father-in-law had served as a general under the former Iraqi leader Saddam Hussein and therefore his repatriation would endanger his life in that he would be executed, and that he would be persecuted because of his different sect.

46. The Ministry, in its observations, referred to the expulsion order issued in respect of the applicant as well as the annulment proceedings in this regard, and indicated that the relevant provisions of the Convention and the legislation as well as the criteria previously determined by the Court in similar cases should be taken into consideration.

2. Assessment

47. 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 applicant's claim that he could be executed if deported has been considered within the scope of the prohibition of ill-treatment and no further examination has been deemed necessary from the standpoint of the right to life.

48. While the Constitution affords an absolute right to citizens regarding their entry into the country and exiting from the country, aliens are subject to a different legal framework. As is also recognised in the international law, this issue falls within the scope of the State's sovereignty. It is therefore undoubted that the State has a margin of appreciation in admitting aliens into the country or in expelling them. However, an individual application may be lodged in the event that such

procedures constitute an interference with the fundamental rights and freedoms safeguarded by the Constitution (see *A.A. and A.A.* [Plenary], no. 2015/3941, 1 March 2017, § 54).

49. Article 17 § 1 of the Constitution safeguards the right to protect and improve one's corporeal and spiritual existence, as well as the right to life. Article 17 § 3 provides that no one shall be subjected to *torture or ill-treatment* and that no one shall be subjected to penalties or treatment *incompatible with human dignity*. As can also be understood from the systematic structure of the relevant article, the corporeal and spiritual existence of the individual that is generally safeguarded by the first paragraph is specifically protected against ill-treatment in the third paragraph (see *A.A. and A.A.*, § 55).

50. The aforementioned provision contains no exception to the State's (negative) obligation in relation to the prohibition of inflicting ill-treatment. Article 15 of the Constitution, which allows for the suspension of the exercise of fundamental rights and freedoms in times of war, mobilization, martial law or a state of emergency, also states that the integrity of the corporeal and spiritual existence shall be inviolable. This is a clear indication of the absolute nature of the prohibition of ill-treatment (see *A.A. and A.A.*, § 56).

51. However, in order to consider that the rights protected by this prohibition are effectively guaranteed, it is not sufficient that the State refrain from ill-treatment. The State is also expected to protect individuals against any ill-treatment by its own officials or third parties (see *A.A. and A.A.*, § 57).

52. In this scope, if it is claimed that the prohibition of ill-treatment would be breached in the country to which the alien would be expelled to, the administrative and judicial authorities must inquire in detail whether there is a real risk of ill-treatment in that country (see *A.A. and A.A.*, § 62).

53. It is not incumbent on the State to investigate all expulsion processes as set out above. In order for such an obligation to arise, the applicant must first present an arguable claim. Accordingly, the

applicant must reasonably explain the alleged risk of ill-treatment in the receiving country; provide information and documents (if any) supporting this claim; and these claims must attain a certain level of severity. However, as the arguable claim may be raised in various ways in the particular circumstances of the case, each case must be considered separately (see *A.A. and A.A.*, § 63).

54. In the present case, the applicant relied on two grounds in support of the alleged risk he was likely to face in the receiving country. First, his father-in-law had served as a general under the former leader of Iraq. For the very reason, he would be persecuted in his country. It has been observed that the applicant attached the certificate of citizenship of his father-in-law in the individual application file. However, it has been assessed that the said document lacked sufficient information substantiating that the relevant person had indeed been a general in Iraq. Besides, the applicant, who claimed that he could be executed given the situation of his father-in-law, did not provide any explanation on the oppression he had faced in his country during his marriage for the said reason. It has been considered that the applicant's abstract claim, which was not based on any document or report indicating that the applicant, who had resided in his country until 2017, had been under risk because of his father-in-law did not attain the minimum level of seriousness necessitating an investigation to be conducted.

55. The applicant also claimed that he would be persecuted in his country because of his different sect. However, he did not provide further information substantiating his claim. Although the applicant had mentioned his sect in his statement as a suspect, he provided no detail in this sense either in his individual application form or in the petition he had submitted during the annulment proceedings. Nor did the applicant mentioned in his written statement submitted pursuant to the interim decision of the administrative court or during his interview with the immigration expert that he had experienced difficulties in his country because of his sect. Therefore, it has been observed that the applicant, who had been under an obligation to provide information and reasonable explanations about himself, acted in breach of this obligation, and that his statements contradicted each other.

56. In addition, it should be underlined that the applicant, who stated that he would be subjected to ill-treatment in his country if he was expelled, first raised these claims before the public authorities within the scope of his action for annulment of the expulsion order.

57. Thus, the applicant's allegations regarding the possibility of ill-treatment are not deemed worthy of investigation. As a matter of fact, the administrative court also emphasised that the applicant failed to provide tangible information. Hence, there is no reason to depart from the assessments and conclusion of the administrative court.

58. In the light of the foregoing, since it has been understood that the alleged violation of the prohibition of ill-treatment safeguarded by Article 17 § 3 of the Constitution is not arguable, it must be held that this part of the application must be declared inadmissible for being *manifestly ill-founded*.

C. Alleged Violation of the Right to an Effective Remedy in conjunction with the Freedom of Residence, within the scope of Procedural Safeguards Inherent in the Expulsion Procedures

1. The Applicant's Allegations

59. The applicant claimed that the principle of the rule of law, the right to a fair trial and the presumption of innocence had been violated, stating that an expulsion order had been issued against him due to a criminal investigation and restriction code, although he had not committed any unfavourable act, that the expulsion order was unfounded since there was no evidence substantiating his alleged membership of an illegal organisation, and that the administrative court dismissed his case solely relying on the assessments of the public authorities without carrying out sufficient examination.

2. Assessment

60. Although the applicant claimed that his right to a fair trial had been violated due to the rejection, without any investigation, of his action for annulment against the expulsion order and that his presumption of innocence had been violated due to his being treated

as a member of a terrorist organisation, the alleged violation of the presumption of innocence under the right to a fair trial has not been examined since the proceedings related to the expulsion process do not fall under the scope of the right to a fair trial. 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*, § 16). The Court has focused on the right to an effective remedy in conjunction with the freedom of residence within the scope of procedural safeguards inherent in the expulsion procedures of the aliens.

a. Applicability

61. Article 23 of the Constitution, titled "*Freedom of residence and movement*", reads, insofar as relevant, as follows:

"*(1) Everyone has the freedom of residence and movement.*

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

…

(5) Citizens shall not be deported, or deprived of their right of entry into the homeland."

62. 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 (see *Onurhan Solmaz*, no. 2012/1049, 26 March 2013, § 18).

63. Since the freedom of residence is not among the rights and freedoms under the common protection realm of the Constitution and the Convention, the Court finds inadmissible the applications regarding the said freedom for lack of jurisdiction *ratione materiae* (see *Servet Sancar*, no. 2013/2734, 20 April 2016, §§ 39-45).

64. Nevertheless, considering that aliens cannot enjoy the safeguards enshrined in Article 6 of the Convention since the cases of expulsion are not related to civil rights and obligations, some Contracting Parties sought particular special arrangements capable of offering protection to certain aliens against expulsion. Additional Protocol no. 7 to the Convention, which was drafted in this sense, includes some procedural safeguards regarding expulsion procedures. Article 1 § 1 of Additional Protocol no. 7, titled "*Procedural safeguards relating to expulsion of aliens*", stipulates that an alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law. It is also set forth therein that an alien against whom an expulsion order has been issued shall be provided with the safeguards such as a) to submit reasons against his expulsion, b) to have his case reviewed, and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. Article 1 § 2 thereof, on the other hand, provides an exception to the circumstances in which an alien against whom an expulsion order has been issued cannot benefit from the relevant safeguards. Accordingly, an alien may be expelled before availing of the aforementioned procedural safeguards, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

65. The Law no. 6684, dated 10 March 2016, on the Approval of the Ratification of Additional Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 entered into force upon its publication in the Official Gazette no. 29664 dated 25 March 2016. The Protocol became effective for Türkiye as of 1 August 2016.

66. Accordingly, for the Court to examine the individual applications filed by aliens, whose expulsion has been ordered, whereby they raised their complaints falling under the scope of the safeguards set out in Additional Protocol no. 7, it must first be established that these procedural safeguards are also enshrined in the Constitution.

67. As stated above, Article 23 of the Constitution stipulates that everyone has the freedom of residence and movement. It is explicitly

worded in the Constitution that these rights may be exercised by anyone in the country regardless of their nationality. The second and third paragraphs thereof set forth the general reasons for restriction code, while the last paragraph stipulates that a citizen cannot be deported. Accordingly, expulsion of aliens is not constitutionally prohibited. Aside from the regulation of expulsion under the aforementioned article, it is obvious that the expulsion process, which actually results in leaving/departure from the country, will constitute an interference with/restriction on the freedom of residence of the person concerned, if he/she actually has such an opportunity.

68. Another important issue to be addressed as regards the case of aliens is related to Article 16 of the Constitution. It is specified therein that fundamental rights and freedoms may be restricted for aliens in a manner different from that for citizens, and that such a restriction can be imposed only by law in accordance with the international law. Thus, the freedom of residence of aliens may be restricted in a different way than Turkish citizens under specific conditions. As a consequence, all aliens in the country may not be afforded the freedom of residence, since it is at the discretion of the legislator under the aforementioned circumstances. Besides, although it is to be evaluated whether an alien can enjoy the freedom of residence in the particular circumstances of each case and bearing in mind his/her legal status, once it is established that a foreigner has been legally afforded the freedom of residence, there will be no dispute that the expulsion in question would constitute an interference with this freedom.

69. In case of an interference with the freedom of residence of an alien through a measure such as expulsion, then he/she may avail himself/herself of the right to an effective remedy laid down in Article 40 of the Constitution. The right to an effective remedy may be described as ensuring that everyone who claims to have suffered a violation of one of his/her constitutional rights are provided with an opportunity to resort to administrative and judicial remedies that are reasonable, accessible, and capable of preventing the violation from taking place or ceasing its continuation or redressing its consequences (i.e. offering adequate redress), whereby the person concerned can have his claims

examined in a manner compatible with the nature of the right at stake (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 47; and *Murat Haliç*, no. 2017/24356, 8 July 2020, § 44). As it is seen, the right to an effective remedy affords certain safeguards and solutions for the person concerned to ensure that she/he enjoys his/her constitutional right alleged to have been violated.

70. It has been observed that Article 1 of Additional Protocol no. 7 provides the alien, who resides in the country legally, with certain procedural safeguards such as being represented before the competent authority, submitting reasons against his/her expulsion, and having his/her case reviewed. Furthermore, it should be acknowledged that an alien who is afforded the freedom of residence also enjoys these guarantees at the constitutional level, in conjunction with the said right, within the scope of the right to an effective remedy. Thus, the safeguards laid down in the Protocol are also enshrined in the Constitution. For these reasons, as it appears that the safeguards enshrined in Article 1 of the Protocol fall within the common protection realm, the deported aliens may assert their rights through individual application.

71. In the present case, the applicant, an Iraqi citizen, applied to the public authorities after entering Türkiye and obtained a residence permit valid until 3 November 2020. Even if the short-term residence permit was revoked after the issuance of the expulsion order or on the same day, it should necessarily be accepted that the applicant legally resided in Türkiye. Therefore, the applicant should enjoy the procedural safeguards under Article 1 of Additional Protocol no. 7, which are also protected by the Constitution.

b. Admissibility

i. General Principles

72. Now that it has been acknowledged that the procedural safeguards enshrined in Article 1 of Additional Protocol no. 7 are also protected by the Constitution, the scope of these safeguards should be determined. Although it is clear from the wording of the Protocol that the expelled aliens are afforded certain rights, such as submitting reasons

against their expulsion or being represented before the competent authority, it should be considered whether the claim raised in a given case falls within the scope of procedural safeguards or whether it infringes them.

73. In order for an alien -against whom an expulsion order has been issued- to enjoy the procedural safeguards under Additional Protocol no. 7, he/she must legally reside in the country in question. Otherwise, he/she cannot benefit from the relevant safeguards. Whether an alien enjoys the freedom of residence must be determined within the scope of Law no. 6458 or the relevant legislation, which regulates the residence of aliens, in the particular circumstances of the case.

74. The prerequisite for ensuring the protection of an alien residing in the country is to issue the expulsion order in accordance with the law. In order for an expulsion order to be considered lawful, its wording and implementation must comply with the principle of legal certainty that the aliens can foresee the consequences of their actions. In other words, the quality of the law is also important in determining whether the requirement of lawfulness is met (for considerations in the same vein, see *Necmiye Çiftçi and Others*, no. 2013/1301, 30 December 2014, § 55). As a result, the impugned interference, namely the law underlying the expulsion order must be accessible and foreseeable enough (for considerations in the same vein, see *Türkiye İş Bankası A.Ş.* [Plenary], no. 2014/6192, 12 November 2014, § 44).

75. The attitudes and practices of those issuing the expulsion order are as important as the quality of the law. Public authorities must duly identify the acts and behaviours underlying the expulsion order, and such acts and behaviours must be reasonably related to the grounds for expulsion set out in Article 54 § 1 of Law no. 6458.

76. In addition, an alien subject to an expulsion order under Article 1 § 1 (a) and (b) of Additional Protocol no. 7 to the Convention, must be duly communicated with the expulsion order as well as he/she must be aware of -even with some limitations- the factual grounds of the relevant order so as to submit reasons against his/her expulsion, and to have his/her case reviewed before a competent authority – a court pursuant to

the applicable legislation-. Besides, to ensure effective protection by the procedural safeguards, an assessment of the merits of the alien's claims beyond a formal examination must also be made. Moreover, the alien should be able to benefit from the facilities of the proceedings in order to prepare and submit his/her arguments. In this regard, the proceedings should proceed without a very strict interpretation of the procedural rules, thereby preventing the imposition of an excessive burden on the alien, especially if he/she is unfamiliar with the language and legal system of the country.

ii. Application of Principles to the Present Case

77. It has been observed that the expulsion order against the applicant was issued on the grounds that he posed a threat to the public order and safety under Article 54 § 1 (d) of Law no. 6458. As can be understood from the reply letter submitted by the administration, the content of the file of investigation conducted by the chief public prosecutor's office, and the reasoning of the administrative court, the applicant's name was found on a list of members of the DAESH terrorist organization, which was seized during a raid on a headquarters of the organisation in Hasakah, Syria in 2018, whereupon this information was shared with other public institutions by intelligence officers. Relying on this information, the relevant authorities issued a restriction code against the applicant, and then an investigation was launched.

78. Pending the judicial investigation against the applicant, the Governorship of Çorum ordered the expulsion of the applicant. However, the applicant was provided with the opportunity to challenge the said order before the administrative court, whereby he was represented by a lawyer and not expelled until the end of the proceedings.

79. The alleged lack of reasonable grounds for the applicant's expulsion, in other words the alleged arbitrariness of the expulsion order, will be examined under the procedural safeguard of lawfulness, and then the applicant's other complaints will be addressed.

80. An expulsion order was issued against the applicant under Article 54 § 1 (d) of Law no. 6458. According to the said article, an expulsion

order shall be issued for those who pose a threat to the public order and safety or public health. While more precise reasons for expulsion are laid down in other subparagraphs, the article in question cannot be regarded as unforeseeable since the legislator has formulated it with broader language. Given the diverse and unforeseeable nature of the acts and behaviours constituting a threat to the public order and safety, the legislator may reasonably refrain from exhaustively defining the content of these concepts in detail, but may justify the expulsion of an alien on these grounds, within the scope of the sovereignty. Although it is not necessary to specify conclusively which specific acts and behaviours correspond to these broader concepts, what is important is that the acts and actions of the administration within this framework must not compromise the principle of foreseeability.

81. It is at the discretion of the inferior courts to interpret the legal rules, and in particular the provisions of law relied on for the interference. It is not incumbent on the Court to examine whether the interpretations of the inferior courts in relation to the provisions constituting the legal basis of the impugned interference with the right at stake were accurate. However, in cases where the interpretations of the inferior courts contradict the explicit wording of the law or where it has been concluded that they cannot be foreseen by individuals given the text of the law, the impugned interference can be said to have no legal basis (for similar assessments in relation to the right of access to a court, see *Ziya Özden,* no. 2016/67737, 19 November 2019, § 59).

82. In the annulment proceedings, the administrative court indicated that the expulsion order was issued for public safety reasons, referring to the restriction code imposed on the applicant based on the information provided by the intelligence units to the public authorities. To accept that the expulsion order issued for public safety reasons was not arbitrary, the acts attributed to the applicant must be related to the concept of public safety, in other words, they must be foreseeable.

83. Considering the harms caused by terrorism and terrorist organisations, it is inevitable that states perceive such formations as a threat to public order or safety, therefore take certain measures to

protect the lives or physical integrity of their citizens and to combat these groups, and make certain evaluations and take actions based on the information they obtain. The public authorities' establishing a link between the applicant and a terrorist organisation after learning that the former's name appeared in a list of members of a terrorist organisation -despite the decision of non-prosecution subsequently issued by the chief public prosecutor's office- cannot be considered either ungrounded or unreasonable. Accordingly, in the light of the information available to the administrative and judicial authorities, their assessment of the expulsion process complied with the principle of foreseeability. Thus, it should be accepted that the impugned expulsion order had a legal basis.

84. The applicant's allegations that there was no evidence proving his membership of a terrorist organisation and that only the evidence adduced by the public authorities was relied on will be examined within the scope of the guarantee to have his case re-examined. The information on the grounds relied on for the restriction code, which was the basis for the applicant's expulsion, was included in the file of the action for annulment upon the chief public prosecutor's letter of 23 November 2020. It has been observed that the information regarding the communication of the said letter to the applicant was not included in the case file, and that the case was dismissed approximately one month after the letter. First of all, it should be noted that although the applicant learned, during the criminal investigation, that as asserted by the public authorities his name was on the list of the terrorist organisation members, this does not necessarily imply that he was aware of the fact that the impugned restriction code had been issued on that basis. However, after learning of the restriction code from the defendant administration's initial reply, the applicant did not request to learn the grounds on which the said code was issued and which information was relied on, neither in the application letter nor in the later stages of the proceedings. Moreover, the applicant did not claim that his access to the documents related to the investigations before the administrative court and the chief public prosecutor's office had been restricted; nor did he claim that a decision had been issued against him without being informed of the documents in the file of the action for annulment, or

that he had not been aware of the acts constituting the grounds for his expulsion. Additionally, even after becoming aware of the grounds for the restriction code upon the reasoning of the administrative court at the latest, the applicant did not raise a complaint, within the scope of the individual application process, regarding the lack of an investigation into whether the aforementioned list allegedly containing his name was indeed a list of members of a terrorist organization or -even if it is true- whether it is lawful to consider him having relation with the organisation on the sole ground of his appearance on the list. The applicant confined his arguments before the administrative court to the fact that he had not committed any illegal act and that no evidence was adduced against him during the criminal investigation.

85. The applicant did not request from the administrative court the information on the restriction code forming a basis for his expulsion, nor did he raise any counterclaim to render the said information irrelevant or present any evidence in his favour. Thus, the applicant's allegation that only the information provided by the public authorities had been relied on was unfounded, as he did not raise any objection or request regarding the aforementioned issues or submit any evidence in his favour.

86. The applicant stated in his application letter that his expulsion was unjustified, arguing that he had not committed any tortious act and that there was no evidence indicating his membership of a terrorist organisation Considering that the basis for the expulsion order was the alleged threat the applicant posed to the public safety, the failure to conduct an investigation into his alleged membership of a terrorist organisation or issuing a decision of non-prosecution at the end of the criminal investigation had no effect in the action for annulment. In the particular circumstances of the case, it is sufficient for the administrative court to confine its examination to whether the public safety concern was justified. As such, the administrative court, which decided -relying on the documents and information forming a basis for the applicant's expulsion- that the public authorities' assessment acknowledging the threat posed by the applicant to public safety was in compliance with the law, cannot be said to have violated the safeguard to have a case re-examined, given its review and conclusion about the allegations raised.

87. In the light of the foregoing, this part of the application must be declared inadmissible for being *manifestly ill-founded*, since it is clear that the applicant's right to an effective remedy, in conjunction with his freedom of residence, within the scope of procedural safeguards inherent in the expulsion procedures was not violated.

Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM, Mr. M. Emin KUZ, Mr. Yusuf Şevki HAKYEMEZ and Mr. Selahaddin MENTEŞ dissented from this conclusion.

VI. JUDGMENT

For these reasons, the Constitutional Court held on 15 February 2023:

A. That the request for legal aid be GRANTED;

B. 1. UNANIMOUSLY, that the alleged violation of the prohibition of ill-treatment be DECLARED INADMISSIBLE for being *manifestly ill-founded*;

2. BY MAJORITY and by dissenting opinions of Mr. Zühtü ARSLAN, Mr. Engin YILDIRIM, Mr. M. Emin KUZ, Mr. Yusuf Şevki HAKYEMEZ and Mr. Selahaddin MENTEŞ, that the alleged violation of the right to an effective remedy, in conjunction with the freedom of residence, within the scope of procedural safeguards inherent in the expulsion procedures, be DECLARED INADMISSIBLE, for being *manifestly ill-founded*; and

C. That 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, since their collection would cause victimisation of the applicant.

DISSENTING OPINION OF PRESIDENT ZÜHTÜ ARSLAN

1. The applicant's complaint as regards the violation of his right to an effective remedy, in conjunction with his freedom of residence, due to the incompliance of the expulsion order issued against him with the procedural safeguards has been found inadmissible for being manifestly ill-founded.

2. As agreed by the majority, in order to avoid a violation of the aforementioned right, the expulsion order must first be duly communicated to the alien concerned and he/she must be *able to be aware of the actual reasons underlying the said measure* in order to submit his/her counter-statements before the incumbent authority and to request a re-examination of his/her situation (§ 76).

3. In the present case, an expulsion order was issued against the applicant on the grounds that his name appeared on a list considered to belong to the members of a terrorist organisation. At any stage of the annulment proceedings initiated by the applicant to challenge the expulsion order, the said list, which was sent by the chief public prosecutor's office and annexed to the file of the action for annulment, was not communicated to the applicant, and thus he was not informed of the grounds of the restriction code underlying the expulsion order against him (§ 84).

4. According to the majority acknowledging this fact, the applicant did not seek to learn the grounds for the impugned expulsion order at any stage of the proceedings, nor did he submit counterclaims or evidence in his favour to render them unfounded. Moreover, at the latest, he made no comment on the list allegedly containing his name at the individual application stage as well, even though he became aware of the grounds of the restriction code through the decision of the administrative court. Therefore, it is clear that given its assessment and conclusion, the inferior court did not act contrary to the safeguard to have one's case re-examined (§§ 84-86).

5. In my opinion, the consideration above is not well formulated either principally or factually. First of all, it should be noted that the

applicant was not obliged to make a request to learn the grounds for his expulsion. Moreover, it cannot be maintained that the applicant -who did not or was not expected to know whether the letter addressing the list including his name had been put in the file of the annulment proceedings- should have made such a request.

6. In principle, informing the plaintiff of the grounds for expulsion is one of the most fundamental procedural safeguards. In other words, it is incumbent on the public authorities issuing an expulsion order to notify the grounds for the expulsion to the person concerned. Otherwise, the person bringing an action for annulment of the said procedure would be deprived of the opportunity to respond to the allegations and, in this sense, to defend himself/herself. As a matter of fact, in similar cases, the Court has found violations of the principle of equality of arms and the principle of adversarial proceedings as a procedural safeguard within the scope of the right to a fair trial (see *Oğuzhan Aksoy*, no. 2018/37293, 13 September 2022; and *Süphan Oğurtay*, no. 2018/35544, 15 September 2021).

7. In addition, a person who is not aware of the grounds for the expulsion order cannot be expected to put forward "*counterclaims*" and "*favourable evidence*" to rebut the said grounds. In order for a person to address an allegation, he/she must know what the allegation is. In this sense, a person who is subjected to an expulsion order on the grounds that his/her name appears on a list allegedly including the names of the members of a terrorist organisation must first be aware of this list in order to evaluate the existence or reliability of this list and to adduce some evidence in his/her favour.

8. Undoubtedly, it is known that the applicant was aware of the list in the course of the criminal investigation, that he was able to defend himself against it, and that the investigation was concluded in his favour. However, the applicant cannot be expected to know that the grounds, which were the subject matter of the criminal investigation and the expulsion procedure were the same.

9. On the other hand, I do not agree with the consideration that the applicant did not raise any complaint about the list allegedly containing

his name at the individual application stage after he had been aware of the grounds for the restriction code. The applicant clearly stated in his individual application form that there was no evidence substantiating "*his membership of a criminal organisation*", that no indictment had even been issued against him in this regard, and that "*he had already fled the DAESH terrorist organisation*" and that "*almost all of his relatives had been brutally murdered by the DAESH terrorist organisation*".

10. Accordingly, it cannot be said that the applicant did not raise the facts regarding the grounds for the restriction code, in essence, in the individual application process. Moreover, it is not necessary to make all the explanations regarding the material facts, which should be made before the inferior courts, also within the scope of the individual application.

11. Hence, the applicant was deprived of an important procedural safeguard during the annulment proceedings regarding the expulsion order. This demonstrates that the expulsion order issued against the applicant did not comply with the procedural guarantees.

12. For the reasons explained above, I do not agree with the majority's decision of inadmissibility, as I consider that the applicant's right to an effective remedy, in conjunction with his freedom of residence, has been violated.

DISSENTING OPINION OF JUSTICE ENGİN YILDIRIM

1. Additional Protocol no. 7 to the Convention ("the Protocol") entered into force for Türkiye on 1 August 2016. Article 1 thereof sets out procedural safeguards for the expulsion of aliens. These safeguards are envisaged to evaluate the interference, in the form of expulsion, with the freedom of residence of an alien residing in accordance with the rules applicable in the territory of a State, and they must be examined within the scope of Articles 23 and 40 of the Constitution. Accordingly, the present application must be assessed within the scope of the right to an effective remedy, in conjunction with the right to freedom of residence.

2. It is laid down in Article 23 of the Constitution that everyone has the freedom of residence. However, considering that the freedom of residence is not within the common protection realm -outside the scope of the Protocol - this freedom cannot per se be the subject of an individual application.

3. The applicant's name appeared on a list seized during a raid on the premises of the DAESH terrorist organisation. Therefore, a criminal investigation was conducted against him, at the end of which a decision of non-prosecution was issued. In addition, an expulsion order was issued against the applicant on grounds of posing a threat to the public order and safety. The administrative case brought by the applicant for the annulment was dismissed by the incumbent court on the grounds that his name appeared on the list in question.

4. However, according to the content of the case file, the applicant had not been aware of the list on which the administrative court based its decision. The applicant became aware of the impugned list when he was asked about it on 12 November 2020 within the scope of the criminal investigation. At the material time, the time-limit for submitting a petition to the administrative court had ended. The applicant may not be aware of the fact that the criminal investigation and the expulsion procedure relied on the same grounds. Indeed, while the applicant was able to challenge the charges against him during the criminal investigation, he was deprived of this opportunity during the proceedings before the administrative court. Moreover, the chief public

prosecutor's office, conducting a proper investigation, issued a decision of non-prosecution in respect of the applicant. This process was finalised before the administrative court's decision.

5. Since the applicant was not aware of the grounds for the restriction code, which was also the reason for his expulsion, he was not able to challenge it. Therefore, the applicant, who could not enjoy the principles of adversarial proceedings and equality of arms, was deprived of the right to "*have his case reviewed*" under Article 1 § 1 (b) of the Protocol in the light of the guarantee to "*submit reasons against his expulsion*" under Article 1 § 1 (a), which is afforded by the right to an effective remedy under Article 40 of the Constitution.

6. In view of the foregoing, the application is not manifestly ill-founded. Therefore, I do not agree with the majority's decision, considering that the applicant's right to an effective remedy safeguarded by Article 40 of the Constitution, in conjunction with his freedom of residence safeguarded by Article 23 thereof, has been violated.

DISSENTING OPINION OF JUSTICE M. EMİN KUZ

It has been concluded that the alleged violation of the prohibition of ill-treatment due to the order entailing expulsion to the country where the applicant would face the risk of ill-treatment and the alleged violation of the right to an effective remedy, in conjunction with the freedom of residence, due to the expulsion being contrary to procedural safeguards were inadmissible for being manifestly ill-founded.

While I agree with the conclusion reached regarding the alleged violation of the prohibition of ill-treatment, I disagree with the majority's assessment and conclusion regarding the second allegation.

It has been specified in the reasoning of the majority's decision on inadmissibility, insofar as it is related to the second allegation, that the applicant did not submit any request at any stage of the proceedings to learn the grounds for the expulsion order issued against him after he became aware of it upon the first reply letter of the respondent administration. Accordingly, even though he had not been informed of the grounds for the impugned restriction code which was included in the case file of the proceedings before the administrative court where he requested the annulment of the expulsion order; that he did not claim that his access to documents before the court or the chief public prosecutor's office had been restricted; that an order had been issued against him without his being aware of the documents in the file of the action for annulment; or that he had not been informed of the acts constituting the grounds for his expulsion. The majority also concluded that the applicant did not complain about the alleged unlawfulness of his being associated with the organisation on the sole ground that his name has appeared on the list; that that his claims before the administrative court were confined to the fact that he had not committed any unlawful act and that there was no evidence against him at the criminal investigation stage; and that in short, he did not request from the administrative court the information underlying the expulsion order or did not submit any evidence in his favour. Therefore, his allegation that only the information available to the public authorities had been relied on was devoid of basis.

As discussed in the decision, although the applicant claimed that the impugned expulsion order was unjustified, arguing that he had not committed any unlawful act and that there was no evidence indicating his membership of a terrorist organisation, his claim was based on the fact that the judicial authorities issued decisions relying on the assessments of the administrative authorities without carrying out an examination. In this regard, it has been acknowledged by the majority that the right to re-examination laid down in Article 1 § 1 (b) of the Protocol should be taken into account in the examination of this part of the application, which has been examined within the scope of the right to an effective remedy, in conjunction with the freedom of residence.

In the present case, since the applicant's name appeared in a list seized during a raid, a criminal investigation was launched against him to investigate his relation with a terrorist organisation. In another letter, a restriction code was issued against the applicant, his residence permit was revoked in accordance with Law no. 6458, and his expulsion was ordered.

The applicant brought an action before the administrative court, seeking the annulment of the said order; however, his action was dismissed. In the administrative proceedings, the aforementioned list on which the restriction code had been based was mentioned for the first time in the dismissal decision. Nevertheless, in spite of the fact that the applicant had been questioned about the impugned list during the criminal investigation, which concluded twenty days before the decision of the administrative court, that he had raised his objections to the list within the scope of the criminal charge, and that a decision of non-prosecution was issued, these issues were disregarded in the decision of the administrative court.

Law no. 6458 does not specify the acts covered by the phrase "posing a threat to public safety or order". Although it is not possible to enumerate these acts one by one in the law, the facts should be foreseeable through the concepts embedded in the law, in accordance with the assessments made by the administrative and judicial authorities in this sense.

In this regard, although it is not clear what facts the administrative authorities relied on while initiating the expulsion procedure, it appears from the reasoning of the administrative court that the said order was foreseeable in that the applicant might have a link with the terrorist organisation since his name was referred to in the seized list.

Besides, as stated above, the applicant's procedural claim must be considered within the scope of the right to re-examination set forth in Article 1 § 1 (b) of the Protocol and, in this context, the remedy must not only exist in theory but it must also be applicable in practice in accordance with Article 40 of the Constitution, in conjunction with Article 23 thereof, whereby the aforementioned safeguard is provided.

In other words, the aforementioned safeguard does not necessitate a formal review, but a review where the proceedings are conducted in compliance with the principles of adversarial proceedings and equality of arms. This approach enables the applicant to challenge the facts forming a basis for the expulsion order and requires the relevant court decision to provide relevant and sufficient grounds.

As is known, the right to an effective remedy may be described as ensuring that everyone who claims to have suffered a violation of one of his/her constitutional rights are provided with an opportunity to resort to administrative and judicial remedies that are reasonable, accessible, and capable of preventing the violation from taking place or ceasing its continuation or redressing its consequences (see, for example, *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 47; and *Murat Haliç*, no. 2017/24356, 8 July 2020, § 44). Thus, in the application of the stipulated conditions in the present case, the arguable claims should be evaluated in an exhaustive manner, and if the conditions are not met, this should be explained by the judicial authorities based on relevant and sufficient grounds (see, for example, *İlhan Gökhan*, no. 2017/27957, 9 September 2020, §§ 47, 49).

In the present case, no material fact was referred to as a basis for the administration's action, and the administrative court's decision was based on the fact that the applicant's name had been found on a list of names seized during a raid.

According to the reasoning of the majority's decision on inadmissibility, there was no issue with not investigating the importance of the list in terms of public safety given that the applicant did not challenge it before the administrative court; however, the applicant cannot be expected to do so in the absence of an assessment as to whether he was indeed aware of it.

After the proceedings before the administrative court, the applicant first became aware of the list when he was questioned about it in the course of the criminal investigation, therefore he was also not aware of the grounds for the restriction code underlying the expulsion order issued against him, and thus he was denied the opportunity to challenge the said grounds and could not benefit from the principles of adversarial proceedings and equality of arms. Hence, the applicant could not enjoy the safeguards of "*submitting reasons against his expulsion*" and "*having his case reviewed*" respectively set forth in Article 1 § 1 (a) and Article 1 § 1 (b) of the Protocol, as well as he was deprived of the right to an effective remedy within the meaning of Article 40 of the Constitution.

Considering that a proper examination was carried out against the applicant, who had been provided with the opportunity to challenge the list during the criminal investigation conducted by the chief public prosecutor's office, and a decision of non-prosecution was issued against him before the administrative court's decision, whereas the latter contained no such assessment nor did it provide relevant and sufficient grounds, I am of the opinion that this part of the application should be found admissible and a violation of his right to an effective remedy in conjunction with his freedom of residence should be found. Therefore, I dissent from the majority's decision of inadmissibility.

DISSENTING OPINION OF JUSTICE YUSUF ŞEVKİ HAKYEMEZ

1. I disagree with the majority' decision that the application should be declared inadmissible on the grounds that alleged violation of the right to an effective remedy, in conjunction with the freedom of residence, due to the expulsion being contrary to procedural safeguards was manifestly ill-founded. I consider that the application should be declared admissible.

2. The applicant claimed that his expulsion had been ordered due to the criminal investigation conducted as well as the restriction code issued against him, despite not having committed any unfavourable act. He further claimed that in the proceedings he had initiated to challenge the lawfulness of the impugned expulsion order, which was issued in the absence of any evidence, the administrative court dismissed the case without carrying out a proper examination and only relied on the public authorities' assessments.

3. In the present case, upon the expulsion order issued against the applicant, his residence permit was also revoked by the administration.

4. The administrative court, dismissing the applicant's case with its decision of 23 December 2020, relied on the restriction code issued against the applicant, considering the relevant information and documents sent in response to the interim decision dated 18 November 2020. It concluded that the expulsion order issued against the applicant due to the threat he posed to the public order and safety was not unlawful, taking into account the assessment regarding the applicant and the broad discretionary power vested in the states to expel the suspected aliens within the scope of their sovereignty rights.

5. However, although the administrative court, dismissing the applicant's request for annulment of the expulsion order issued against him, relied on the impugned restriction code, it has been observed that the applicant was deprived of the opportunity to be informed of the restriction code and to present his arguments against it. In addition, it is also unclear whether the applicant was informed of the list, which was taken as a basis for the administrative act and which was also relied on by the court, before the final decision.

6. The failure to inform the applicant of the restriction code issued against him, which was presumed to have been relied on for the expulsion order, and of the lists in which his name was included, during the proceedings before the administrative court led to procedural shortcomings notably depriving the applicant of the opportunity to submit his counter claims. However, such shortcomings may affect the outcome of the proceedings as to its merits.

7. Actually, in view of the considerations above, I do not agree with the majority's decision on the grounds that in the individual application regarding the alleged violation of the right to an effective remedy in conjunction with the right to freedom of residence due to the expulsion order being contrary to the procedural safeguards, the said claims should be examined more substantively; therefore, the present application should be found admissible and examined on the merits.

DISSENTING OPINION OF JUSTICE SELAHADDİN MENTEŞ

1. The majority of the Court held that the alleged violation of the right to an effective remedy, in conjunction with the freedom of residence, within the scope of procedural safeguards inherent in the expulsion procedures was inadmissible for being manifestly ill-founded. I dissent from the majority's decision for the reasons set out below:

2. As summarized under the heading "The Facts", the applicant is an Iraqi citizen. Due to the civil unrest in his county, he arrived at Türkiye with his wife and 3 children, settled in Çorum, and started the administrative procedures for a residence permit. At the material time, a list including his name was seized during an operation carried out by the National Intelligence Organisation in Syria. The said document was subsequently submitted to the chief public prosecutor's office, considering the applicant's possible membership of the DAESH terrorist organisation. Following the investigation process, the prosecutor's office issued a decision of non-prosecution on 31 December 2020. On the basis of the same document, a restriction code of G-87 and an expulsion order were issued against the applicant. The applicant's subsequent appeal was dismissed by the administrative court.

3. The applicant claimed that the principle of the rule of law had been violated, stating that the expulsion order issued against him was devoid of basis in the absence of any evidence proving his membership, and that the administrative court dismissed his case only relying on the assessments of public authorities without sufficient examination.

4. The applicant's claims must be examined from the standpoint of the general safeguard of legality lawfulness as well as the pertinent procedural safeguard. The majority assessed the application without ascertaining whether the phrase "threat to public order or safety" was sufficiently foreseeable or whether the law contained adequate safeguard against arbitrary interference.

5. Law no. 6458 does not explicitly specify which acts are covered by the phrase "constitutes a threat to public order or safety". When administrative and judicial authorities consider a particular act to fall within these concepts, the imputed act must be reasonably foreseeable as

fitting within the scope of aforementioned concepts. Otherwise, as in the present case, the issue of foreseeability may arise.

6. In the present case, it is unclear from the relevant information and documents which material fact the administrative authorities relied on when ordering the applicant's expulsion. In spite of this, it appears that the administrative court based its decision on the information that "the restriction code had been issued against the plaintiff on account of a list seized during an operation carried out in 2018, and thereby suggesting that the applicant had been among the members of the organisation".

7. The applicant argued that the administrative court had rejected his application only relying on the public authorities' assessments, without conducting a proper examination. This claim must be considered in the context of the applicant's right to re-examination enshrined in Article 1 § 1 (b) of the Protocol. Article 40 of the Constitution, in conjunction with Article 23, stipulates that a remedy must not only exist in theory but also apply in practice. Hence, this requires an examination where the right to adversarial proceedings and the principle of equality of arms, which enables the applicant to challenge the grounds of the expulsion order, have been respected and where the incumbent authority provides sufficient reasoning in its decision.

8. In the present case, the administration did not refer to any material fact to justify the applicant's expulsion. The administrative court, on the other hand, based its decision on the list seized by the intelligence services. The applicant was not aware of the list during the administrative proceedings. Therefore, he could not raise objections to the said list. Although it can be argued that the applicant had been aware of the impugned list during the questioning in the criminal investigation process, it can be assumed that the applicant became aware of the list after the proceedings before the administrative court had concluded. Moreover, the chief public prosecutor's office conducted a criminal investigation against the applicant and issued a decision of non-prosecution before the decision of the administrative court.

9. For the aforementioned reasons, I dissent from the majority's decision, considering that the right to an effective remedy, in conjunction

with the freedom of residence, was violated, since the safeguard of "having one's case reviewed" set forth in Article 1 § 1 (b) of the Protocol was violated in the light of the safeguard of "submitting reasons against one's expulsion" set forth in Article 1 § 1 (a) of the Protocol insofar as it concerned the applicant who had not been informed of the restriction code underlying the expulsion order issued against him.

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

KENAN YILDIRIM

(Application no. 2017/28711)

14 September 2023

On 14 September 2023, the Plenary of the Constitutional Court found a violation of the right to an effective remedy safeguarded by Article 40 of the Constitution, in conjunction with the right to property safeguarded by Article 35 of the Constitution, in the individual application lodged by *Kenan Yıldırım* (no. 2017/28711).

(I-IV) SUMMARY OF THE FACTS

[1-36] The applicant invested US dollars on various dates and in different amounts in a private financial institution, namely İhlas Finans Kurumu ("the Company"), under a participation agreement. Upon the revocation of the Company's operating license with the decision of the Banking Regulation and Supervision Agency ("the BRSA"), the applicant issued a notice to the Company, requesting the payment of his receivables, and then initiated enforcement proceedings without judgment. The payment order issued was contested on the grounds that the applicant did not have receivables due, that the Company was in the process of liquidation, and that the enforcement office was not authorised thereof. Following an objection regarding authorisation, the enforcement file was referred to the incumbent enforcement directorate. As the Company subsequently objected to the payment order communicated by the authorised enforcement directorate, the relevant enforcement proceedings were suspended.

The applicant brought an action before the commercial court, seeking the annulment of the Company's objection, claiming that the latter arbitrarily failed to complete the liquidation process and that a number of persons whose receivables had not been due and payable received payment unlawfully. However, the applicant's action was dismissed by the commercial court. Having examined the applicant's appeal, the Court of Cassation upheld the commercial court's decision. The applicant's subsequent request for rectification of the decision was also dismissed.

V. EXAMINATION AND GROUNDS

37. The Constitutional Court ("the Court"), at its session of 14 September 2023, examined the application and decided as follows:

A. The Applicant's Allegations

38. The applicant claimed that he could not collect the money he had deposited in the Company in 1999-2000, despite exhausting legal remedies, and that the Company arbitrarily withheld the money, although it made payments to some other creditors. Indicating that approximately seventeen years had elapsed for the payment of his receivables until the date of the individual application and that the Company had not been subjected to an audit in this regard. Accordingly, the applicant argued that it was uncertain whether or when his receivables would be paid. Therefore, the applicant claimed that his rights to a fair trial and property had been violated, specifying that the expert reports documented the payments made to some of the creditors, which the incumbent court disregarded and delivered a decision as a result of an incomplete examination, that the liquidation process had not been completed on arbitrary grounds since 2001, and that he could not collect his receivables through enforcement proceedings or lawsuits.

B. The Court's Assessment

39. Article 35 of the Constitution 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.*"

40. 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 applicant claimed that his right to a fair trial had also been violated, it has been observed that the essence of his grievances was related to the non-payment of the receivables due to the non-completion of the liquidation process on arbitrary grounds since 2001, the incomplete examination carried out by the court which disregarded the expert report indicating that some of the creditors had been made payment, and his inability to collect the receivables through enforcement proceedings and lawsuits. Thus, the applicant's complaints principally concern the right to property. Besides, since the disputed case had been dismissed on the grounds that the

liquidation process had not been completed and its completion was a precondition to make a claim, it has been concluded that the complaint raised by the applicant must be examined under the right to an effective remedy safeguarded by Article 40 of the Constitution in conjunction with the right to property safeguarded by Article 35 thereof.

1. Admissibility

41. The alleged violation of the right to an effective remedy in conjunction with 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 Property

42. In the present case, it is beyond dispute that the money deposited by the applicant in the Company constituted property.

b. General Principles

43. The right to an effective remedy may be described as ensuring that everyone who claims to have suffered a violation of one of his constitutional rights is provided with an opportunity to submit applications with administrative and judicial remedies that are reasonable, accessible, and capable of preventing the violation from occurring or ceasing its continuation or eliminating its consequences (i.e. offering adequate redress), whereby the person concerned can have his allegations examined in a manner compatible with the nature of the right at stake (see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019, § 47; and *Murat Haliç*, no. 2017/24356, 8 July 2020, § 44).

44. The existence of effective legal remedies capable of enabling an examination on the merits of the complaints and, when necessary, affording appropriate redress is a requisite of the exercise of the right to an effective remedy. Accordingly, the mere existence of legal remedies designed to afford redress in the relevant legislation is not per se sufficient, and such remedy must offer reasonable prospects of success also in practice. In assessing whether the conditions sought to

be fulfilled for having a recourse to these remedies are satisfied under the particular circumstances of given cases, the arguable claims resulting from an impugned act, action or negligence must be considered in a comprehensive manner; and if it is concluded that the necessary conditions are not satisfied, the incumbent tribunals must provide relevant and sufficient grounds to justify their decisions (see *İlhan Gökhan*, no. 2017/27957, 9 September 2020, §§ 47, 49).

45. Article 35 of the Constitution provides "*Everyone has the right to own and inherit property*." thereby safeguarding the right to property. It is also laid down in Article 5 of the Constitution that it is among the State's aims and duties to set the conditions to ensure the development of individuals' corporeal and spiritual existence. The genuine and effective exercise of the right safeguarded as a fundamental right under Article 35 of the Constitution does not depend merely on the State's duty not to interfere. Pursuant to Articles 5 and 35 of the Constitution, the State also has positive obligations to protect the right to property. These positive obligations may require the State to take certain measures necessary to protect the right to property even in the context of disputes between private individuals in certain cases (see the Court's decisions no. E.2019/40, K.2020/40, 17 July 2020, § 37; and no. E.2019/11, K.2019/86, 14 November 2019, § 13; *Türkiye Emekliler Derneği*, no. 2012/1035, 17 July 2014, §§ 34-38; *Eyyüp Boynukara*, no. 2013/7842, 17 February 2016, §§ 39-41; and *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri Petrol Ürünleri Sanayi Ticaret Limitet Şirketi*, no. 2014/8649, 15 February 2017, § 43).

46. The positive obligations imposed on the State by virtue of the right to property may require the State to take protective and remedial measures. Protective measures refer to measures capable of preventing an interference with the right to property while remedial measures cover legal, administrative and practical measures capable of remedying, in other words, redressing the effects of the interference. It is a requirement of the positive obligations of the State to establish administrative or judicial legal mechanisms that ensure the restoration of the negative consequences of the interference with the right to property, if possible, and if not possible, to redress the damages and losses sustained by

the owner (see *Osmanoğlu İnşaat Eğitim Gıda Temizlik Hizmetleri Petrol Ürünleri Sanayi Ticaret Limited Şirketi*, §§ 46, 48).

c. Application of Principles to the Present Case

47. In the present case, the applicant deposited a total of USD 11,773 between 1999 and 2000 under a participation agreement in the Company, which started to operate in 1995 as a private financial institution. The operating license of the Company was revoked by the BRSA on 10 February 2001 and a liquidation decision was issued at the Extraordinary General Meeting held on 3 August 2001 where it was also decided that all finalised debts would be settled within five years, insofar as circumstances permit, depending on the amount to be collected from the debtor companies by the liquidators during the liquidation process as well as on the method and timeline of these collections.

48. The applicant, who could not recover the amounts he had deposited due to the liquidation process that started in 2001, initiated enforcement proceedings in 2011 to collect his receivables. Upon the Company's appeal, the enforcement proceedings were suspended and the applicant brought an action for annulment of the suspension decision in order to ensure the collection of his receivables.

49. In the report issued by a financial advisor, in his capacity as an expert, in the course of the proceedings, it was stated that the amount deposited by the applicant to the Company had reached USD 13,321 as of 1 January 2003, that the Company had fully paid the current accounts as of 2007 through the payments made during the liquidation process, that while the participation account balances had been EUR 240,301,345 and USD 658,891,488 in 2001, the debt balances had decreased year by year between 2001 and 2011, and that the debt amounts in the participation accounts had been EUR 76,011,316 and USD 153,668,772 on 31 March 2011. Nevertheless, the incumbent court dismissed the applicant's case despite the findings indicating that the applicant was one of the creditors.

50. In its reasoning, emphasizing that the liquidation process was ongoing, the court noted that all kinds of enforcement and bankruptcy proceedings regarding private financial institution, including interim

injunctions, would cease as of the date of publication in the Official Gazette of the decision revoking the Company's operating license. The court clarified that the provisions of Law no. 2004 would not be applicable in the liquidation process, and that the liquidation process had to be completed in order for the applicant to claim his rights. However, it has been observed that the court decision did not include any examination or assessment regarding the applicant's claims. The Court of Cassation upheld the court decision and dismissed the request for rectification of the decision, merely stating that the said decision had been duly rendered.

51. Right to an effective remedy laid down in Article 40 of the Constitution does not guarantee that applications to administrative and judicial mechanisms established for the protection of fundamental rights and freedoms will necessarily be concluded in favour of the applicant. In this sense, it is incumbent on the relevant administrative and judicial authorities to examine the applicant's complaint as to its merits and to adjudicate it by providing relevant and sufficient justification. However, the right to an effective remedy may be violated if the courts make arbitrary interpretations and assessments, which renders the recourse to the remedy in question ineffective and reduces the prospect of success, or are based on clearly unreasonable grounds (see *Seyfettin Şimşek*, no. 2019/21111, 30 March 2022, § 41).

52. The primary issue to be examined by the Court is whether there is an effective remedy in place enabling the applicant to collect the amount he claimed. The second issue to be examined is whether this remedy, which is considered to be effective in theory, actually functions in the case brought by the applicant, in other words, whether it offers a prospect of success in practice.

53. It has been observed that the provisions on liquidation embodied in the repealed Law no. 6762, which was in force at the time when the liquidation process started, and in Law no. 6102, which entered into force during the liquidation process, regulate the measures to be taken from the beginning of the liquidation process, the manner of conducting the process, the transactions to be carried out and how the process will

be concluded. Upon examining these provisions, it has been found that no time limit is set but the process is required to be completed at the soonest time possible. It is obvious that the objective of not limiting the length of the liquidation process is to ensure its proper conduct. In the same vein, there is no doubt that the requirement of conclusion of the liquidation process before claimants can resort to legal remedies to prove their receivables, as per Law no. 4672, is intended to achieve the very aim pursued by liquidation. However, it appears that while there are provisions entailing the completion of the liquidation process to demonstrate the condition of receivables and debts, within the scope of the State's positive obligations, measures should be taken to ensure that those who are allegedly entitled to claim their rights can assert these rights within a reasonable period of time.

54. In the present case, there was uncertainty as to when the ongoing liquidation process that started in 2001 would be completed, and the court made no examination or assessment regarding the transactions carried out within the scope of the liquidation process. Given the reasoning of the inferior courts, it is obvious that enforcement proceedings or lawsuits to be initiated before the completion of the liquidation process had no prospect of success. The applicant deposited money in the Company in 1999 and 2000, yet sought to collect the amounts he had deposited since 2001 when the liquidation process started. It is clear that the prolonged duration of the liquidation, exceeding twenty years, was neither bearable nor foreseeable for the applicant. Although the State does not have a positive obligation to guarantee the applicant's recovery of his receivables, it falls within the scope of the State's positive obligations to establish and ensure the effective functioning of the appropriate legal remedies and mechanisms that enable the collection of the applicant's receivables.

55. Thus, the applicant was deprived of the opportunity to employ legal mechanisms since the liquidation process, which had been going on for a long time, was not completed although he had initiated enforcement proceedings and lawsuits for the collection of his receivables. Hence, the legal remedy which appeared effective in theory had no prospect of success in practice in the present case.

56. In the light of the foregoing, it must be held that there was a violation of the right to an effective remedy safeguarded by Article 40 of the Constitution, in conjunction with the right to property safeguarded by Article 35 of the Constitution.

3. Redress

57. Article 50 of the Code no. 6216 on Establishment and Rules of Procedures of the Constitutional Court, dated 30 March 2011, insofar as relevant, provides 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 a 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."

58. The applicant requested the Court to find a violation, and award him USD 11,000 in Turkish liras (TRY) equivalent with the highest deposit interest.

59. In the course of the proceedings initiated upon objection to the enforcement process, which was considered to be an effective remedy, in theory, capable of redressing the consequences of the violation found, the inferior courts failed to examine the applicant's allegations on its merits. In this regard, since the only means to ensure the proper examination of the applicant's allegations as to merits is a retrial, there is a legal interest in holding a retrial. However, given that a retrial alone cannot fully redress the consequences of the violation as a whole, it has been concluded that the applicant should be awarded TRY 30,000 for

non-pecuniary damages. In addition, since the award of non-pecuniary damages is considered to provide a sufficient remedy given the decision on retrial, the applicant's claim for pecuniary damages was rejected.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 14 September 2023 that

A. The alleged violation of the right to an effective remedy, in conjunction with the right to property, be DECLARED ADMISSIBLE;

B. The right to an effective remedy safeguarded by Article 40 of the Constitution, in conjunction with the right to property safeguarded by Article 35 thereof, was VIOLATED;

C. A copy of the judgment be REMITTED to the 7th Chamber of the Bakırköy Commercial Court (E.2012/454, K.2013/291) for retrial to be conducted to redress the consequences of the violation of the right to an effective remedy, in conjunction with the right to property;

D. A net amount of TRY 30,000 be REIMBURSED to the applicant for non-pecuniary damages, and the remaining claims for compensation be REJECTED;

E. The total litigation costs of TRY 10,157.50, including the court fee of TRY 257.50 and counsel fee of TRY 9,900 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 TRADE-UNION FREEDOM (ARTICLE 51)

REPUBLIC OF TÜRKİYE
CONSTITUTIONAL COURT

PLENARY

JUDGMENT

MUHARREM ÇİMEN

(Application no. 2016/5002)

23 March 2023

On 23 March 2023, 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 *Muharrem Çimen* (no. 2016/5002).

(I-IV) SUMMARY OF THE FACTS

[1-28] The Associated Metalworkers Union (*Birleşik Metal İşçileri Sendikası*) ("the Union") of which the applicant was a member decided to embark on a strike in January 2015. Nevertheless, the Council of Ministers postponed the strike. Following the postponement decision, all workers including the applicant working in the defendant workplace organised slowdown strikes for 20-25 minutes a day. Subsequently, the defendant workplace terminated the employment contracts of thirty workers including the applicant.

In the action brought by the applicant requesting his reinstatement and the awarding of union compensation, the labour court partially accepted the case and ruled on the reinstatement of the applicant but dismissed his request for union compensation. The first-instance decision was quashed by the Court of Cassation on the grounds that the applicant had gone on a strike despite the postponement decision, and the case was dismissed with final effect.

V. EXAMINATION AND GROUNDS

29. The Constitutional Court ("the Court"), at its session of 23 March 2023, examined the application and decided as follows:

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

30. The applicant argued that although all workers had participated in union protests which were held peacefully, only employment contracts of certain individuals were terminated, thereby violating the employer's obligation of equal treatment. The applicant further asserted that the said protests constituted collective actions, which is a democratic right affecting social and economic rights. The applicant claimed that, given the nature of his work, he was at the last stage of production and

that it was technically impossible for him to slow down production, and that his name was absent from the production reports issued by the notary upon the request of the employer. According to the applicant, the Court of Cassation quashed the inferior court's decision without sufficient reasoning and disregarding the principle foreseeing the termination of the contract as the last resort. There was also no uniform practice among the chambers of the Court of Cassation. The applicant claimed that his rights safeguarded by Articles 10, 11, 13, 36, 49, 51 and 53 had been violated.

31. In its observations, the Ministry noted that the Council of Ministers had postponed the strike on the grounds of *national security*, therefore the impugned restriction on the right complied with the constitutional requirements, and that these issues should be taken into consideration in evaluating whether the said interference, which had a legal basis and pursued a legitimate aim, met the conditions of necessity in a democratic society and proportionality.

32. In his counter-statements, the applicant reiterated his submissions he had set forth in the individual application form.

B. The Court's Assessment

33. The Court is not bound by the legal qualification of the facts by the applicant and it makes such assessment itself. Since it has been understood that the essence of the applicant's allegations is the termination of his employment contract for union-related reasons, the alleged violations, as a whole, should be examined within the scope of the right to trade-union freedom. Article 51 § 1 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 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.*"

34. Article 53 § 1 of the Constitution, titled "*Rights of collective labour agreement and collective agreement*", reads 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.*"

35. Article 54 §§ 1, 2 and 4 of the Constitution, titled "*Right to strike, and lockout*", reads as follows:

"*Workers have the right to strike during the collective bargaining process if a disagreement arises. The procedures and conditions governing the exercise of this right and the employer's recourse to a lockout, the scope of, and the exceptions to them shall be regulated by law.*

The right to strike and lockout shall not be exercised in a manner contrary to the rules of goodwill, to the detriment of society, and in a manner damaging national wealth …

The circumstances and workplaces in which strikes and lockouts may be prohibited or postponed shall be regulated by law."

1. Admissibility

36. In the present case, upon appeal by the defendant against the first instance court's decision, the Court of Cassation quashed the relevant decision and dismissed the case. Hence, the applicant lodged an individual application. 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

37. In the present case, the employment contract of the applicant who had been working for a private company was terminated due to his participation in a slowdown strike within the scope of the right to trade-union freedom. At the end of the proceedings, the Court of Cassation concluded that the impugned termination was based on reasonable grounds. The termination of the employment contract constitutes a dispute between the employer and the applicant, and there is no

interference by the State in this regard. Accordingly, the present case must be examined within the scope of the positive obligations imposed on the State by Article 51 of the Constitution (see *Abbas Akçay and Others*, no. 2015/2790, 23 May 2018, § 32).

a. General Principles

38. The phrase "*Employees … in order to safeguard … the interests of their members*" embodied in Article 51 of the Constitution explicitly indicates that union activities of members, intended to protecting their professional interests, are safeguarded by the Constitution (see *Kristal-İş Sendikası* [Plenary], no. 2014/12166, 2 July 2015, § 54). In this sense, the right to trade-union freedom requires that union activities aimed at protecting the interests of their members are permitted (see *Tayfun Cengiz,* no. 2013/8463, 18 September 2014, § 31).

39. The right to trade-union freedom, laid down in Article 51 of the Constitution, affords constitutional protection against any interference by the public force, as well as any interference by the unions with their members or, in some cases, any interference by private law entities. Therefore, in addition the negative obligation of the State to refrain from interference, the right to trade-union freedom also encompasses positive obligations on the State to ensure protection against any interference by third parties, (see *Anıl Pınar and Ömer Bilge,* no. 2014/15627, 5 October 2017, § 36; *Ahmet Sefa Topuz and Others,* no. 2016/16056, 21 April 2021, § 52; and *Barış Adıgüzel,* no. 2016/15802, 8 September 2021, § 29).

40. The positive obligations imposed on the State by the right to trade-union freedom may require the State to adopt protective and corrective measures. The positive obligation to protect the right to trade-union freedom entails the State to take measures to ensure that third parties, especially employers, avoid preventing employees from exercising their rights to join trade unions and to engage in trade union activities, and that employees are not imposed sanctions or subjected to discrimination solely for exercising these rights. The measures to be taken in this context should have a chilling effect on third parties, especially employers, to prevent them interfering with employees' right to trade-union freedom. Moreover, it is one of the positive obligations incumbent on the State

to establish legal mechanisms capable of affording real and effective protection whereby the alleged interference with the right to trade-union freedom by third parties can be challenged and the consequences of the violation can be redressed and, if necessary, to provide the opportunity to bring an action for compensation or similar claims (see *Barış Adıgüzel,* § 30; and *Anıl Pınar and Ömer Bilge,* § 37).

41. Trade union freedoms can be safeguarded by securing the employment contracts of employees while exercising their trade union rights. In cases where employment contracts are terminated due to the membership of a trade union, refusal to join a union, or participation in trade union activities, the termination may be deemed to be motivated by reasons related to trade unions (see *Ahmet Sefa Topuz and Others,* § 55).

42. It is primarily for the inferior courts to consider whether the issues and the conditions of proof stipulated by the legislation have been met. Undoubtedly, the inferior courts are better placed to evaluate the circumstances of the case. As for the Court, its role is limited with the determination of whether the interpretation of these rules by the inferior courts is in conformity with the Constitution. The Court therefore contents itself with reviewing the procedure followed by the inferior courts and, more specifically, determining whether those courts have observed the safeguards afforded by Article 51 of the Constitution. Therefore, the Court does not substitute itself for the inferior courts, and it evaluates the approach of the public authorities in the relevant process in view of procedural safeguards regarding the right to trade-union freedom (for assessments in the same vein, see *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası,* no. 2016/13328, 19 November 2020, § 40; *Türkiye Petrol, Kimya ve Lastik Sanayi İşçileri Sendikası,* no. 2016/13351, 15 December 2020, § 40; and *Ahmet Sefa Topuz and Others,* § 57).

b. Application of Principles to the Present Case

43. In the present case, since the Union of which the applicant was a member and the defendant workplace failed to reach an agreement in the negotiations of collective labour agreement (CLA), the Union decided to embark on a strike. The Council of Ministers postponed the strike on the grounds of *national security*. Following the postponement decision,

the applicant and other workers organised a slowdown strike, as a result of which their employment contracts were terminated. The court of first instance accepted the case and ruled on the reinstatement of the applicant, stating that the impugned termination was not justified but could not be considered as a termination related to the union. The first-instance decision was quashed by the Court of Cassation on the grounds that "*the applicant had gone on a strike despite the postponement decision*", and the case was dismissed with final effect.

44. The alleged violation of the right to trade-union freedom due to the postponement by the Council of Ministers of the strike to be embarked on by the Union across multiple workplaces was previously examined by the Court. The Court noted in the cases of *Kristal İş* and *Birleşik Metal İşçileri Sendikası* that it adopted the criterion developed by the 10th Chamber of the Council of State in a decision of 2003 regarding national security as grounds for restriction and that this criterion would be applied in similar applications (see *Kristal-İş Sendikası*, § 79; and *Birleşik Metal İşçileri Sendikası*, no. 2015/14862, 9 May 2018, § 48). The assessments made by the Court in the judgment of *Birleşik Metal İşçileri Sendikası* are as follows:

"49. The decision of the Council of Ministers merely stated the grounds for the postponement and contained no further explanation. Although the 10th Chamber of the Council of State, acting in its capacity as the first instance court, noted that the relevant public authorities "expressed opinions based on tangible data" indicating that the imputed strike had a detrimental effect on national security, it did not explain the said tangible data and its relationship with the national security, if any. However, it should be clearly stated in the decisions of the inferior courts how the stoppage of production in the workplaces where strike is embarked on for a period of time disrupts national security.

…

51. … Pursuant to Article 63 of Law no. 6356, a strike can be postponed on the sole grounds of national security and public health … A very broad interpretation of the phrases included in the aforementioned provision, in the absence of convincing reasons, may lead to the conclusion that all strikes, which will yield some economic consequences, could be deemed to threaten

national security, thereby resulting in in disproportionate interferences with constitutional rights, which are unnecessary in a democratic society.

52. In the present case, first in the decision of the Council of Ministers to postpone the strike and then in the decisions of the inferior courts on the dispute, it must be demonstrated that there are serious threats to the security of the country and of the nation which necessitated special measures to be taken and that these threats corresponded to a pressing social need in a democratic society to justify the postponement of the strike. This requirement stems from the aim of protecting the interests of the individuals against arbitrary interference by public authorities in the exercise of the right to trade-union freedom.

53. It is obvious that the statutory restrictions on the right to strike must define the workplaces subject to the said restrictions as clearly, definitely and convincingly as possible. In the present case, the administration postponed the strikes insofar as it concerned thirty-eight workplaces represented by the applicant Union in the negotiations of collective labour agreement with the Metal Industrialists Union, and did not provide a convincing explanation for the its decision.

54. Additionally, the strike postponement decision was issued during a period when the legal calendar for the collective agreement process was in full swing, leaving the applicant Union with no viable option but to apply to the Supreme Arbitration Board. With the aforementioned postponement decision, the exercise of the constitutional right to strike and collective agreement was rendered de facto ineffective. It is obvious that the workers were deprived of the opportunity to exert pressure on the employers to conclude a more advantageous collective labour agreement by embarking on a strike. The decisions of the inferior courts did not contain reasonable grounds for placing the workers in a more disadvantageous situation.

55. The administration and the inferior courts failed to demonstrate the existence of a conflict between the individuals' right to trade-union freedom and the interests of the society as a whole. Even if there existed such a conflict, they did not attempt to strike a fair balance between the conflicting interests.

56. Thus, the decisions of the inferior courts failed to provide relevant and sufficient grounds that the interference with the right to trade-union freedom

corresponded to a "pressing social need" and was therefore necessary for the maintenance of the democratic social order. The mere fact that the strike was postponed on grounds of national security, as specified in the relevant decisions, does not in itself, confirm that the postponement decision corresponded to a pressing social need and was necessary in a democratic society."

45. The applicant and all of his colleagues at the same workplace participated in slowdown strikes in response to the Council of Ministers' decision to postpone the strike, a decision that the Court found to be in breach of the right to trade-union freedom. These actions were organised as a reaction to the failure to conclude a CLA between the Union and the workplace. A CLA is a labour agreement concluded between a trade union and an employers' union or an employer who is not a member of a union. CLAs are of undeniable importance for unions to protect and promote the rights and interests of their members. Enjoying the authority to conclude a CLA, unions avail of the opportunity to act in an organised manner and express their demands strongly. Hence, CLA and trade union freedom are intrinsically linked concepts (for assessments in the same vein, see *Türkiye Gıda ve Şeker Sanayi İşçileri Sendikası*, § 35; and *Türkiye Petrol, Kimya ve Lastik Sanayi İşçileri Sendikası*, § 35).

46. It is laid down in Article 54 § 1 of the Constitution that workers have the right to strike during the collective bargaining process if a disagreement arises. Thus, the right to strike is one of the most powerful instruments of labour struggle that enables workers to voice their economic and social demands. In this regard, Article 54 § 4 of the Constitution indicates that the cases and workplaces in which strikes may be postponed shall be regulated by law. In consideration of the importance of the constitutional right to strike, any compelling reasons for restricting the right must be convincingly and clearly demonstrated, as also emphasised in the Court's judgment of *Birleşik Metal İşçileri Sendikası*. Failure to do so would render the exercise of the constitutional right to strike and collective labour agreement *facto* dysfunctional.

47. In this context, short-term protests in the nature of the exercise of democratic rights against practices affecting economic, social and working conditions of workers should be tolerated. In the present case,

the Court of Cassation only stated that the applicant had engaged in an unlawful act given the existence of the decision postponing the strike, and that his employment contract had been terminated on reasonable grounds. Nevertheless, it did not provide any further assessment in this regard. Considering that the Court found a violation of the right to trade-union freedom regarding the decision to postpone the strike (see *Birleşik Metal İşçileri Sendikası*, §§ 55-57) and that the strike in which the applicant took part was of a short-term and peaceful nature, which aimed at expressing grievances related to CLAs negotiations, the strike in question should be deemed as falling within the scope of the right to trade-union freedom.

48. In addition, the duration for which an employer is expected to tolerate such protests must also be addressed. According to the findings of the first instance court, all workers engaged in slowdown strikes lasting 20-25 minutes each day for eleven days, which did not cause irreparable damage to the employer. The employer subsequently terminated the employment contracts of thirty workers for allegedly causing loss of production. However, as underlined both by the first instance court and the Court of Cassation, the employer failed to clarify the criteria used to select the thirty workers it dismissed. Accordingly, the incumbent courts failed to address the claims regarding the arbitrary act of the employer. Furthermore, the issues such as the applicant's position in the workplace, the reason for his participation in the slowdown strikes, the extent of the burden of the applicant's protest imposed on the employer, and its potential impact on other workers were not ascertained. In this respect, it could not be demonstrated that the applicant's actions against the employer exceeded the exercise of his democratic rights.

49. In the present case, it has been considered that the slowdown strikes embarked on by the workers, including the applicant, to express their claims for trade union rights upon the postponement decision could be regarded as part of their efforts to safeguard their trade union rights within the scope of national law and under conditions consistent with Article 51 of the Constitution, especially given that the Court found that their right to strike had been unduly hindered in violation of the

Constitution. Therefore, according to the Court, there was no reason justifying the intolerance exhibited towards the applicant's act.

50. The applicant had to face a severe consequence, losing his job due to his impugned act within the scope of his right to trade-union freedom. Accordingly, it is explicit that the *principle of resorting to termination of contracts as the last resort*, developed by the Court of Cassation, be necessarily applied to these types of labour cases for the protection of fundamental rights and freedoms. However, it has been observed that the said principle was not taken into account in the present case. The Court has considered that -when evaluated together with the first instance court's finding that the applicant's act did not cause irreparable damage to the employer- the employer failed to demonstrate that the termination of the applicant's employment contract, without imposing lenient sanctions such as deducting the applicant's salary or making him work overtime, had been strictly necessary.

51. In light of the foregoing, the Court has concluded that the employer's interference with the applicant's right to trade-union freedom would have a chilling effect on him and others in exercising union rights and that the State failed to fulfil its positive obligations due to the lack of an effective judicial review by the inferior courts as required by the said constitutional right. Thus, it must be held that the right to trade-union freedom safeguarded by Article 51 of the Constitution was violated.

3. Application of Article 50 of Code no. 6216

52. The applicant requested the Court to find a violation, order a retrial and award him compensation.

53. 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 (for the details regarding retrial procedure in terms of individual application, which is laid down

in Article 50 § 2 of the Code no. 6216 on Establishment and Rules of Procedures 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).

54. In addition, the violation of the right to trade-union freedom cannot be redressed by only retrial; therefore, the applicant should be awarded 18,000 Turkish liras (TRY) for non-pecuniary damages.

VI. JUDGMENT

For these reasons, the Constitutional Court UNANIMOUSLY held on 23 March 2023 that

A. The alleged violation of 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;

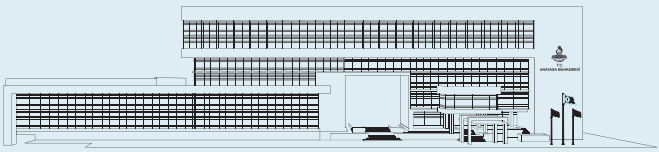
C. A copy of the judgment be REMITTED to the 1st Chamber of the Eskişehir Labour Court (E.2015/323 K.2015/527) in order to be referred to the 22nd Civil Chamber of the Court of Cassation (E.2015/33593 K.2015/35551) for retrial to be conducted to redress the consequences of the violation of the right to trade-union freedom;

D. A net amount of TRY 18,000 be REIMBURSED to the applicant for non-pecuniary damages;

E. The total litigation costs of TRY 10,139.50, including the court fee of TRY 239.50 and counsel fee of TRY 9,900, 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.



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