



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2013/1430

Date of Decision: 21/11/2013

FIRST SECTION

DECISION

President : Serruh KALELİ
Members : Mehmet ERTEN
Zehra Ayla PERKTAŞ
Erdal TERCAN
Zühtü ARSLAN
Rapporteur : Murat AZAKLI
Applicant : İhsan Dođramacı Bilkent University
Counsel : Att. Hüseyin ALTAŞ

I. SUBJECT OF APPLICATION

1. The applicant alleged that the fact that compensation was adjudged as a result of the case filed against it with the claim that it confiscated without expropriation the immovable property of which it was a shareholder violated its rights to property and to a fair trial.

II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on the date of 19/2/2013. 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. It was decided on 18/11/2013 by the Second Commission of the First Section that as it was deemed necessary to take a principle decision in order for the application to be concluded, 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. INCIDENTS AND FACTS

A. Incidents

4. The relevant facts in the application petition are summarized as follows:

5. The parcels numbered 11, 17, 18, 19 and 20 with the block number 26080 located in Lodumu Quarter of Çankaya district of Ankara province are registered in the title deed in shares by the applicant, the State Treasury and other persons.

6. As a result of the case filed against by Ali Baştüzel and his twenty five friends against the applicant before the 11th Civil Court of First Instance of Ankara with the claim that the parcels numbered 11, 17, 18, 19 and 20 with the block number 26080 were confiscated without expropriation, it was decided that the case be admitted with the decision dated 14/12/2011 and numbered M.2009/470, D.2011/477 on the ground that confiscation without expropriation occurred, that 7.500 TL be collected from the applicant, that the registries of the immovable properties in the title deed be canceled and registered in the title deed on behalf of the applicant.

7. The judgment was approved with the decision of the 5th Civil Chamber of the Supreme Court of Appeals dated 5/6/2012 and numbered M.2009/1792, D. 2009/11907 by indicating that the case was related to the request for the collection of the price of the immovable property which was confiscated without expropriation.

8. Upon the request for correction, the judgment was corrected in terms of the adjudged fee and approved with the decision of the 5th Civil Chamber of the Supreme Court of Appeals dated 17/12/2012 and numbered M.2012/19705, D. 2012/26809.

9. The mentioned decision was notified to the applicant on the date of 21/1/2013.

B. Relevant Law

10. According to the Decision of the Supreme Court of Appeals on the Consolidation of Case-Law dated 16/05/1956 and numbered 1/6; *“A person whose immovable property is confiscated without expropriation can file a case for the prevention of confiscation against the relevant public legal person, so can s/he file a case for the collection of the price of the immovable property in the event that s/he consent to the situation with this action.”*

IV. EXAMINATION AND JUSTIFICATION

11. The individual application of the applicant dated 19/2/2013 and numbered 2013/1430 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

12. The applicant asserted that its right to property defined in article 35 and right to a fair trial defined in article 36 of the Constitution were violated and filed a request for the holding of a retrial by stating that although it had shares over the immovable properties located in Lodumu Quarter of Çankaya district and the shares which belonged to other persons were not used, a compensation was adjudged as a result of the action for compensation filed against it based on confiscation without expropriation, that although the expert reports drawn up in the mentioned case were contrary to facts, its objections with regard to this were not taken into consideration, that the heirs of some persons who were shown as shareholders in the title deed registry were not included in the case, that there was no action carried out by using public force, that a decision was issued against it as a result of a case arising out of a relation between those that were completely equal, that the case had a quality of a dispute arising out of the use of the right to shared ownership, that therefore, it had the right to lodge an individual application, that the applicant could not be considered as a public legal person that used public power, that the consideration of foundation universities as public legal persons in line with the law did not mean that they used public force in all activities of them, that in cases where public force was not used, it needed to be considered as

a private law legal person, that it used a small portion of its shares over the immovable properties.

B. Evaluation

13. Article 130 of the Constitution is as follows:

“For the purposes of educating, within an order that is based on the contemporary training and education principles, the manpower which meets the requirements of the nations and the country; universities having the identity of a public entity and also scientific autonomy which are comprised of several units in order to deliver training and education at various levels based on secondary education, to conduct scientific research, to issue publications and to perform as consultants and to serve the country and humanity are established by the State through the means of law.

Higher education institutions may be established by foundations under the oversight and supervision of the State in line with the principles and procedures specified in law and on the condition that no purpose of earnings and profit-making are maintained.

...

In terms of their academic studies except for financial and administrative matters, of the provision of the teaching staff and of security, the higher education institutions established by foundations are subject to the provisions set forth in the Constitution in relation to the higher education institutions established by the State.”

14. The first sentence of paragraph (2) of article 46 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 is as follows:

“(2) Public legal persons cannot make individual applications.”

15. Subparagraph (d) of paragraph one of article 3 of the Code on Higher Education dated 4/11/1981 and numbered 2547 is as follows:

“Definitions of the concepts and terms used in this Code are given below.

...

University: A higher education institution which has scientific autonomy and public legal personality, performs education-training, scientific researches, publications and consulting at a high level; is composed of faculties, institutes, colleges and similar organizations and units.”

16. Additional article 2 of the Code Numbered 2547 is as follows:

“Foundations can establish a vocational college within the framework of the provisions of this Code on the condition that it is not for the purpose of profit. This vocational college shall have a public legal personality and be established with the resolution of the Council of Ministers by receiving the opinion of the Council of Higher Education. ...”

17. Article 5 of the Regulation on Foundation Higher Education Institutions dated 31/12/2005 is as follows:

“A foundation university is a higher education institution which has a public legal personality established by foundations through a code, performs researches, education-

training, scientific researches, publications and consulting at a high level, is composed of faculties, institutes, colleges, vocational colleges, support, preparation schools or units, similar institutions and units on the condition that they only spend their revenues so as to develop their own universities and the institutions and organizations whose ownership belongs to universities."

18. The first paragraph of Additional article 5 added into the Code on the Organization of Higher Education Institutions dated 28/3/1983 and numbered 2809 through the Code dated 5/3/1992 and numbered 3785 is as follows:

"In Ankara, a University named İhsan Doğramacı Bilkent University which has a public legal personality has been established by Hacettepe Institute of Child Health Foundation, Hacettepe Medical Center Foundation and Hacettepe University Foundation on the condition that it is subject to the provisions of the Code on Higher Education numbered 2547 with regard to foundation higher education institutions."

19. The paragraph added into Additional article 7 of the Code numbered 2547 through article 24 of the Code on the Amendment of the Organization of Public Financing and Debt Management and Some Codes and Decrees in the Force of Code dated 3/4/2013 and numbered 6456 is as follows:

"Higher education institutions established by foundations cannot acquire any immovable property by way of expropriation."

20. A foundation university is defined as a higher education institution which has a public legal personality established by foundations through a code, is composed of institutes and units that perform researches, education-training, scientific researches, publications and consulting at a high level on the condition that they only spend their revenues so as to develop their own universities and the institutions and organizations whose ownership belongs to universities.

21. Article 130 of the Constitution prescribes that a university which is composed of various units so as to serve for humanity by training man power with a quality to meet the requirements of the country within an order in accordance with the requirements of modern education and training and universal principles covered by the concept of "university", which has a public legal personality and scientific autonomy can only be established by a code. In accordance with article 130 of the Constitution, universities are organizations which have a public legal personality irrespective of their being established by the state or foundations. Public legal personality is one of the compulsory characteristics of universities and one of the elements of their legal structures. "Public legal personality" required by paragraph one of article 130 of the Constitution is similarly a compulsory quality for the universities that foundations will establish in accordance with the last paragraph of this article (CC, M.1991/21, D.1992/42, 29/6/1992).

22. Foundation universities are established by the state through a code and as a public legal person. As the quality of "public legal personality" which is a natural consequence of the obligation of being established by a code is a feature that is unique for the structure of universities, it is clear that the universities established by foundations also have a public legal personality.

23. In paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code numbered 6216, everyone claiming that its/his/her fundamental rights and freedoms are violated by public force is granted with the right to lodge an individual

application to the Constitutional Court. However, in the first sentence of paragraph (2) of article 46 of the mentioned Code, it is stated that public legal persons cannot lodge an individual application. Foundation universities are also included within the concept of "*public legal person*" here.

24. The applicant University was established on the date of 20 October 1984 with the decisions of *İhsan Dođramacı Education Foundation*, *İhsan Dođramacı Health Foundation* and *İhsan Dođramacı Science and Research Foundation* and started education in the years of 1986 – 1987.

25. The applicant claimed that it had the capacity of an individual application by asserting that public force was not used in the action for compensation filed against it based on confiscation without expropriation with regard to the immovable property of which it was a shareholder, that the case was a case between the equals as private law legal persons and that there was a dispute between the parties arising out of the use of the right to shared ownership.

26. In the first sentence of paragraph (2) of article 46 of the Code numbered 6216, it is regulated that public legal persons will not be able to lodge an individual application and in the mentioned provision, no differentiation is made as to whether or not the incident which is the subject matter of the application is an incident that arises out of the relation of private law or the use of public force. In this respect, there is no importance of the quality of the legal relation in which the relevant administration is involved.

27. As individual application is a remedy granted against the violations of rights arising out of the use of public force, the granting of the right to individual application for public legal persons does not accord with the legal quality of this constitutional entity (App. No: 2012/22, § 28, 25/12/2012).

28. When the mentioned provisions of the Constitution and Code are taken into account, universities whose establishment, duties and authorities are regulated by a code, which are equipped with the privileges and liabilities of public force and have a public legal personality do not have the capacity of an individual application.

29. Due to the reasons explained, as it is understood that the applicant which is a university that has a public legal personality does not have the capacity of an individual application, it should be decided that the application is inadmissible due to "*the lack of venue in terms of person*" without it being examined in terms of other conditions of admissibility. Erdal TERCAN has disagreed with this opinion in terms of the right to a fair trial.

V. JUDGMENT

It is decided on the date of 21/11/2013

1. With the dissenting vote of Erdal TERCAN in terms of the right to a fair trial and **BY MAJORITY OF VOTES**, that the application is **INADMISSIBLE** due to "*the lack of venue in terms of person*" with regard to the right to property and to a fair trial,

2. **UNANIMOUSLY** that the trial expenses be charged on the applicant.

President
Serruh KALELİ

Member
Mehmet ERTEN

Member
Zehra Ayla PERKTAŞ

Member
Erdal TERCAN

Member
Zühtü ARSLAN

DISSENTING OPINION

The applicant is İhsan Dođramacı Bilkent University. As a result of the case filed against by Ali Bařtüz el and his twenty five friends against the applicant before the 11th Civil Court of First Instance of Ankara with the claim that it confiscated without expropriation the parcels numbered 11, 17, 18, 19 and 20 with the block number 26080 located in Lodumu Quarter of Çankaya district of Ankara province, it was decided that the case be admitted with the decision dated 14/12/2011 and numbered M.2009/470, D.2011/477 on the ground that confiscation without expropriation occurred, that 7.500 TL be collected from the applicant, that the registries of the immovable properties in the title deed be canceled and registered in the title deed on behalf of the applicant. This decision was also approved at the stages of appeal and correction and became final on the date of 17/12/2012.

The applicant asserted that its right to property defined in article 35 and right to a fair trial defined in article 36 of the Constitution were violated and filed a request for the holding of a retrial by stating that it had shares which belonged to them over the immovable properties in question, that however, it was sentenced to pay a compensation as a result of the action for compensation filed against it based on confiscation without expropriation, that the expert reports drawn up in the case were contrary to facts, that its objections with regard to this were not taken into consideration, that the heirs of some persons who were shown as shareholders in the title deed registry were not included in the case, that there was no action carried out by using public force, that a decision was issued against it as a result of a case arising out of a relation between those that were completely equal, that the case had a quality of a dispute arising out of the use of the right to shared ownership, that therefore, it also had the right to lodge an individual application, that the applicant could not be considered as a public legal person that used public power, that the consideration of foundation universities as public legal persons in line with the law did not mean that they used public force in all activities of them, that in cases where public force was not used, it needed to be considered as a private law legal person, that it used a small portion of its shares over the immovable properties.

The application was found to be inadmissible by the Esteemed majority of the 1st Section of our Court on the ground of "the lack of venue in terms of person" due to the provision as to the effect that "*public legal persons cannot lodge an individual application*" in paragraph 2 of article 46 of the Code on the Establishment and Trial Procedures of the Constitutional Court numbered 6216.

The application is a foundation university. Within the framework of the provisions of paragraphs 1 and 10 of article 130 of the Constitution and the Code numbered 2547, foundation universities also have a public legal personality. As a matter of fact, in the first paragraph of Additional article 5 added into the Code on the Organization of Higher Education Institutions dated 28/3/1983 and numbered 2809 with regard to the establishment of the applicant University through the Code dated 5/3/1992 and numbered 3785, it is clearly stated that the university has a public legal personality and the following is stated: *"In Ankara, a University named İhsan Doğramacı Bilkent University which has a public legal personality has been established by Hacettepe Institute of Child Health Foundation, Hacettepe Medical Center Foundation and Hacettepe University Foundation on the condition that it is subject to the provisions of the Code on Higher Education numbered 2547 with regard to foundation higher education institutions."*

In paragraph 3 of article 148 of the Constitution and paragraph 1 of article 45 of the Code numbered 6216, it is accepted that "everyone" can lodge an individual application. In article 46,2 of the Code numbered 6216, it is provided that "public legal persons cannot lodge an individual application". It was requested that this provision be abolished on the ground that it prevented the rights of public legal persons to individual application, the request for abolition was dismissed on the ground that "... Constitutions are texts which contain general and abstract regulations. While the right to lodge an individual application seems to be a right granted to everyone in article 148 of the Constitution, it needs to be accepted that the phrase "everyone" stipulated in the Constitution also covers some restrictions due to the reasons arising out of the quality of persons as well.

It needs to be accepted that the phrase "everyone" stipulated in article 148 of the Constitution is not suitable for being understood in a way to cover public legal persons that use public force, that in this respect, the lawmaker has a discretionary power in terms of right holders with regard to lodging an individual application.

As the remedy of individual application is not a remedy accepted for the protection of all rights and freedoms stipulated in the Constitution, it is not a general remedy of claiming rights either. For this reason, it has a different quality when compared to the freedom to claim rights stipulated in article 36 of the Constitution. While the freedom to claim rights stipulated in article 36 of the Constitution regulates the protection function of general courts, the remedy of individual application is regulated as a more special, exceptional and secondary remedy of claiming rights. For this reason, the phrase "everyone" stipulated in article 36 and the phrase "everyone" stipulated in article 148 need to be interpreted in accordance with the quality of the remedies of claiming rights regulated in both articles" (CC, 01.03.2012, M.2011/59, D.2012/34).

In line with the wording of the provision in article 46,2 of the Code numbered 6216, when we evaluate the application in question, as the applicant is a public legal person, the application needs to be dismissed due to "the lack of value in terms of person". However, according to me, it is not proper to determine the area of application of the provision in question only on the basis of its wording; it will be more appropriate to subject it to teleological interpretation also by considering the quality and aim of the individual application and to determine its area of application accordingly. Within the framework of the provisions of article 148,3 of the Constitution and article 45,1 of the Code numbered 6216, everyone can lodge an individual application in the event that out of their fundamental rights and freedoms guaranteed in the Constitution, any of them which is covered by the ECHR and the additional protocols ratified by Turkey is violated by public force. Then, individual

application is an extraordinary legal remedy with a secondary quality granted to those whose rights are violated in the event that a fundamental right guaranteed in the Constitution is violated by public force on the condition that it is regulated in the ECHR or its additional protocols ratified by Turkey. This remedy has been accepted for the protection of the fundamental rights of those who do not use public force and are in a weak state against those who use public force. It is necessary to consider the provision as to the fact that “public legal persons cannot lodge an individual application” also in this respect. As a rule, as public legal persons use public force, by taking into consideration this situation, the inclusion of a general provision to the effect that public legal persons will not be able to lodge an individual application is appropriate for the quality of both individual application and public legal persons. Indeed, the fact that public legal persons perform an action by using public force on one hand and complain about it on the other constitutes a conflict. Likewise, as the one which causes a violation is another body that uses public force, it is not possible to make a conflict or dispute within state bodies the subject of an individual application. It cannot be said that public legal persons have fundamental rights and freedoms just like other real persons and private law legal persons due to their qualities; for this reason, it cannot be accepted that they need to be protected against public force in terms of fundamental rights and freedoms. As a matter of fact, as specified above, due to these reasons, the request for the abolition of the provision in question was also dismissed.

However, as extending the provision in the 1st sentence of article 46,2 of the Code numbered 6216 to cover the cases in which public legal persons do not use public force, interpreting and implementing it in a way that will exclude fundamental rights and freedoms of which public legal persons make use and accepting that public legal persons will not categorically be able to lodge an individual application in any way are contrary to the quality of individual application, they do not accord with the aim thereof either. For this reason, in cases where public legal persons do not use public force, it is necessary to accept that they can lodge an individual application with regard to fundamental rights and freedoms of which they can make use even if it is limited. As a matter of fact, although it is, as a rule, forbidden for public legal persons to lodge an individual application (in terms of constitutional complaint) as long as they use public force also in German law¹, with regard to fundamental rights on exceptional trial (or procedure) (such as article 101,1; 103,1 of the Constitution), it is accepted that they can lodge an individual application in relation to subjects such as the principle of legal justice, the freedom to claim rights, the right to a fair trial². Indeed, in such cases, as the fact that public legal persons also make use of the rights in question and can lodge an individual application when these rights are violated is not contrary to the position of public legal persons, does it also accord with the quality and aim of individual application. This situation is also necessary for ruling out the fact that especially judicial bodies result in the violation of a right through arbitrary behaviors.

Also in terms of our law, as public legal persons can already make use of the rights in articles 36, 37 of the Constitution, it should also be accepted that they can lodge an individual application in case of the violation of these rights. Also in the incident which is the subject

¹ Theodor Mainz/ Dürig Günter: Grundgesetz Kommentar, Bd. IV, Art.93, München 2012, Art 93, Nr.66.

² Furthermore, it is accepted that religious institutions (such as church), universities and broadcasting organizations which fulfill their duties relatively independently from the state and have a public legal personality can also file a constitutional complaint if there is a restriction, violation with regard to the service they fulfill; for example, in cases where the freedom of a university to scientific research, education and science is violated and so on; Maunz/Schmidt-Bleibtreu/Klein/Bethe: Bundesverfassungs- gerichtsgesetz, Kommentar, Bd.2, München 2012, §.90, Nr. 147 vd.

matter of examination, when the applicant's claims of violation are taken into consideration, it is seen that they are based on the right to property in article 35 and the right to a fair trial in article 36 of the Constitution (article 6 of the ECHR). Although a decision of "the lack of venue in terms of person" could be issued by considering the fact that the applicant is a public legal person in terms of the examination of these claims separately and the violation of the right to property, a decision of the applicant's "lack of venue in terms of person" would not be issued in terms of the right to a fair trial and the examination of admissibility would also need to be performed in terms of other aspects.

Interpreting and implementing the rule as to the fact that "public legal persons cannot lodge an individual application" in article 46,2 of the Code numbered 6216 in a way that public legal persons will not categorically be able to lodge an individual application in any way is also contrary to articles 36 and 148 of the Constitution. As also specified above in the decision of the Constitutional Court dated 01.03.2012, "*...the phrase "everyone" stipulated in article 36 and the phrase "everyone" stipulated in article 148 need to be interpreted in accordance with the quality of the remedies of claiming rights regulated in both articles*". As accepting that public legal persons make use of the rights regulated in article 36 by including them in the phrase "everyone" and then not including them in the phrase "everyone" in article 148,3 with regard to the right to individual application; accordingly, not granting them with the right to individual application which can be considered as the continuation of the rights granted with article 36 constitutes a conflict in itself, it also creates a contrariety to the interpretation of the two provisions in line with each other and to the quality of the remedies of claiming rights regulated in both articles. The fact that individual application is different from other remedies of claiming rights and has a secondary quality should not prevent public legal persons from resorting to this remedy in exceptional cases.

As interpreting and implementing the provision in question in article 46,2 of the Code numbered 6216 in a way that public legal person will not be able to lodge an individual application as a rule, that however, it is possible for them to lodge an application exceptionally with regard to the rights as regulated in articles 36, 37 of the Constitution for which they do not use public force will ensure that articles 36 and 148 of the Constitution are interpreted and implemented in accordance with each other in this respect, is it also appropriate for the quality of individual application.

Due to the aforementioned reasons, I disagree with the opinion of the majority of the Section as I think that it is necessary not to issue a decision of "inadmissibility due to the lack of venue in terms of person" with regard to the claim that the right to a fair trial has been violated in relation to the individual application that the applicant İhsan Dođramacı Bilkent University has lodged; that the examination of admissibility needs to be carried out also for other elements.

Member
Erdal TERCAN