



**REPUBLIC OF TURKEY**  
**CONSTITUTIONAL COURT**

**FIRST SECTION**

**DECISION**

**ZAFER ÖZTÜRK APPLICATION**

(Application Number: 2012/51)

Date of Decision: 25/12/2012

## **FIRST SECTION**

### **DECISION**

<b>President</b>	:	Serruh KALELİ
<b>Members</b>	:	Burhan ÜSTÜN Nuri NECİPOĞLU Hicabi DURSUN Erdal TERCAN
<b>Rapporteur</b>	:	Esat Caner YILMAZOĞLU
<b>Applicant</b>	:	Zafer ÖZTÜRK

#### **I. SUBJECT OF APPLICATION**

1. The applicant alleged that his constitutional rights were violated by indicating that his spouse had lost her life as a result of a medical error during an operation carried out at a university hospital, that he could not obtain a result from the legal remedies he resorted to due to the incident.

#### **II. APPLICATION PROCESS**

2. The application was lodged in person to the Constitutional Court on 1/10/2012. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. As it was deemed necessary by the Third Commission of the First Section that a principle decision be delivered by the Section in order for the application to be concluded, it was decided 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.

#### **III. FACTS AND CASES**

##### **A. Facts**

4. The relevant facts contained within the application are summarized as follows:

5. The spouse of the applicant was taken ill on 6/2/2001, and passed away on 20/2/2001 following her operation carried out at the university hospital to which she was taken for treatment.

6. The applicant filed a criminal complaint to the Office of the Chief Public Prosecutor of Denizli on 21/3/2001 with the claim that the physician who had conducted his spouse's operation was culpable, in the public action that was filed regarding the physician in question after the investigation that was conducted, it was decided with the decision of the 4th Criminal Court of First Instance of Denizli dated 29/1/2009 and numbered M. 2008/810, D. 2009/35 that the public action be removed due to statute of limitations.

7. The applicant filed a civil case at the 1st Civil Court of First Instance of Denizli on 17/6/2005 with the request of material and moral compensation. With the decision of the Court in question dated 1/10/2010 and numbered M. 2005/394, D. 2010/178, the applicant's request of material and moral compensation was dismissed.

8. Upon the applicant's appeal, the decision of the Court in question was approved with the decision of the 4th Civil Chamber of the Supreme Court of Appeals dated 2/2/2012 and numbered M. 2010/13450, D. 2012/1325.

9. The applicant's request for correction was dismissed with the decision of the same Chamber dated 14/6/2012 and numbered M. 2012/5613, D. 2012/10506 and the decision became final on the same date.

## **B. Relevant Law**

10. Paragraph three of article 148, paragraph seven of provisional article 18 of the Constitution, paragraph (1) of article 45, paragraph (8) of provisional article 1 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216, paragraph one of article 427, paragraph one of article 432, paragraph one of article 440 and paragraph one of article 442 of the abolished Code of Civil Procedure dated 18/6/1927 and numbered 1086.

## **IV. EXAMINATION AND JUSTIFICATION**

11. The individual application of the applicant dated 1/10/2012 and numbered 2012/51 was examined during the session held by the court on 25/12/2012 and the following were ordered and adjudged:

### **A. Claims of the Applicant**

12. The applicant alleged that his rights defined under articles 17 and 36 of the Constitution were violated by indicating that his spouse had lost her life due to a medical mistake made during her operation and that he could not obtain a result despite having seized legal remedies and requested compensation.

### **B. Evaluation**

13. Paragraph three of article 148 of the Constitution is as follows:

*“Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention of Human Rights which are guaranteed by the Constitution has been violated by public force. In order to make an application, ordinary legal remedies must be exhausted.”*

14. Paragraph (1) of article 45 of the Code numbered 6216 with the side heading *“The right to individual application”* is as follows:

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

15. Paragraph (1) of article 76 of the Code numbered 6216 is as follows:

*“Articles 45 to 51 of this Code;*

*a) enter into force*

*...*

*on 23/9/2012.”*

16. Paragraph (8) of provisional article 1 of the Code numbered 6216 is as follows:

*“The court shall examine the individual applications to be lodged against the last actions and decisions that were finalized after 23/9/2012.”*

17. As per the mentioned provisions of the Constitution and Codes, the beginning of the Constitutional Court's venue in terms of time is 23/9/2012, the Court will only be able to examine individual applications that are lodged against actions and decisions that were finalized after this date.

18. One of the general principles of law is the principle of legal security. This principle requires legal norms to be predictable, individuals to be able to have confidence in the state in all of their acts and actions, and the state to avoid methods that would tarnish this feeling of confidence in its legal regulations. As a principle, codes are passed to apply to incidents, acts and actions that succeed their dates of entry into force. For this reason, the facts that a definite date is determined for the Constitutional Court's venue in terms of time with a view to individual applications and that the Court's venue is not applied retrospectively is a requirement of the principle of legal security.

19. In the incident that is the subject of the application, the applicant filed an action for material and moral compensation at the 1st Civil Court of First Instance of Denizli due to the death of his spouse, this action was dismissed with the decision of the Court in question dated 1/10/2010 and numbered M. 2005/394, D. 2010/178. The decision of dismissal in question was approved with the decision of the 4th Civil Chamber of the Supreme Court of Appeals dated 2/2/2012 and numbered M. 2010/13450, D. 2012/1325. The applicant's request for correction was dismissed with the decision of the Chamber in question dated 14/6/2012 and numbered M. 2012/5613, D. 2012/10506, the decision of dismissal became final on the same day.

20. For the explained reasons, as it is understood that the decision that is the subject of the application was finalized before the date of 23/9/2012, which is determined as the date on which the examination of individual applications was initiated, it should be decided that the application is inadmissible due to *“the lack of venue in terms of time”* without examining it in terms of the other admissibility conditions.

## **V. JUDGMENT**

It was decided **UNANIMOUSLY** on 25/12/2012 that the application is **INADMISSIBLE** due to “*lack of venue in terms of time*”, that the trial expenses be left on the applicant.

President  
Serruh KALELİ

Member  
Burhan ÜSTÜN

Member  
Nuri NECİPOĞLU

Member  
Hicabi DURSUN

Member  
Erdal TERCAN