

REPUBLIC OF TURKEY CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2012/1158

Date of Decision: 21/11/2013

FIRST SECTION

DECISION

President : Serruh KALELİ

Members : Mehmet ERTEN

Zehra Ayla PERKTAŞ

Erdal TERCAN

Zühtü ARSLAN

Rapporteur : Serhat ALTINKÖK

Applicants : Firas ASLAN

Hebat ASLAN

Counsel : Att. İnan AKMEŞE

I. SUBJECT OF APPLICATON

1. The applicants claimed that the right to personal liberty and security regulated in article 19 of the Constitution was violated by asserting that the decisions on the continuation of their state of detention were based on stereotype justifications, that the examination of objection against detention was performed without hearing and that the opinion received by the Court from the Public Prosecutor was not notified to them.

II. APPLICATION PROCESS

- 2. The application was lodged on 11/12/2012 via the 17th Civil Court of First Instance of Istanbul. As a result of the preliminary administrative examination of the petition and its annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.
- 3. It was decided on 18/3/2012 by the Third Commission of the First Section that the admissibility examination be carried out by the Section, that the file be sent to the Section as per paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.
- 4. In the session held on 26/3/2013, the Section decided as per subclause (b) of paragraph (1) of article 28 of the Internal Regulation of the Constitutional Court that the examination on admissibility and merits be conducted jointly.
- 5. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on 26/3/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 31/5/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 5/6/2013. The applicants submitted their counter statements to the Constitutional Court on 26/6/2013.

III. FACTS AND CASES

A. Facts

- 7. As expressed in the petition of the applicants, the facts are summarized as follows:
- 8. Hebat ASLAN who is one of the applicants was born in 1987 and is a detainee at the 1st F Type Prison of Tekirdağ. Firas ASLAN who is the other applicant was born in 1986 and resides in Istanbul.
- 9. The applicants were arrested and taken into custody by the officers of the Branch Directorate of Anti-Terrorism affiliated under Istanbul Police Department on 31/12/2008, detained on 3/1/2009 by the 11th Assize Court of Istanbul to which they were referred with a request for detention with the accusation of "Being a Member of an Illegal Armed Organization" following their statements in the police departments and the office of prosecutor.
- 10. The applicants were started to be tried before the 10th Assize Court of Istanbul within the scope of the file numbered M.2009/38.
- 11. At the hearing held by the 10the Assize Court of Istanbul on 4/10/2012, it was decided that the state of detention of the applicants continue on the ground that the reasons for detention shown in paragraph (3) of article 100 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 were present, that it would be insufficient to apply the provisions of judicial control given the reasons for detention and the measure of detention was proportionate.
- 12. The applicants objected against the decision of the 10th Assize Court of Istanbul on the continuation of the state of detention on the date of 9/10/2012 with the claim that it was contrary to article 19 of the Constitution.
- 13. The objection filed against the decision of the 10th Assize Court of Istanbul on the continuation of the state of detention was dismissed through the decision of the 11th Assize Court of Istanbul dated 15/10/2012 and numbered Miscellaneous Action 2012/718. The decision of dismissal was notified to the applicants on the date of 12/11/2012.
- 14. In the examination of detention performed by the 10th Assize Court of Istanbul as per article 108 of the Code numbered 5271, it was decided that the detention of the applicants continue on the date of 31/10/2012.
- 15. Of the applicants, Firas ASLAN was released at the hearing dated 27/11/2012. In the opinion of the Ministry of Justice, it was stated that Hebat ASLAN who is one of the applicants was released on the date of 19/2/2013 after he lodged an individual application to the Constitutional Court.
 - 16. The case on the applicants is pending before the Court.

B. Relevant Law

17. Article 100 of the Code numbered 5271 is as follows:

- "(1) A decision of arrest can be issued about the suspect or accused in the presence of facts indicating the existence of strong suspicion of a crime and the presence of a ground for detention. A decision of detention cannot be issued in the event that importance of the case is not proportionate to the anticipated penalty and security measure to be imposed.
 - (2) Grounds for detention can be considered to exist in the following circumstances:
- a) If there are concrete facts indicating that the suspect or accused will escape and arising suspicion towards the suspect or accused escaping or hiding.
 - b) If the suspect or accused's behaviors give rise to strong suspicion on the matters of;
 - 1. Destruction, concealment or alteration of evidences,
 - 2. Attempting to exert pressure on the witness, aggrieved or others.
- (3) Grounds for arrest can be considered to exist in the presence of grounds for strong suspicion that the crimes below have been committed:
- a) The following crimes stipulated in the Turkish Criminal Code dated 26.9.2004 and numbered 5237;

...

- 11. Crimes Against the Constitutional Order and the Operation of Said Order (Articles 309, 310, 311, 312, 313, 314, 315),
- b) Crimes of arms trafficking (Article 12) defined in the Code on Firearms and Knives and Other Tools dated 10.7.1953 and numbered 6136.

...'

18. Article 101 of the Code numbered 5271 is as follows:

- "(1) A ruling on detention of the suspect at the investigation stage shall be given by the criminal judge of peace upon request of the Public prosecutor and a ruling on the detention of the accused at the prosecution stage shall be given by the court ex officio or upon request of the Public prosecutor. In these requests, justification shall be certainly shown and the legal and factual reasons stating that application of judicial control will be insufficient shall be written therein.
- (2) (Amended paragraph: 02/07/2012- C.N. 6352 / art. 97) In the decisions pertaining to detention, continuation of detention or overruling the motion for release on said matter, evidence pointing towards;
 - a) Strong suspicion of crime,
 - b) Presence of grounds for detention,
 - c) The fact that the measure of detention is proportionate,

shall be explicitly shown by being justified with concrete facts. The content of the decision shall be notified to the suspect or accused orally, also a copy thereof shall be given thereto in writing and said matter shall be stated in the decision.

...

(5) Decisions made as per this article and article 100 may be opposed."

19. Article 104 of the Code numbered 5271 is as follows:

- "(1) The suspect or accused may request to be released at every phase of the investigation and prosecution stages.
- (2) Continuation of detention of the suspect or accused or release thereof shall be decided by the judge or court. The decision of refusal may be opposed.

...,

20. Article 108 of the Code numbered 5271 is as follows:

"(1) It shall be decided by the criminal judge of peace, during the investigation stage, whether or not continuation of detention will be necessary during the period the suspect is in a detention house and at intervals of thirty days at the latest upon request of the Public prosecutor by taking into consideration the provisions of article 100.

. . .

(3) The judge or court shall decide ex officio whether or not the continuation of detention of the accused held in a detention house will be necessary in each session or between sessions when conditions thus require or within the time period prescribed under paragraph one."

21. Article 270 of the Code numbered 5271 is as follows:

"The authority to inspect the opposition may notify the objection to the Public prosecutor and the opposing party in order for them to be able to respond in writing. As may the authority conduct inspection and research, so may it order for these to be conducted when it deems necessary."

22. Paragraph (1) of article 271 of the Code numbered 5271 is as follows:

"On the condition that the cases stipulated in the Code are reserved, a decision about the objection shall be made without holding a trial. However, when deemed necessary, the Public prosecutor and then the defense counsel or attorney shall be heard."

IV. EXAMINATION AND JUSTIFICATION

23. The individual application of the applicants dated 11/12/2013 and numbered 2012/1258 was examined during the session held by the court on 21/11/2013 and the following were ordered and adjudged:

A. Claims of the Applicant

24. The applicants claimed that the right to personal liberty and security regulated in article 19 of the Constitution was violated by asserting that the decisions on the continuation of their state of detention were based on stereotype justifications, that the examinations which were conducted both upon their objection and *ex officio* by the court as per article 108 of the Code numbered 5271 were conducted over the file without any hearing, that the principles of adversarial trial and the equality of arms were not complied with as a result of the fact that the opinion received by the Court from the Public Prosecutor was not notified to them.

B. Evaluation

1. In Terms of Admissibility

25. In its opinion, the Ministry of Justice stated that the objection applications on the lawfulness of detention which were filed before a certain court in a way which would cover the examination of both the requests for release and the objections filed against the continuation of detention were evaluated by the European Court of Human Rights ("ECtHR") within the framework of paragraph (4) of article 5 of the European Convention on Human Rights ("ECHR"). Moreover, the Ministry of Justice stated that the ECtHR repeated in may of its decisions its case-law as to the effect that it was not responsible for coming to a conclusion in terms of paragraph (4) of article 5 of the ECHR in relation to the court decisions which were related to the extension of detention in a trial and accepted with the principles of *ex officio* (on its own motion).

- 26. The Ministry of Justice stated that the decision dated 31/10/2012 as issued by the 10th Assize Court of Istanbul as per article 108 of the Code numbered 108 in the concrete incident was issued as a result of an examination conducted *ex officio* without the application or objection of the applicants in relation to the evaluation of the lawfulness of their detention.
- 27. The applicants did not agree with the evaluations that the Ministry of Justice conducted in relation to the admissibility of the application, stated, by repeating their claims which they had stated in the application petition, that the fact that the decisions on the continuation of their state of detention were based on stereotype justifications, that the examination of objection against detention was conducted over the file without any hearing, that the opinion received by the Court from the Public Prosecutor upon the objection against detention was not notified to them and that for this reason, the principle of the equality of arms was not complied with during the trial violated the right to personal liberty and security regulated in article 19 of the Constitution.

28. Paragraph eight of article 19 of the Constitution is as follows:

"For any reason whatsoever, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is made about his/her case as soon as possible and in order to be released immediately if such restriction is in violation of the law."

29. Paragraph (4) of article 5 of the ECHR is as follows:

"Everyone who is deprived of his liberty by arrest or detentionshall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his releaseordered if the detention is not lawful."

- 30. Paragraph eight of article 19 of the Constitution and paragraph (4) of article 5 of the ECHR grant a person whose freedom is restricted for whatsoever reason the right to apply to a court which can speedily decide on the lawfulness of his detention and order his release if his detention is not lawful. The aforementioned provisions of the Constitution and the ECHR essentially constitute a guarantee for the examination of the requests for release or the decisions on the extension of detention in the cases which are tried before a court upon an application of objection as regards the lawfulness of detention.
- 31. In article 108 of the Code numbered 5271, it is provided that it shall be decided by the criminal judge of peace during the investigation stage whether the continuation of detention will be necessary or not in the period during which the suspect is in a detention house and at intervals of thirty days at the latest upon the request of the Public prosecutor by

taking into consideration the provisions of article 100; that it shall be decided by the judge or the court *ex officio* during the prosecution stage whether the continuation of detention of the detained accused will be necessary or not at each session or between sessions when conditions thus require or within a period of thirty days at the latest.

- 32. The evaluation to be carried out according to article 108 of the Code numbered 5271 is carried out on its own motion (*ex officio*), it cannot be considered to be within the scope of the right to object before a judicial authority granted for a person whose freedom is restricted in accordance with paragraph eight of article 19 of the Constitution. For this reason, it should be decided that the complaints of the applicants as to the effect that the examination conducted *ex officio* by the court as per article 108 of the Code numbered 5271 on the date of 31/10/2012 lacked of any hearing and that the principle of adversarial trial was not complied with are inadmissible due to "*lack of venue in terms of subject*".
- 33. The applicants complained about the fact that the decisions issued by the court in relation to the continuation of detention upon objection were based on stereotype justifications. According to this, it is possible for applicants to file a case against the court decisions in relation to the continuation of detention as issued based on stereotype justification with the request for material and/or moral compensation as per articles 141 and 142 of the Code numbered 5271. Therefore, it should be evaluated whether or not the remedies have been exhausted in terms of this complaint.
- 34. In accordance with paragraph three of Article 148 of the Constitution and paragraph (2) of Article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court numbered 6216, in order for an individual application to be lodged to the Constitutional Court, all administrative and judicial remedies which are prescribed for the act or action that is claimed to have caused a violation need to be exhausted. As the individual application is a remedy to claim rights with a secondary quality, what is essential is that rights and freedoms are respected by public authorities and that, in case of a possible violation, this is redressed through ordinary administrative and/or judicial remedies. For this reason, the remedy of individual application can only be resorted to in cases where a violation cannot be removed although the ordinary remedies prescribed in the code have been exhausted (App. No: 2012/338, 2/7/2013, §§ 26-28).
- 35. However, in addition to being accessible, the application remedies that need to be exhausted also need to have the capacity of compensation and offer a reasonable chance of redressing the complaints of the applicant when they are exhausted. Therefore, including these remedies in the legislation is not sufficient per se, it should also be demonstrated that they are effective in implementation or at least it should not be proven that they are not effective (App. No: 2012/338, 2/7/2013, § 29).
- 36. According to paragraph (1) of article 141 of the Code numbered 5271 where the request for compensation is regulated, it is seen that the provisions as to the effect that those who are arrested, detained or whose continuation of detention is decided upon except for the conditions stipulated in codes and the persons who are not brought before the trial authority in a reasonable time and about whom no judgment is issued within this period although they are detained in accordance with law can request all kinds of material and moral damages from the State prescribe an application mechanism in this matter (App. No: 2012/338, 2/7/2013, § 30). However, in paragraph (1) of article 142 of the same Code where the conditions of the request for compensation are regulated, it is provided that a request for compensation can be filed "Within three months following the notification of the finalization of decisions or judgments to

the concerned and in any case within a year following the date of finalization of the decisions or judgments".

- 37. In the concrete incident, of the applicants, Firas ASLAN was taken into custody on the date of 31/12/2008 and released on the date of 27/12/2012, Hebat ASLAN was taken into custody on the date of 31/12/2008 and released on the date of 19/2/2013. The applicants complained about the fact that the decisions issued by the court in relation to the continuation of detention were based on stereotype justifications. According to this, it is possible for applicants to file a case against the court decisions in relation to the continuation of detention as issued based on stereotype justification with the request for material and/or moral compensation as per articles 141 and 142 of the Code numbered 5271. However, there is no example in practice indicating that the remedy stipulated in the mentioned articles of the Code numbered 5271 is effective before the finalization of the judgment in terms of the complaints of the applicants as to the effect that the continuation of detention was based on stereotype justifications (App. No: 2012/338, 2/7/2013, § 32).
- 38. For this reason, it is understood that there is no application remedy with a quality that can redress the victimization of the applicants, which needs to be exhausted. It is seen that the part of the application as to the effect that "the court decisions in relation to the continuation of detention were based on stereotype justifications" is not devoid of basis. It should be decided that the application for which no other reason for inadmissibility has been observed is admissible.
- 39. As it is seen that the claims of the applicants as to the effect that the opinion of the Public prosecutor was not notified to them and that the examination of the objection against detention conducted upon their application was conducted over the file without any hearing are not clearly devoid of basis and also that there is no other reason for inadmissibility, it should be decided that the application is admissible in terms of these complaints.

2. Examination on Merits

40. The complaints of the applicants as to the effect that the court decisions in relation to the continuation of their state of detention were based on stereotype justifications need to be evaluated within the framework paragraph seven of article 19 of the Constitution, their complaints as to the effect that the examination of the objection against detention was conducted over the file without any hearing without complying with the principles of adversarial trial and the equality of arms within the framework of paragraph eight of article 19 of the Constitution.

a. The Claim As to the Effect that Paragraph Seven of Article 19 of the Constitution Was Violated

- 41. The applicants complained about the fact that the application of objection that they filed against being kept as detained was dismissed through stereotype justifications.
- 42. In its opinion, the Ministry of Justice, in relation to the complaints of the applicants as to the effect that their requests for release were dismissed through stereotype justifications, stated that it was sufficient that reasonable doubt or convincing reasons be sought for the continuation of detention up to a certain period according to the decisions of the ECtHR with regard to the matters related to detention, that in the concrete incident, it was necessary to evaluate together whether or not there was convincing evidence indicating that the applicant committed the alleged crime, the total period of detention and the justifications

of the decisions of the local courts on detention, the scope and complexity of the case, the number of the accused, the fact that there were two separate indictments and the two cases were joined, the fact that the alleged crime was an organized crime, whether or not there was any negligence or failure to act which could be attributed to the court of instance during the trial and whether or not the court paid all kinds of attention and diligence expected therefrom in the continuation and completion of the trial.

43. The applicants did not agree with the opinion of the Ministry of Justice and repeated their statements in the application petition.

44. Paragraph seven of article 19 of the Constitution is as follows:

"Detained individuals have the right to request being tried within a reasonable time and being released during investigation or prosecution. Release can be linked to a guarantee in order to ensure that the relevant individual is present at the court during trial or that the sentence is executed."

- 45. In paragraph seven of article 19 of the Constitution, it is enshrined that the individuals who are detained within the scope of a criminal investigation have the right to request the conclusion of the trial within a reasonable period and being released during investigation or prosecution.
- 46. It is not possible to evaluate the issue of whether the period of detention is reasonable or not within the framework of a general principle. Whether the period during which an accused is kept under detention is reasonable or not should be evaluated depending on the characteristics of each case. The continuation of detention can be considered to be justified in spite of the presumption of innocence only if there is a public interest which has more precedence over the right to personal liberty and security enshrined in article 19 of the Constitution (App. No: 2012/1137, 2/7/2013, § 61; For the decision of the ECtHR in the same vein, see: *Labita v. Italy* [BD], no. 26772/95, 6/4/2000, § 152).
- 47. Ensuring that detention does not exceed a certain period of time in a case is primarily the duty of the courts of instance. To this end, all incidents which affect the aforementioned requirement of public interest should be examined by the courts of instance and these facts and cases should be put forth in the decisions as regards the requests for release (App. No: 2012/1137, 2/7/2013, § 62).
- 48. The measure of detention can be resorted to in the presence of a strong indication on the delinquency of individuals and in order to prevent these individuals from escaping, the destruction or alteration of the evidence. Even if these grounds for detention can be initially considered sufficient for the continuation of detention up to a certain period, after the expiry of this period, it is necessary to show that the grounds for detention still continue to exist together with their justifications in the decisions as regards extension. In the event that these justifications are considered as "relevant" and "sufficient", whether the trial process was diligently executed or not should also be examined. Factors such as the complexity of a case, whether it is related to organized crimes or not or the number of the accused are taken into account for the evaluation of diligence shown in the functioning of the process. A conclusion can be reached on whether the period is reasonable or not when all these elements are evaluated together (App. No: 2012/1137, 2/7/2013, § 63).
- 49. Therefore, in the evaluation of whether paragraph seven of article 19 of the Constitution is violated or not, above all, the justifications of the decisions as regards the

requests for release should be considered and whether the decisions are sufficiently justified or not within the framework of the documents submitted in the applications of opposition against detention filed by the individuals who are kept under detention should be taken into account. On the other hand, as long as a strong indication that a person who is detained in accordance with the law has committed a crime and one or more of the grounds for detention continue to exist, it is necessary, as a principle, to accept the state of detention up to a certain period as reasonable (App. No: 2012/1137, 2/7/2013, §§ 63–64).

- 50. The beginning of the period in the calculation of the reasonable period is the date of being arrested and taken into custody in cases where an applicant was arrested and taken into custody for the first time or the date of detention in cases where s/he has been directly detained. The end of the period is, as a rule, the date on which the person is released or the judgment is ruled by the court of first instance (App. No: 2012/1137, 2/7/2013, § 65).
- 51. When the case file is examined, at the hearing dated 4/10/2012, the applicants requested from the Court that they be released by stating "that there were only telephone tappings within the scope of the indictment, that Firas ASLAN did not even have telephone call records and that only his name was mentioned in a telephone call, that it was also accepted by the Supreme Court of Appeals that no penalty could be imposed according to the telephone calls which could not be supported with concrete facts, that secret witnesses and the signatories of minutes did not have any statements against them, that they were detained for 3 years and 9 months".
- 52. The 10th Assize Court of Istanbul which evaluated the requests of the applicants for release decided on the continuation of the state of detention of the applicants on the ground "that in the matter of the fact that the detained accused committed the crime alleged to them; when the statements of victims and minutes were taken into consideration, there were facts indicating the existence of a strong suspicion of crime, that the existence of facts attesting to the existence of a suspicion of escape given the lower and upper limit of the penalties prescribed for the alleged crimes and the alleged crimes were among the reasons for detention shown in paragraph (3) of article 100 of the Code numbered 5271, that moreover, the application of the provisions of judicial control would prove to be insufficient given the reasons for detention and that the measure of detention was proportionate".
- 53. The applicants objected against the decision, the requests for release were dismissed through the decision of the 11th Assize Court of Istanbul dated 15/10/2012 and numbered Miscellaneous Action 2012/718 on the ground "that there was no inappropriateness in the decision in relation to the continuation of the state of detention issued by the court considering the quality and nature of the crime alleged to the accused, the current state of evidence".
- 54. Individuals against whom there is strong indication of delinquency can only be detained in order to prevent their escape, prevent the destruction or alteration of evidence or in other cases such as these which make detention compulsory and are shown in the code. While the fact that these conditions continue during detention is a *sine qua non* condition for the lawfulness and legitimacy of the continuation of detention, it is necessary to put forth whether or not this situation continues with relevant and sufficient justifications and to pay necessary attention in the acts which are carried out (App. No: 2012/338, 2/7/1013, § 70).
- 55. In the concrete incident, the applicants were taken into custody on the date of 31/12/2008 and detained by the 11th Assize Court of Istanbul on the date of 3/1/2009. Of the

applicants, Firas ASLAN was released on the date of 27/12/2012, Hebat ASLAN on the date of 19/2/2013. According to this, of the applicants, Firas ASLAN was deprived of his freedom for 3 years, 11 months and 24 days, Hebat ASLAN for 4 years, 1 month and 16 days.

- 56. When the justifications of the decisions delivered by the courts of instance on objection against detention and the dismissal of objection are examined, it is seen that these justifications did not have diligence and content that would justify the lawfulness of the continuation of detention and the legitimacy of detention and had the quality of being a repetition of the same matters. It cannot be said that these justifications are relevant and sufficient as regards the continuation of the state of detention in the concrete case. The period during which the applicants were kept as detained and which elapsed from the moment at which they were deprived of their freedoms based on the justifications which were not relevant and sufficient until they were released through the decision of the court of first instance cannot be considered as reasonable.
- 57. Due to the reasons explained, it should be decided that paragraph seven of article 19 of the Constitution was violated.

b. The Claim As to the Effect that Paragraph Eight of Article 19 of the Constitution Was Violated

- 58. The applicants asserted that the examination of the objection against detention was conducted over the file without any hearing and that the opinion received by the Court from the Public Prosecutor upon the objection against detention was not notified to them and that for this reason, the principles of adversarial trial and the equality of arms were not complied with in the trial conducted on them.
- 59. In its opinion, the Ministry of Justice stated, in relation to the claim that the examination of objection was conducted without any hearing, that the applicants participated at the hearings during the trial which continued before the 10th Assize Court of Istanbul and had the right to be heard before the judge, that when the decisions of the ECtHR were taken into consideration, examination on the continuation of detention was needed to be conducted by hearing the accused at reasonable intervals, that however, the obligation of hearing the suspect or accused in each examination in relation to detention could make the judiciary system non-functional when it was considered that such an examination needed to be concluded in a very short period of time, that the hearing of the suspect or accused at reasonable intervals was sufficient.
- 60. Moreover, in the opinion, it was stated that in cases where detained persons appeared before judge a short period of time prior to the examination of objection, the fact that a separate hearing was not conducted in the examination of objection would not constitute contrariety to the ECHR.
- 61. In its opinion, the Ministry of Justice stated, in relation to the claim that only the opinion of the Public Prosecutor was received in the examination of objection, that it was necessary to inform parties on the statements of the opposing party and to grant them with the possibility of responding to these statements, stated, in relation to the issuing of a decision on detained persons by hearing them at reasonable intervals, that the amendment made with the Code Concerning Amendments Made in Some Codes Within the Context of Human Rights and the Freedom of Expression dated 11/4/2013 and numbered 6459 entered into force as of 30/4/2013.

62. The applicants repeated their statements in the application petition against the opinion of the Ministry of Justice.

63. Paragraph eight of article 19 of the Constitution is as follows:

"For any reason whatsoever, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is made about his/her case as soon as possible and in order to be released immediately if such restriction is in violation of the law."

i. The Claim That the Objection Against Detention Was Evaluated Without Holding Any Hearing

- 64. Paragraph eight of article 19 of the Constitution grants a person who is deprived of his/her freedom through arrest or detention the right to apply to a judicial authority of venue in relation to the conditions relevant to the procedure and principle that forms the essence of the lawfulness of the deprivation of his/her freedom. It is necessary that the evaluation to be made by the judicial authority of venue in relation to the complaints of the person whose liberty is restricted hold a judicial quality and provide guarantees which are appropriate in terms of the complaints of the persons who are deprived of freedom (For the decision of the ECtHR in the same vein, see: *Çatal v. Turkey*, App. No. 26808/08, 17/4/2012, § 32; *A. and Others v. the United Kingdom* [BD], App. No. 3455/05, 18/2/2009, § 203).
- 65. In the examination conducted during the review of detention, the principles of "adversarial trial" and "the equality of arms" need to be complied with (For the decision of the ECtHR in the same vein, see: Altınok v. Turkey, App. No: 31610/08, 29/11/2011, § 45).
- 66. Paragraph eight of article 19 of the Constitution also guarantee the right to request the effective examination of whether or not detention is contrary to law at the hearings held before a judge and to request that whether or not the state of detention is necessary be determined by authorities in a speedy manner.
- 67. The fact that a person whose liberty is restricted appears before the court of first instance which issues a decision on his/her request for release, but does not appear before the court at which the examination of objection is conducted and no hearing is held here does not violate the guarantees provided through paragraph eight of article 19 of the Constitution as long as the principles of the quality of arms is pursued (For the decisions of the ECtHR in the same vein, see: *Saghinadze and Others v. Georgia*, App. No: 18768/05, 27/5/2010, § 150; *Depa v. Poland*, App. No: 62324/00, 12/12/2006, §§ 48–49).
- 68. In accordance with paragraph eight of article 19 of the Constitution, while it is not necessary to hear the applicant in each objection filed against the decisions issued by courts in relation to the continuation of detention, the detained person has the right to request that s/he be heard at reasonable intervals (For the decisions of the ECtHR in the same vein, see: *Altınok v. Turkey*, App. No: 31610/08, 29/11/2011, § 54; *Knebl v. Czech Republic*, App. No: 20157/05, 28/10/2010, § 85).
- 69. According to paragraph (3) of article 108 of the Code numbered 5271, the judge or court shall be obliged to examine whether or not the continuation of detention of the accused held in a detention house will be necessary in each session or between sessions when conditions thus require; within the time periods of thirty days at the latest in the stage of investigation according to paragraph (1) thereof.

- 70. According to paragraph (1) of article 104 of the Code numbered 5271, a suspect or accused can request that s/he be released without waiting for any period at every phase of the stages of investigation and prosecution. According to article 267 of the same Code, all decisions which are issued on detention *ex officio* or upon request can be the subject of objection before a court.
- 71. In the concrete incident, no hearing was held during the examination of objection. In an examination where the applicants and the Public Prosecutor were not called to the Court and heard to make an oral examination on whether or not the state of detention was contrary to law, it cannot be mentioned that the principle of the equality of arms was violated (For the decision of the ECtHR in the same vein, see: *Çatal v. Turkey*, App. No: 26808/08, 17/4/2012, § 37).
- 72. The 10th Assize Court of Istanbul examined whether or not the state of detention was contrary to law at the hearings which were held at regular intervals and at which the applicants had the opportunity of making a defense. At the hearing held by the Court on 4/10/2012, it was decided that the state of detention of the applicants continue. The applicants had the opportunity of objecting against the decision on the continuation of detention issued on them within the same day, but the request was dismissed by the court. Thereupon, the applicants objected against the decision of the 10th Assize Court of Istanbul on the continuation of the state of detention on the date of 9/10/2012 with the claim that it was contrary to article 19 of the Constitution. The objection filed against the decision of the 10th Assize Court of Istanbul on the continuation of the state of detention was dismissed through the decision of the 11th Assize Court of Istanbul dated 15/10/2012 and numbered Miscellaneous Action 2012/718 based on the written documents of the parties without holding any hearing. On the date of 31/10/2012, the Court reviewed the state of detention of the applicants *ex officio* without holding any hearing in accordance with article 108 of the Code numbered 5271.
- 73. When the rule prescribed in paragraph eight of article 19 of the Constitution is taken into consideration, holding a hearing in each objection filed against a decision of detention including the principle of issuing a decision on the state of a person whose liberty is restricted in a short period of time will make the system of criminal justice non-functional. For this reason, the liabilities in relation to the trial procedure stipulated in paragraph eight of article 19 of the Constitution do not require the holding of a hearing in any case for the objections to be filed against detention unless there is a special case which will require the holding of a hearing (For the decisions of the ECtHR in the same vein, see: *Çatal v. Turkey*, App. No: 26808/08, 17/4/2012, § 40; *Altınok v. Turkey*, App. No: 31610/08, 29/11/2011, § 54).
- 74. In the concrete incident, the applicants had the opportunity of stating their objections in relation to their state of detention and of making an oral defense before the court at the hearing dated 4/10/2012 as held by the 10th Assize Court of Istanbul. For this reason, it is not necessary to hold a hearing during the examination of objection filed before the 11th Assize Court of Istanbul on the date of 15/10/2012 a reasonable period such as 11 days after the examination conducted by the 10th Assize Court of Istanbul.
- 75. Due to the reasons explained, it should be decided that the fact that no hearing was held in relation to the decision of detention issued on the applicants during the examination of objection did not violate paragraph eight of article 19 of the Constitution.

ii. The Claim That the Opinion of the Public Prosecutor Was not Notified

76. In a case where an objection is filed against the state of detention, the Public Prosecutor and the detainee have the right to participate in the case. Moreover, in an application of objection against the state of detention, it is necessary to consider the principle of the equality of arms between the Public Prosecutor and the detainee (For the decisions of the ECtHR in the same vein, see: *Ceviz v. Turkey*, App. No: 8140/08, 17/7/2012, § 52; *Nikolova v. Bulgaria* [BD], App. No: 31195/96, 25/3/1999, § 58).

77. The equality of arms is a principle which requires allowing an applicant to have access to his/her investigation file. As a rule, the opportunity of being able to respond to the opinions of a Public Prosecutor in an effective manner can be possible in the event that an applicant has access to the documents in question. While determining how this requirement will be fulfilled belongs to the law-maker, the statements of parties need to be notified to each other and they need to have the opportunity of being able to respond to these statements.

78. By adding, through article 15 of the Code numbered 6459, the sentence "The opinion of the Public prosecutor, suspect, accused or defense counsel thereof shall not be received when said decision is being made outside the trial." into paragraph (1) of article 105 of the Code numbered 5271 in which the procedure in relation to the examination of the requests of a suspect or accused for release is determined, it is provided that the opinions of the parties will not be received while issuing a decision over the file without holding any hearing. Thus, in the event that the requests for release after the date of 30/4/2013 on which the Code numbered 6459 enters into force are evaluated outside a hearing, the examinations will be conducted over the file and the opinions of the parties will not be received.

79. In the concrete incident, the applicants objected against the decision of the 10th Assize Court of Istanbul on the continuation of the detention on the date of 9/10/2012. The Court received the written opinion of the Public Prosecutor according to article 270 of the Code numbered 5271, but this opinion was not notified to the applicants. The applicants did not have the opportunity of responding to the opinion of the Public Prosecutor. The objection filed against the decision of the 10th Assize Court of Istanbul on the continuation of the state of detention was dismissed through the decision of the 11th Assize Court of Istanbul on 15/10/2012 in line with the opinion of the Public Prosecutor.

80. It should be decided that paragraph eight of Article 19 of the Constitution was violated due to the fact that the opinion received from the Office of the Public Prosecutor in the examination of objection against detention was not notified to the applicants.

3. In Terms of Article 50 of the Code Numbered 6216

- 81. In paragraph (1) of article 50 of the Code numbered 6216, it is stated that in the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged; however, it is provided that legitimacy review cannot be done, decisions having the quality of administrative acts and actions cannot be made.
- 82. In the application, it has been concluded that paragraphs seven and eight of article 19 of the Constitution were violated. Each of the applicants filed a request for a material compensation of 10.000,00 TL and a moral compensation of 20.000,00 TL.

- 83. In relation to the material damage that the applicants claimed to have incurred, no causal relation could be established between the request for compensation and the damage. The requests of the applicants for material compensation should be dismissed.
- 84. In return for the moral damages of the applicants which cannot be compensated only with the determination of the violation due to the intervention in their rights to liberty and security, by considering the characteristics of the concrete incident, it should be decided by discretion that a moral compensation of 4.000,00 TL be paid to Firas ASLAN and 4.200,00 TL to Hebat ASLAN out of the applicants.
- 85. The trial expense of 2.812,50 TL in total composed of the fee of 172,50 and the counsel's fee of 2.640,00 TL, which was made by the applicants and determined in accordance with the documents in the file should be paid to the applicants.

V. JUDGMENT

In the light of the reasons explained; it is **UNANIMOUSLY** decided on 21/11/2013

- A. That the part of the application in relation to the complaints as to the effect that the examination conducted *ex officio* by the court as per article 108 of the Code numbered 5271 on the date of 31/10/2012 was conducted without any hearing and that the principle of adversarial trial was not complied with is INADMISSIBLE due to "*lack of venue in terms of subject*",
 - B. That the application is ADMISSIBLE in terms of other claims,
- C. That paragraph seven of article 19 of the Constitution was VIOLATED due to the fact that the detention exceeded the reasonable period and that the justifications of the decisions in relation to the continuation of detention were insufficient,
- D. That paragraph eight of article 19 of the Constitution was NOT VIOLATED due to the fact that no oral explanation is made and no hearing is held within the framework of the trial procedure in relation to the objection against detention,
- E. That paragraph eight of article 19 of the Constitution was VIOLATED due to the fact that the opinion of the Chief Public Prosecutor was not notified to the applicants or their attorneys within the framework of the trial procedure in relation to the objection against detention,
- F. That a COMPENSATION of 4.000,00 TL be PAID to the applicant Firas ASLAN, 4.200,00 TL to Hebat ASLAN,
- G. That the other requests of the applicants in relation to compensation BE DISMISSED,
- H. That the trial expense of 2.812,50 TL in total composed of the fee of 172,50 TL and the counsel's fee of 2.640,00 TL which was made by the applicants BE PAID TO THE APPLICANTS,
- I. That the payments be made within four months from the date of application of the applicants to the State Treasury following the notification of the judgment; if there happens to be a delay in payment, legal interest be accrued for the period elapsing from the date when this duration ends until the date of payment,

İ. That a copy of the decision be sent to the relevant court.

President Member Member Serruh KALELİ Mehmet ERTEN Zehra Ayla PERKTAŞ

Member Member Erdal TERCAN Zühtü ARSLAN