REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

SAMİ ÖZBİL APPLICATION

(Application Number: 2012/543)

Date of Decision: 15/10/2014

Official Gazette Date - Number: 17/12/2014 -29208

DECISION

President	:	Serruh KALELİ
Members	:	Burhan ÜSTÜN
		Nuri NECİPOĞLU
		Hicabi DURSUN
		Hasan Tahsin GÖKCAN
Rapporteur	:	Muharrem İlhan KOÇ
Applicant	:	Sami ÖZBİL
Counsel	:	Att. Özlem GÜMÜŞTAŞ

I. SUBJECT OF APPLICATION

1. The applicant asserted that the right to personal liberty and security and the right to a fair trial, which are regulated under articles 19 and 36 of the Constitution, were violated as a result of a detention that continued for a lengthy period of time, statements that were taken under pressure and without the presence of a defense counsel having been taken as the basis for the judgment and a search having been conducted unlawfully.

II. APPLICATION PROCESS

2. The application was directly lodged with the Constitutional Court on 9/11/2012. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the Third Commission of the First Section on 25/12/2012 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. It was decided by the Section on 12/2/2013 that the examinations pertaining to the admissibility and merits of the application be conducted together and a copy be sent to the Ministry of Justice for its opinion.

5. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on 15/2/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 16/4/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 13/5/2013. The attorney of the applicant submitted their counter statements against the opinion after its due period on 30/5/2013.

III. FACTS AND CASES

A. Facts

7. As expressed in the application form and the annexes thereof and the opinion of the Ministry of Justice, the facts are summarized as follows:

8. The applicant was taken into custody on 15/6/2003 with the accusation of being a member of a terrorist organization and after his statement was taken by the Public Prosecutor on 19/6/2003, he was detained by the Izmir State Security Court (SSC) for the crime of attempting to alter the constitutional order by force in line with the objectives of the illegal organization called MLKP (Marxist Leninist Communist Party).

9. It is indicated in the reasoned decision that the applicant declared on 17/06/2003, while in custody, that ''*I do not have a membership to any associations nor political organizations. I do not have a passport nor a driver's license. I have never been abroad to this day. Neither have I ever participated in meetings or demonstrations in legal areas nor have I ever been taken into custody with regard to this matter. I was taken in custody in 1984 due to DHKP/C and in 1996 due to TKEP/l, sentenced to life imprisonment and I was released in 2001 as a result of the postponement of my sentence. I adopt socialist views. I have undertaken actions to convey messages so as to protest against matters that I have personally found to be wrong. As I proceeded with these actions, I would go to the location where I would carry out the action a day in advance, do some reconnaissance and then carry out the action. While doing this, I would place explosives in places where it would not harm people and also choose a suitable time of the day''.*

10. The statement provided by the applicant to the Public Prosecutor of the SSC is as follows:

''*I do not accept the crimes that I am charged with. In 1996 I was tried at the Istanbul SSC with the accusation of being a member to the organization named TKEP/L (Turkey Communist Emde Party-Leninist). The trial ended in 2001. I was sentenced to 12 years in prison based on article 168 of the TCC and I was given indefinite permission during the period of the death fast protests with the diagnosis of organic brain syndrome. Towards the end of 2001, I was released from prison. Since then I have been residing with my family in Muğla. My treatment is being continued by the Human Rights Association in Istanbul. Officials apprehended me a couple of days ago in Kuşadası Davutlar. Most recently they made accusations that I was involved in the incident when explosives were thrown at the building where the Star Newspaper is located and some other similar incidents. I do not accept the accusations. I have not engaged in any illegal action or activity since my release.*

I know İbrahim, the other accused, since I grew up in Söke. My father used to operate a limestone quarry in Söke before moving to Milas, where he currently is. We lived in Söke until 1995. Later on my father started doing the same business in Milas. I also have relatives in Söke. Ibrahim's father is a teacher. Therefore, we are friends. After I was released from prison, I inquired about Ibrahim at the teacher's lodge in Söke. His father is the director of the Söke Teacher's Lodge. They told me that he was studying in İzmir. This happened last year. I got his mobile number and met him in Izmir, we went to his house in Buca. At that point I was staying with my relatives in Izmir. He told me I could stay at his house. I did not stay there constantly I stayed there from time to time. He gave me one of the keys to his house. He gave me the key because he was going to leave for Davutlar for the summer. The last time I went to stay at that house was one day before I was apprehended. As I mentioned before, I did not stay there constantly but rather from time to time, I did not really need that place. I rarely stayed in that house. After I was apprehended, the police took me to Ibrahim's

house. They entered the house and came back out while I waited in the car. I only went into the house with the police to grab my underwear. I do not know what they obtained from the house. He said, can I ask this from you. The content of the house search minutes was read to him.

He said that this was an absurd, indecent plot. I did not change the keys to the house. The police must have opened the door with the keys that Ibrahim had given me. Ibrahim's family should have a copy of the same key, they should try it.

His statement from the Police Station was read and he was asked. I did not give a statement at the police station. I am exhausted and very weak due to the disorder I have just mentioned. They later told me that they had me sign a document. I did not know what its contents were. . I do not accept the content of this statement of mine either. Threats against my family were made while I was in custody. They told me that I would be made to disappear while in custody. For this reason, I do not accept the content of my statement. I bought the ID under the name of Recep Baysal from those who do this business, which was confiscated from me at the time of my apprehension. I am both wanted as a military deserter and the court that had released me apparently issued a decision of detention again, that's why I obtained this.

I followed from the media the incident of the Akbank Branch in Istanbul Eyüp being robbed that you relayed to me. However, there was no information as to whether the incident was an ordinary robbery or the action of an organization. I do not know that aspect but I heard about the incident. The photograph identification minutes dated 17/06/2003 drafted by the Istanbul Police Department and contained within the documents was read and was asked. These identification minutes might be police manipulation. I did not take part in this robbery action. I was sentenced for being a member of the organization named TKEP/L. According to what you have told me, it's the organization named MLKP that is responsible for this incident. It is not appropriate that a person who benefited from TKEP/L and then was sentenced would be accepted into the organization named MLKP and highlighted within the organization to such a degree as to carry out a robbery in such a short period of time. He said that this is against the usual course of life and the logical rules of life. He asked whether a new identification action was possible with regard to those who had participated in the identification action. It was explained to him that this was possible during the trial phase. He indicated that he hoped to be released after his statement was determined. He went on to say that Ibrahim, the accused, was younger than him, that the last time he saw him was in 1995, that Ibrahim, the accused, might not remember him from those years given that they did not have any relationship during the past year, I do not accept the accusations."

11. It was requested with the indictment of the Office of the Public Prosecutor of Izmir SSC dated 22/08/2003 with the merit number 2003/216 that the applicant be sentenced as per articles 146(1)., 31., 33. and 40 of the Turkish Criminal Code (TCC) numbered 765 for the crime of attempting to alter constitutional order by force.

12. While the public action that was filed with regard to the applicant was being heard in the file with the merit number 2003/286 at the Izmir SSC Number 1, it was merged with the file of the Istanbul SSC Number 4 with the merit number 2003/213 on 9/12/2003 with the justification that "*there is legal and actual connection between them*".

13. In the defense he made before the court on 13/10/2004, the applicant stated that he "*was not a member of the terrorist organization named MLKP, did not accept the accusations brought forward in the indictment, did not take part in the incidents involving explosives or usurpation*".

14. In the case, which was conducted at the 12th Assize Court of Istanbul tasked with article 250 of the Code of Criminal Procedure numbered 5271 after the State Security Courts

were abolished, the applicant was tried with the allegation that he personally committed/participated in nine separate actions of bombing and looting that took place between the dates of 16/7/2002-14/6/2003 and were carried out by the MLKP terrorist organization.

15. In the file with the merit number 2003/213, in which the trial was conducted, judgment was delivered with regard to the other 18 accused on 4/5/2011, the file regarding the applicant was separated with the decision that ''*since it has been understood that the applicant did not come to the hearing, that the counsel of the applicant did not come to the hearing by means of sending a medical report and that the defense counsel Att. Z. K. came to the hearing on a temporary basis, that he declared that he would not be able to make his defense since he was only participating on a temporary basis, given the stage of the file, that the accused and their counsels have been trying to prolong the trial for all kinds of different reasons, that the file has been at the decision stage for almost two years and that the decision has not been able to be delivered for similar reasons and that the trial is unnecessarily prolonged, that the trial has been continuing with the concerned individuals under detention, that the trial integrity would not be disrupted even in the event that the case is separated with regard to the accused Sami Özbil, that the file be separated with regard to the accused Sami Özbil and that a trial be conducted based on another merit with regard to this accused*''.

16. A judgment of life imprisonment was delivered with regard to the applicant due to the crime that was attributed with the decision of the 12th Assize Court of Istanbul dated 17/6/2011 and numbered M.2011/105, D.2011/131.

17. The evaluation part of the conviction decision of the 12th Assize Court of Istanbul dated 17/6/2011 is as follows:

> *"It has been accepted that the accused was apprehended with the A.B. fake identity as a result of the investigation that was carried out in Izmir, that he used the alias of Uzun, that, once his statement and the whole content of the file are evaluated as a whole, it can be derived that he was part of the illegal DHKP/C organization in 1994, that he was detained and tried during that period, that he was taken into custody by the Istanbul police department in 1996 due to his actions and activities on behalf of the TKEP/L organization, that he was tried and sentenced to life imprisonment due to his actions and activities on behalf of the organization, that his sentence was postponed for 6 months since his health deteriorated as a result of the death fast action, that he did not surrender at the end of the postponement and met organization members who carried out activities in Istanbul and Izmir on behalf of the MLKP organization and that he participated in the below actions, which are described with their justifications above.*
>
> *Throwing of explosives in front of the building housing civil courts located in the district of Bornova at around 21:00 on 08/04/2003,*
>
> *Throwing of explosives at the entry door of the M... Cargo Express building located in the district of Karşıyaka on 09/04/2003,*
>
> *Throwing of explosives next to the entry door of the business complex housing the office of the S. Newspaper located in the district of Konak on 14/06/2003,*
>
> *Placing of a bomb in the Kuruçeşme Cemil Topuzlu Park in the District of Beşiktaş on 02.07.2002,*
>
> *Placing of a bomb in Taksim Gezi Park in the district of Beyoğlu on 16.07.2002,*

Placing of a bomb in a rubbish container in front of the Ç. Taxi stand on Çırağan Boulevard in the district of Beşiktaş on 02.09.2002,

Placing of a bomb in the coffee house located in Mahmut Şevket Paşa neighborhood of Okmeydanı in the district of Şişli on 06.09.2002,

Armed looting of the A. Topçular Branch Office located in the Rami Dry Food Wholesalers Complex in the district of Eyüp on 24.01.2003,

Looting of the weapons belonging to A.K. and H.K. in the Cevizli Neighborhood in the district of Maltepe on 17.03.2003,

Therefore, taking into consideration the number, quality and the alarming aspect of the actions that are accepted to have been committed by the accused, it is accepted that the crime of attempting to disrupt or eliminate the totality or a part of the Constitution of the Republic of Turkey by force on behalf of the MLKP terrorist organization was committed.

When the weapons that were seized from the organization house that the accused A.A. used as a cell house, the actions in which these weapons were used, the related registration documents, expert reports, the descriptions by the complainants and the witnesses, the statement of the accused A.A., which is corroborated via the weapons and documents that were seized within the scope of the file, the statements of the complainants and the eyewitnesses, the manner in which the actions were committed as well as with the statement of the accused A.R.K. who delivered his statement during the police phase and thus accepted to be true, the extent of the file at the Izmir Police Department regarding the accused Sami Özbil as well as his statements that overlap with the actions carried out in Izmir, the statement of the accused I.A. regarding whom a decision had been previously delivered, the details of which are included above, and the entire content of the file are considered as a whole, the judgment has been established in the following manner."

18. The judgment of conviction was approved with the writ of the 9th Criminal Chamber of the Supreme Court dated 25/9/2012.

B. Relevant Law

19. Paragraph one of article 31 of the Code dated 18/11/1992 and numbered 3842, which was in force during the period when the applicant was in custody, is as follows:

"*Articles 4, 5, 6, 7, 9, 12, 14, 15, 18, 19, 20 and 22 of this Code shall not be applied in crimes that fall within the jurisdiction of the State Security Courts. With regard to these, the former provisions of the Code of Criminal Procedure numbered 1412 that were in force prior to this amendment shall be applied as they were before being amended."*

20. Article 16 of the Code on the Establishment and Trial Procedures of the State Security Courts dated 16/6/1983 and numbered 2845 is as follows:

"*An individual who is apprehended or detained for crimes that fall within the jurisdiction of the State Security Courts shall be brought before a judge and questioned within forty-eight hours at the latest except for the compulsory period for him/her to be sent to the court that is the closest to the place of apprehension or detention.*

In crimes that are committed in a collective fashion with the involvement of three or more individuals, the Public prosecutor can issue a written order so that this period is extended up to four days for reasons such as the difficulty in the collection of evidence or the high number of perpetrators and similar other reasons. If the investigation is not concluded within this

period, the period can be extended up to seven days upon the request of the Public prosecutor and the decision of the judge.

As per article 120 of the Constitution, with regard to individuals who are apprehended or detained in regions that have been declared as emergency regions, the period that is determined as seven days under paragraph two can be extended up to ten days upon the request of the Public prosecutor and the decision of the judge.

The accused who is detained can see the defense counsel at all times. After it has been decided by the judge to extend the period of custody, the same provision shall be applied with regard to the individual who is under custody."

21. Article 19 of the Code dated 15/7/2003 and numbered 4928.

22. The Code dated 16/6/2004 and numbered 5190 on the Amendment of the Code of Criminal Procedure and the Abolishment of the State Security Courts.

23. Article 148 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271.

IV. EXAMINATION AND JUSTIFICATION

24. The individual application of the applicant dated 9/11/2012 and numbered 2012/543 was examined during the session held by the court on 15/10/2014 and the following were ordered and adjudged:

A. Claims of the applicant

25. The applicant indicated that,

i. Statements that were obtained under pressure while in custody and without the presence of a defense counsel were taken as the basis for the judgment,

ii. Evidence that was found during the search that was conducted without the participation of those required to be present as per the relevant legislation in the absence of an attorney and the suspect was used as the justification for the accusation, that the search was taken as the basis for the judgment without the signatories of the minutes and the owner of the place where the search was conducted being heard,

iii. The individuals who testified to his detriment and carried out the identification were not heard before the court and that the right to questioning was not granted,

iv. He was not allowed to benefit from the attorney's assistance in his defense during the final hearing due to the fact that it was accepted that the excuses were stated in order to prolong the case,

v. Their demand for the gathering of evidence in favor was not evaluated, that the requirements of the right to a fair trial,

vi. Trial within a reasonable period of time and being released while the trial was ongoing, having the court swiftly examine whether or not the action of restriction of liberty was done in line with the code and the compensation of the

damage were not fulfilled and alleged that personal liberty and security were violated, requested that a decision be made on the renewal of the trial.

B. Evaluation

1. Admissibility

a. In Terms of Personal Liberty and Security

26. The applicant alleged that he was kept in detention for a long period of time due to the accusations attributed to himself, that article 19 of the Constitution, which concerns the rights to a trial within a reasonable period and being released while trial is ongoing, having a court swiftly examine whether or not the action of restriction of liberty was done in line with the code and the right to compensation of the damage, was violated.

27. In the opinion of the Ministry of Justice, it was indicated that the complaints of the applicant with regard to detention pertained to the period before the date of 23/09/2012 on which individual application to the Constitutional Court commenced.

28. 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 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."

29. In accordance with this provision, the Constitutional Court shall examine the individual applications to be lodged against the last actions and decisions that were finalized after 23/9/2012. Therefore, the authority of the court in terms of *ratione temporis* shall only be limited to the individual applications that are lodged against the last actions and decisions that were finalized after this date. In the face of this regulation pertaining to public order, it is not possible to expand the scope of the venue in such a way as to also cover the acts and actions that had been finalized prior to the mentioned date (App. No: 2012/832, 12/2/2013, § 14).

30. In order for the application to be accepted, it is also necessary that the last actions or decisions that form the basis for the claim of violation be finalized before 23/9/2012. In the event that it is determined that the last actions or decisions were finalized prior to the mentioned date, it should be decided that the application is inadmissible with regard to the relevant complaints. It is possible to make this determination regarding the jurisdiction of the court at every phase of the examination of the individual application (App. No: 2012/726, 2/7/2013, § 32).

31. However, if the person has been convicted through the decision of the court of first instance at a court case that he is being tried at without being released, the status of detention ends as of the date of conviction. Since, in that case, the legal status of the person is no longer within the scope of being *"detained on the basis of a criminal charge"*. In terms of the examination of an individual application, the significant difference between the conditions of detention and adjudging a conviction requires that. Indeed, when a decision of conviction has been made, it is accepted that the charged crime is committed and proven and that the perpetrator is responsible for this and thus a punishment restricting freedom and/or a fine are adjudged with regard to the accused. Together with the conviction, the strong suspicion of

crime and the status of detention in connection with a reason for detention of the person ends. In this regard, it is not separately required that the conviction decision be finalized (App. No: 2012/726, 2/7/2013, § 33).

32. In the present incident, the applicant was taken into custody on 15/6/2003 and detained with the decision dated 19/6/2003. In the case that is the subject of the application, the state of *''detention due to attributed crime''* ended on 17/6/2011, which is the date on which the decision of conviction of the applicant was delivered.

33. For the explained reasons, as it is understood that the last decision with regard to detention in the incident that is the subject of the applicant's complaints to the effect that *''personal liberty and security''* were violated was delivered prior to 23/9/2012, which is the date on which the venue of the Constitutional Court in terms of time started, it needs to be decided that this part of the application is inadmissible due to *''lack of venue in terms of time''*.

b. In Terms of the Right to a Fair Trial

34. The applicant alleged that the right to a fair trial was violated by indicating that statements that were obtained under pressure while in custody and without the presence of a defense counsel were taken as the basis for the judgment, that evidence that was found during the search that was conducted without the participation of those required to be present as per the relevant legislation in the absence of an attorney and the suspect was used as the justification for the accusation, that the search was taken as the basis for the judgment without the signatories of the minutes and the owner of the place where the search was conducted being heard, that the individuals who testified to his detriment and carried out the identification were not heard before the court and that the right to asking questions was not granted, that the right to benefiting from an attorney's assistance in his defense was violated during the final hearing by accepting that the excuses were stated in order to prolong the case and that their demand for the collection of evidence in favor was not evaluated.

i. Complaint With Regard to the Search

35. The applicant alleged that he was accused due to items that were seized during the search that was conducted without the signatories of the minutes and the owner of the place where the search was conducted being heard and that the unlawful search was taken as the basis for the judgment.

36. The Ministry of Justice indicated that the minutes pertaining to the search that was conducted in the residence belonging to the other accused İ.A. lacked the signature of the applicant or the other accused, that however; the accused İ.A. confirmed in his statement the evidence that was seized as a result of the search.

37. It is primarily the duty of courts of instance to accept and evaluate the evidence brought forward by the parties. For this reason, unless it is openly arbitrary, deciding on whether a certain type of evidence is admissible, on the type of the evaluation process or on whether the applicant is indeed guilty or not is not the duty of the Constitutional Court (App No: 2013/7800, 18/6/2014, § 33).

38. It is indicated in the decision that was delivered at the end of the first instance trial that *''during the investigation of subsequent incidents of explosives being thrown in Izmir, the phone conversations of the accused started to be tapped based on a decision that had been delivered by the Izmir SSC in advance, that the accused Sami Özbil was apprehended along with the other accused İ.A., regarding whom a decision had been previously delivered, on 15/06/2003 in the Kuşadası district of Aydın province, that the house in the district of Buca in which they dwelled together was located based on their statements at the police department, that the door of the house was opened with the key that was obtained from the handbag possessed by the accused Sami Özbil, who had been apprehended with the fake ID under the name of R.B., that 2 defensive grenades, 1 German make and 1 Russian make, various organization documents, 4 computer disks containing the addresses of consulates of foreign countries and companies, in addition, 1.255 liras and the substance potassium nitrate, which has explosive properties, were seized as a result of the search that was conducted, that it was determined in the expert reports pertaining to finger prints detected in the house and on the items that the finger prints of the accused were found''.*

39. It is observed that the accused İ.A., who is the tenant of the place where the search was conducted, in the statement he gave at the office of the judge on duty on 16/06/2003 that "*when I was hastily taken into custody after I was apprehended in Davutlar I left without taking my key to my house, so the police gave me the key that was on Sami , I opened the door, when I got inside the key I had given him was lying on the stove along with the lock that was changed, the old lock was of the K. brand, but when I got inside I understood that the lock had been changed, I could not ask because we were not allowed to see each other with Sami, a grenade was found under the floor cushions in the living room, another grenade was found under the counter in the kitchen, some other folios and similar materials were found, I do not know who left those, I had not stopped by the house for about fifteen days prior to this search, I do not know who changed the lock and brought the materials to the house where I was staying, I was told by the police that Sami had brought these, they had told me that he was under surveillance. I thought Sami Özbil's name was Ahmet, he told me his name was Ahmet when we first met, I never asked his surname*" and it can be seen that he stated in his defense dated 12/11/2003 that was taken by the Criminal Court of First Instance of Söke that *''I have not produced or used explosives as it is alleged. I was in the Davutlar district of Kuşadası on the date of the incident. I had given the key to the house to Sami Özbil, whom I had met on some occasion. Then I was taken in with an operation that was carried out. They took me to the house that I had previously left. They opened the door with the key that they said to have taken out of Sami Özbil's bag, not with the key that was on me . They showed me the explosives, which they said were found during the search that was carried out inside. This is all I know as far as the explosives that were found in my house''.*

40. While matters pertaining to the conduct of the search and the evidence being obtained are described in the statement that the other accused İ.A., who resided in the residence, gave before the judge with regard to the search whereby some evidence serving as the justification for the accusation was obtained, when the statements belonging to the individual residing in this place are taken into consideration, it is concluded that the minutes

that were drafted lacking the signature of the resident alone would not result in considering the search and the evidence that was obtained to be unlawful.

41. Due to the reasons explained, it should be decided that this part of the application is inadmissible due to the fact that "*it is clearly devoid of basis*" without being examined with regard to other admissibility criteria.

ii. Complaints Pertaining to the Principle of Adversarial Trial and the Dismissal of Requests

42. The applicant alleged that the individuals who testified to his detriment and carried out the identification were not heard before the court and that the right to questioning was not granted, that their demand for the gathering of evidence in favor was not evaluated.

43. The Ministry of Justice indicated in its opinion that how the matters brought forward by the applicant would contribute to the trial with a view to discovering the material truth was not stated, that, as a rule, it was up to the applicant to justify and prove his complaints.

44. Clause (3) of article 47 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 with the side heading of *''Individual application procedure''* is as follows:

> *"In the application petition… the right and freedom which is claimed to have been violated due to the transaction, action or neglect and the provisions of the Constitution which are relied on and the reasons for violation…, needs to be stated. Evidence relied upon and the originals or samples of the transaction or the decisions that are claimed to have led to the violation and the document regarding the payment of the fee must be attached to the application."*

45. Paragraphs (1) and (2) of article 48 of the Code numbered 6216 with the side heading *''The conditions and evaluation of admissibility of individual applications''* are as follows:

> *"(1) In order for the decision of admissibility regarding the individual application to be held, the conditions prescribed in articles from 45 to 47 must be fulfilled.*
>
> *(2) The Court can decide that applications which bear no importance as to the application and interpretation of the Constitution or regarding the definition of the borders of basic rights and freedoms and whereby the applicant has incurred no significant damages and the applications that are expressly bereft of any grounds are inadmissible."*

46. As per paragraph numbered (3) of article 47 and paragraphs numbered (1) and (2) of article 48 of the Code numbered 6216 and the relevant paragraphs of article 59 of the Internal Regulation, it rests with the applicant to prove his allegations about the incidents by submitting the evidence relevant to the incidents that are the subject matter of the application to the Constitutional Court and by making statements on the fact that the provision of the Constitution that is relied on was violated according to him (App. No: 2013/276, 9/1/2014, § 19).

47. Which of the rights within the scope of an individual application was violated for what reason and the relevant justifications and evidence needs to be explained in the application petition (App. No: 2013/276, 9/1/2014, § 20).

48. It is understood that in the present incident the applicant was tried along with the other eighteen accused, for the crimes of twenty-three separate bombings, possession of explosives, looting, damage to property as well as attempting to alter the constitutional order by force via these actions as a member of an illegal armed organization, that it was considered to be proven that the applicant had carried out or participated in nine separate bombing and looting actions.

49. While the applicant alleges that the individuals who testified to his detriment and carried out the identification were not heard before the court and that the right to questioning was not granted and that their demand for the collection of evidence in favor was not evaluated, he alleges in general terms that his rights were violated without explaining which witness and evidence this relates to and indicating its impact on the trial.

50. In individual applications that are lodged with the Constitutional Court, the facts that are the basis for the allegation of violation needs to be clearly demonstrated, documents pertaining to actions and decisions that would elucidate the application needs to be submitted. A right violation that is alleged to have taken place as a result of a certain action or decision needs to be justified in a concrete manner so as to allow for examination. The Constitutional Court does not have the liability of replacing the applicant and ex officio inspecting lawfulness in every matter based on general and abstract allegations and determining that fundamental rights have been violated (App. No: 2013/276, 9/1/2014, § 20).

51. Due to the reasons explained, it should be decided that this part of the application is inadmissible due to the fact that "*it is clearly devoid of basis*" without being examined with regard to other admissibility criteria.

iii. Complaint that Attorney's Assistance Was Not Allowed in the Prosecution Phase

52. The applicant alleges that his right to benefit from an attorney's assistance in his defense was violated during the final hearing because it was accepted that the excuses were stated in order to prolong the case.

53. As a matter of fact, a decision was delivered in the case in which the trial was conducted on 4/5/2011, however; the file with regard to the the applicant was separated by indicating that it was understood that the applicant did not come to the hearing, that the counsel of the applicant did not attend the hearing by means of sending a medical report and that another attorney came to the hearing in his place on a temporary basis, that he declared that he would not be able to make his defense since he was only participating on a temporary basis, given the stage of the file, that the accused and their counsels had been trying to prolong the trial for all kinds of different reasons, that the file had been at the decision stage for almost two years and that the decision had not been able to be delivered for similar reasons and that the trial was unnecessarily prolonged, that the trial had been continuing with the concerned individuals under detention.

54. It is observed that in the hearing dated 17/6/2011, during which the judgment was delivered in the file that had been separated with regard to the applicant, the applicant and the

defense counsel made and submitted in writing their defenses, that these matters were indicated by the Court in the minutes of the hearing.

55. Due to the reasons explained, it should be decided that this part of the application is inadmissible due to the fact that "*it is clearly devoid of basis*" without being examined with regard to other admissibility criteria.

iv. Complaint that Defense Counsel's Assistance Was Not Allowed In Custody

56. As it is understood that this part of the application is not clearly devoid of basis and that there is no other reason for inadmissibility, it needs to be decided that the application is admissible.

2. In Terms of Merits

57. Paragraph one of article 36 of the Constitution is as follows:

"Everyone has the right to make claims and defend themselves either as a plaintiff or a defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means."

58. Paragraph (1) and subparagraphs (c) and (d) of paragraph (3) of article 6 titled *"Right to a fair trial"* of the European Convention on Human Rights (ECHR) are as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independentand impartial tribunal established by law...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

c) To defend himself in person or through legal assistance ofhis own choosing or, if he has not sufficient means to payfor legal assistance, to be ex officio given it free when the interestsof justice so require;

d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

59. The applicant alleges that statements that were obtained under pressure while in custody and without the presence of a defense counsel were taken as the basis for the judgment.

60. The Ministry of Justice indicated that in the justification for the decision of conviction the court of first instance relied on the statements of the other accused A. G. A., İ. A. and A. R. K., descriptions by the complainant and witnesses, expert reports and the evidence that was seized during searches in addition to statements of law enforcement.

61. The applicant indicates in general terms that the trial was not conducted in compliance with fairness. Within this framework, he states that his conviction was decided by relying on remarks in statements which the contents of were not accepted, and were signed under pressure without the benefit of having access to an attorney while he was in custody..

62. The right to not being forced to provide statements and evidence to one's detriment in a criminal case requires that the attributed crime be proven without resorting to evidence that has been obtained by force or pressure against the will of the accused. Therefore, the right in question is closely linked with the principle of the presumption of innocence covered by article 6/2 of the ECHR (*Kolu v. Turkey*, App. No: 35822/97, 2/8/2005; *Salduz v. Turkey* (BD), App. No: 36391/02, 27/11/2008).

63. According to the case law of the ECtHR, the right to remain silent and the right to not being forced to provide statements and evidence to one's detriment, which is one of its manifestations, are among the most fundamental elements of the right to a fair trial, which is enshrined under article 6 of the ECHR and also acknowledged by international norms. The guarantees, which protect the accused from excessive pressure by officials, exist in order to avoid judicial mistakes and to fulfill the objective of the right (*Dağdelen and others v. Turkey*, App. No: 1767/03, 14246/04 and 16584/04, 25/11/2008).

64. The ECHR case law with regard to benefiting from the assistance of defense counsel indicates that, in order for the right to a fair trial to be sufficiently implementable and effective, as a rule, the accused needs to be granted the right of access to his/her lawyer starting from his/her first interrogation by law enforcement. It is pointed out that this right can only be restricted in the event that the specific circumstances of the case lead to the emergence of compulsory reasons for the restriction of this right, that even in the exceptional case of using compulsory reasons as justification for the restriction of the right of access to a lawyer, this restriction should not damage the rights of defense, that in the event that the statements of the accused, who has not been granted access to a lawyer , obtained during law enforcement investigation are used in the decision of conviction, the rights of defense will be considered to have been irredeemably damaged (Salduz v. Turkey)

65. In the present incident, it is stated in the justification with regard to Action 1 (throwing of explosives in front of the building housing civil courts located in the district of Bornova at around 21:00 on 8/4/2003), Action 2 (throwing of explosives at the entry door of the M... Cargo Express building located in the district of Karşıyaka on 9/4/2003) and Action 3 (throwing of explosives next to the entry door of the business complex housing the office of the S. Newspaper located in the district of Konak on 14/6/2003) of the nine separate actions attributed to the applicant that *''taking into consideration the acceptance by the accused during the police department phase, the explosives, organizational documents that corroborate this acceptance, the fact that the finger prints on the explosives and in the house that belongs to the accused, the expert reports that were commissioned and the whole content of the documents, the statements of denial by the accused during the office of the prosecutor and court phases were not found to be credible, that a full personal conviction was formed to the effect that the accused committed all three of the attributed actions''.*

66. With regard to Action 4 (placing of a bomb in the Kuruçeşme Cemil Topuzlu Park in the District of Beşiktaş on 2/7/2002), Action 5 (placing of a bomb in Taksim Gezi Park in the district of Beyoğlu on 16/7/2002), Action 6 (placing of a bomb in a rubbish container in front of the Ç. Taxi stand on Çırağan Boulevard in the district of Beşiktaş on 2/9/2002), Action 7 (placing of a bomb in the coffee house located in Mahmut Şevket Paşa neighborhood of Okmeydanı in the district of Şişli on 6/9/2002) and Action 9 (looting of the weapons belonging to Adem Köse and Hakkı Köse in the Cevizli Neighborhood in the district

of Maltepe on 17/3/2003), which are accepted to have been carried out by the accused; *the statement of the accused A.A. at the police department, the weapons that were seized from the cell house he used, expert reports pertaining to these weapons and the whole content of the file* was taken as the basis for the conviction.

67. With regard to Action 8 (armed looting of the A. Topçular Branch Office located in the Rami Dry Food Wholesalers Complex in the district of Eyüp on 24/1/2003), which is considered to be proven to have been committed by the applicant, *the statement of the accused A.A. at the police department, the statements of bank employees S. D. G., F. K. and G. E. and N.Y., who was present at the bank as a customer, to the effect that the individual in the video camera footage with the Kalashnikov brand long barrel weapon in his hand is the accused Sami Özbil as well as the statement of Sami Özbil's father at the police department corroborating these statements, the weapons that were seized from the cell house that the accused A.A. used, expert reports pertaining to these weapons and the whole content of the file* were taken as the basis for the conviction.

68. It is observed that the proof of Actions 1, 2 and 3, which are accepted to have been committed by the applicant, was based on the statement given at the police department, which the accused later on did not accept , and the explosives and other materials that were seized as a result of the search without indicating their link to the actions; that actions 4,5,6,7 and 9 were based on the statements of the accused A.A., the content of which he did not accept later and which had been obtained without the presence of a defense counsel while in custody, and the materials that were seized from the residence of this accused. It is observed that with regard to Action 8, in which the accused is acknowledged to have participated, the statement of the other accused A.A., the content of which he did not accept later, in addition the statements of the witnesses were taken as the basis for the judgment.

69. The ECtHR has considered that in the event that the confession during the investigation phase is refused before the judge by indicating that it has been made under ill-treatment and torture, the utilization of the confession as grounds without examining this matter prior to proceeding to the merits is a significant deficiency (*Hulki Güneş v. Turkey*, App. No: 28490/95, 19/6/2007).

70. In addition to this, a practice that relies on a rule barring the access of an accused to a lawyer while in custody alone can result in the failure to fulfill the requirements of a fair trial (Salduz v. Turkey).

71. During the period when the applicant was in custody, as a rule, benefiting from the assistance of the defense counsel with regards to crimes that fell within the jurisdiction of the State Security Courts was only possible after a certain stage. The relevant legislation does not allow access to a lawyer within the normal custody duration during the dates in question. It is observed that the applicant was kept in custody for four days under the described circumstances.

72. It is observed that in the evaluation regarding the actions within the scope of the crime attributed to the applicant, the statements that were allegedly provided by himself and other accused while in custody, without the presence of a defense counsel and under pressure were accepted as evidence.

73. It is observed that the judgment with regard to the conviction of the applicant for the attributed crime by means of committing the mentioned actions was delivered based on the statement of the applicant, which was taken without the presence of a defense counsel and which was not confirmed later in court, in addition to other evidence, that these statements that were obtained while in custody were used as evidence in a definitive manner for his conviction , that the defense counsel assistance and other guarantees of the trial procedure that were provided in later stages could not repair the damage that was dealt to the applicant's right to defense in the beginning of the investigation.

74. Even though article 148 of the Code numbered 5271, which came into force while the trial was ongoing, is of the quality to ensure the effectiveness of the defense during the prosecution phase with regards to law enforcement statements that are obtained without the assistance of a defense counsel and not confirmed before the judge or the court, this matter was not discussed during the first degree trial and this deficiency was not remedied during the appeal phase.

75. The failure to grant the opportunity of access to a lawyer during the custody phase and the fact that the statements that were obtained during this period were taken as the basis for the decision of conviction as a whole created the result that the trial was not conducted in compliance with fairness.

76. Due to the aforementioned reasons, it should be decided that the applicant's right to a fair trial, which is regulated under paragraph one of Article 36 of the Constitution, was violated.

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

77. Paragraphs (1) and (2) of article 50 of the Code numbered 6216 is as follows:

"(1) At the end of the examination of merits, it shall be decided that the right of the applicant has been violated or has not been violated. 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 ...

(2) If the determined violation arouse out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding a retrial, compensation may be adjudged in favor of the applicant or filing a claim before the general courts may be shown as a remedy. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

78. In the application, it has been concluded that article 36 of the Constitution was violated. It is clear that the retrial of the applicant is the most suitable remedy for the removal of the violation within the scope of the right to a fair trial.

79. It is necessary to decide that the trial expenses of TRY 1.672,50 in total, composed of the application fee of TRY 172,50 and the counsel's fee of TRY 1.500,00, which were made by the applicant, be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 15/10/2014;

A. That the applicant's,

1. Allegation that his personal liberty and security were violated is INADMISSIBLE due to *''lack of venue in terms of time'',*

2. Complaint that access to a lawyer was not granted while in custody is ADMISSIBLE,

3. Other complaints with regard to the right to a fair trial are INADMISSIBLE due to being *clearly devoid of basis,*

B. Right to a fair trial regulated under Article 36 of the Constitution WAS VIOLATED**,**

C. That the file be SENT to the relevant court for a retrial to be conducted with a view to removing the consequences of the violation,

D. That the trial expenses of 1.672,50 TL in total, composed of the application fee of 172,50 TL and the counsel's fee of 1.500,00 TL, which were made by the applicant, PAID to the applicant.

President	Member	Member
Serruh KALELİ	Burhan ÜSTÜN	Nuri NECİPOĞLU

Member	Member
Hicabi DURSUN	Hasan Tahsin GÖKCAN