



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2013/1436

Date of Decision: 6/3/2014

FIRST SECTION

DECISION

President : Serruh KALELİ
Members : Burhan ÜSTÜN
Nuri NECİPOĞLU
Hicabi DURSUN
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Applicant : Celalettin AŞÇIOĞLU

I. SUBJECT OF APPLICATON

1. The applicant alleged that in the case he filed in order to collect the damage incurred as a result of the immovable of which he is the owner being turned into a channel by the Directorate General of Water and Sewage Administration of İzmir (İZSU), his rights to a fair trial and to property were violated as a result of the case being treated as expropriation without confiscation without the request of the parties to the case, a decision being delivered to cancel the immovable as road and determining a lower compensation by means of relying on the agricultural net income method and requested the return of the confiscated immovable and compensation.

II. APPLICATION PROCESS

2. The application was lodged on 12/2/2013 via the Civil Court of First Instance of Seferihisar. 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 by the First Commission of the First Section on 29/3/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In accordance with the interim decision of the First Section dated 17/9/2013, it was decided that the examination of admissibility and merits of the application be carried out together.

5. The facts and cases which are the subject matter of the application and a copy of the application were sent to the Ministry of Justice for its opinion on 24/9/2013, the opinion letter of the Ministry of Justice dated 14/11/2013 was notified to the applicant on 9/12/2013. The applicant submitted his statements against the response of the Ministry of Justice on 19/12/2013 within its legal period.

III. FACTS AND CASES

A. Facts

6. As expressed in the application form, the annexes thereof and the relevant case file, the facts are summarized as follows:

7. The section of the 5.207 m² immovable, of which the applicant is the owner, bearing the quality of a field located with the boundaries of the subprovince of Seferihisar of the province of İzmir, which bears the quality of a field road, has a lower elevation than the field and causes water to accumulate during winter was accepted as a riverbed by the Directorate General of İZSU during rehabilitation works in October 2009, it was dug at a depth of 2 meters in the shape of a strip with a width of 1,5-2 meters without conducting any measurement and a portion of 229,01 m² of it was turned into a channel.

8. With his petition dated 22/10/2009, the applicant applied to the Directorate General of İZSU (the administration) and requested that the mistake, which had been made, be resolved, that the field road be brought back to its former level by being filled in, that the entry road into the field be opened and that the valuable soil taken from his field be returned.

9. Following the request to revert the immovable back to its former state, the Directorate General of İZSU filled the channel, which had been opened, with 0,5 meter green rock fill material instead of fertile soil.

10. Upon this the applicant applied to the Civil Court of First Instance of Seferihisar and requested that the damage be determined, a viewing was conducted by the Court on 25/3/2010, with the decision numbered miscellaneous action 2010/31 it was indicated as per the expert report dated 12/4/2010 that production and transport with a total cost of 13.551,65 TL needed to be made in order for the immovable to be reverted back to its former state and be used as arable land.

11. Following the failure to cover the damage that occurred as a result of the negligent and unjust action of the Directorate General of İZSU, the applicant filed a case before the Civil Court of First Instance of Seferihisar on 3/6/2010 with a request of 13.500,00 TL in compensation by keeping his rights pertaining to excess reserved. The defendant administration indicated that they did not cause the damage to the immovable, that the damage occurred as a result of an overflow of the river due to excessive rainfall and that the damage could not be covered since filling work could not be carried out again due to excessive rainfall, requested the dismissal of the case by stating that the administration could not be held responsible for a catastrophe that occurred due to a natural disaster.

12. A viewing was carried out by the Court on 13/1/2011 along with experts on the site where the immovable is located, it was determined with the expert report dated 28/1/2011, which was submitted to the Court, that the immovable was confiscated without expropriation within the scope of the river rehabilitation work and that the confiscation price was 5.141,27 TL.

13. Upon the objection of the parties, a second viewing was carried out by the Court on 11/5/2011 at the place where the immovable is located accompanied by experts in order to have a second expert report prepared, it was determined with the expert report dated 9/6/2011 that the immovable, which is the subject of the case, was confiscated without expropriation within the scope of the river rehabilitation work and that the value of the confiscated area of 229,01 m² was 7.495,50 TL with the agricultural net income calculation method.

14. At the hearing dated 21/6/2011, a period of 20 days was granted to the parties for them to submit their objections to the expert report and the parties submitted their objections to the Court.

15. At the hearing dated 26/7/2011, a new expert examination was requested in order to determine the damage according to unjust act principles and it was determined with the expert report dated 19/8/2011 that the cost of production and transport, which needed to be carried out in order for the immovable that belongs to the applicant to be used again as arable land, was 13.551,65 TL as of the date of the case. At the hearing dated 11/10/2011, a period of two weeks was granted to the parties for them to submit their objections to this report as well and the parties submitted their objections to the court.

16. With its decision dated 1/11/2011 and numbered M.2010/139, D.2011/259 the Court determined that the road, which surrounds a part of the immovable that is the subject of the case, was registered as İrimi Creek and road during cadastre work, that it appeared as road on the section, that it was used as a road in dry weather, that however, it filled with water in rainy weather and caused overflows, that a part of the immovable belonging to the applicant was also taken when the administration was conducting river rehabilitation work and that confiscation without expropriation took place and ruled that 7.495, 50 TL in compensation be paid to the applicant along with the legal interest that would accumulate starting from the date of the case by relying on the agricultural net income method according to the principle of confiscation without expropriation in line with the expert report.

17. The applicant appealed the decision of the court of first instance with the justification that the fact that the judgment was established based on the value calculated with the agricultural net income procedure instead of conducting a calculation according to unjust act provisions was unlawful; the defendant administration appealed the decision with the justification that it was not taken into consideration that the case was an action for compensation due to unjust act and that there was no causality relation between the damage and the work conducted by the administration, that therefore, the fact that a judgment was established in terms of confiscation without expropriation without investigating whether or not the conditions for the compensation that needs to be paid due to unjust act were met was unlawful.

18. The 5th Civil Chamber of the Supreme Court of Appeals, which examined the request for appeal, decided with its decision dated 13/6/2012 and numbered M.2012/4383, D.2012/12659 that the judgment of the court of first instance be approved with correction by adding the sentence "*on the cancellation as road of the 229,01 m² part of the immovable, which was confiscated and turned into road*" with the justification that there was no inappropriateness concerning the ruling on the collection of the price of the immovable due to the fact that the cost of reverting to former state was determined to be superior to the cost of the immovable.

19. The request for correction, which was examined by the same Chamber of the Supreme Court of Appeals, was also dismissed with the dated 29/11/2012 and numbered M.2012/18214, D.2012/24560. The decision became final on the same date.

20. The finalized decision was notified to the applicant on 18/1/2013.

B. Relevant Law

21. Paragraphs one and six of provisional article 6 added to the Code of Expropriation dated 4/11/1983 and numbered 2942 with the Code dated 18/6/2010 and numbered 5999 prior to being amended with article 21 of the Code dated 24/5/2013 and numbered 6487 are as follows:

"In the event that compensation is requested from the administration by the owner due to immovables or resources, which were de facto set aside for public service or allocated to a need pertaining to public benefit and on which facilities were built between the dates of 9/10/1956 and 4/11/1983 despite the fact that their expropriation actions were not completed or that they were not expropriated at all, being de facto confiscated partially or completely or by means of establishing a right of easement without the consent of the owner, resorting first to the settlement remedy shall be essential.

...

In the event that an agreement cannot be achieved between the administration and the owner, merely an action for compensation can be filed by the owner within three months starting from the date on which the disagreement minutes are drafted or the period under paragraph two expires without an invitation to agreement. In the event that an action is filed, the value of the immovable that is de facto confiscated or of the right of easement established on it on the date of application shall be determined by the court as per the procedures in the first sentence of paragraph two and it shall be adjudged that the immovable or the right be registered in the name of the administration or canceled and that compensation be paid to the owner. The judgment pertaining to registration or cancellation shall be final and the right of appeal of the parties as regards the adjudged compensation shall be reserved."

22. The abolished provisional article 2 of the Code on the Restructuring of Some Receivables and Amendments in the Code of Social Insurance and Universal Health Insurance and Some Other Codes and Decrees in the Force of Code dated 13/2/2011 and numbered 6111 is as follows:

"Applicable for a period of fifteen years starting from the date on which this Code enters into force; the provision of the provisional article 6 of the Code of Expropriation dated 4/11/1983 and numbered 2942 shall be applied to actions of confiscation without expropriation after the date of 4/11/1983. However, an additional five percent share shall be set aside from the allowances that are foreseen for capital expenditures in the annual budgets of administrations in order to be used, in the event that this is needed, in payments as per paragraph seven of provisional article 6 of the Code numbered 2942 with regard to court decisions that are delivered and finalized in actions for compensation filed due to acts of confiscation without expropriation after this date.

23. Article 999 of the Turkish Civil Code dated 22/11/2001 and numbered 4721 with the side heading "Immovables that will not be registered" is as follows:

"Immovables that are not subject to private ownership and that have been spared for the benefit of public are not registered in the log as long as the establishment of a right in-kind pertaining to these that needs to be registered is not concerned. If an immovable that is registered in the land registry transforms into an immovable that is not subject to entry, it is taken out of the land registry."

IV. EXAMINATION AND JUSTIFICATION

24. The individual application of the applicant dated 12/2/2013 and numbered 2013/1436 was examined during the session held by the court on 6/3/2014 and the following were ordered and adjudged:

A. Claims of the Applicants

25. In the case he filed with the request that the damage incurred as a result of the negligent and unjust act of the Directorate General of İZSU be compensated, the applicant indicated that the Court ruled on compensation by taking into account the principle of confiscation without expropriation and by relying on the agricultural net income method without the request of the parties, that upon the appeal of the judgment, the Supreme Court of Appeals approved with correction the judgment of the court of first instance by adding the sentence *"on the cancellation as road of the 229,01 m2 part of the immovable, which was confiscated and turned into road"* and alleged that his rights to a fair trial and to property were violated and requested that the violation be removed, that the canceled share be returned to him and 13.444,65 TL in material compensation in exchange for his damage.

B. Evaluation

1. In Terms of Admissibility

a. In Terms of the Right to a Fair Trial

26. In the case he filed with the request that the damage incurred as a result of the negligent and unjust act of the Directorate General of İZSU be compensated, the applicant alleged that the fact that the Court ruled on compensation by taking into account the principle of confiscation without expropriation and by relying on the agricultural net income method without the request of the parties was not fair, that the court delivered an erroneous decision and that in the end his rights were violated by means of taking the property he owned away from him.

27. In its opinion letter, the Ministry of Justice stated that the acceptance and evaluation of evidence was primarily the competence of local courts, that the Constitutional Court is not liable to inspect material and legal mistakes of local courts as long as rights and freedoms are not violated by local courts during their assessment of facts and the law, that the applicant expressed his complaints that are the subject of the application before the Civil Court of First Instance in the concrete application, that the court provided him with a period in order to examine the expert reports, that the court obtained an additional expert report upon the objection of the applicant, that it assessed the complaints of the applicant as per its due procedure and delivered a decision away from arbitrariness and in compliance with its due procedure.

28. In his statements against the opinion letter of the Ministry of Justice, the applicant indicated that the land, which was confiscated, was at a distance of 1000 meters to the sea, that it had a better value than the value that had been determined, that neither himself nor the administration had a request for expropriation, that the fact that the Court delivered a decision in a way that was not requested by the parties was arbitrary.

29. Paragraph (2) of article 48 of the Code numbered 6216 with the side heading *"The conditions and evaluation of admissibility of individual applications"* is as follows:

"The Court, can rule on the inadmissibility of applications, which are clearly devoid of grounds."

30. Article 25 of the Code of Civil Procedure dated 12/1/2011 and numbered 6100 with the side heading "*Principle of the case being brought by the parties*" is as follows:

1) Apart from the exceptions envisaged in the law, the judge cannot take into consideration a thing or incidents not stated by either one of the parties and cannot even display behavior which may remind these.

(2) Apart from the situations described by law, the judge cannot automatically collect evidence.

31. Article 33 of the Code numbered 6100 with the side heading "Implementation of law" is as follows:

"The judge applies Turkish law in an ex officio fashion."

32. The applicant alleged that the fact that the case was dealt with according to principles of confiscation without expropriation instead of unjust act and that the value was determined at a low level violated his rights to claim rights and to property. Since it is understood that the essence of the application relates to the claim that the legal qualification and interpretation of the dispute that is the subject of the case by the courts of instance was not on point and that it fundamentally pertains to the outcome of the trial, the mentioned complaint will be assessed within the scope of the right to a fair trial, the claim of violation of the right to Property due to confiscation without expropriation will be separately examined.

33. In paragraph four of Article 148 of the Constitution and paragraph (6) of Article 49 of the Code numbered 6216, it is stated that the matters that need to be taken into account in the legal remedy in examinations as regards individual applications cannot be subjected to an examination; in paragraph (2) of article 48 of the Code numbered 6216, it is stated that a decision can be issued on the inadmissibility of the applications which are clearly devoid of grounds by the Court.

34. It is clear that applications, which do not contain a claim of violation of a constitutional right, where it is simply requested that the decisions of courts of instance be reexamined, are clearly devoid of grounds and that they relate to matters, which are left outside the venue of the Court by the Constitution and the Code.

35. In accordance with the aforementioned rules, the certainty of the incidents which are made the subject matter of a case before the courts of instance, the evaluation of the evidence, the interpretation and implementation of legal rules and whether the consequence reached as regards the dispute by the courts of instance is fair in terms of merits or not cannot be a subject matter of the examination of an individual application. As long as the rights and freedoms stipulated in the Constitution are not violated and unless they contain any obvious arbitrariness, material and legal mistakes in decisions of courts of instance cannot be handled in the examination of an individual application either. In this framework, unless an obvious arbitrariness is present in the evaluation of the evidence by the courts of instance, the Constitutional Court cannot intervene in this discretion (App. No: 2012/1027, 12/2/2013, § 26).

36. As a result of the action for compensation, which the applicant filed with the purpose of compensation of the damage (reverting to former state) caused by the administration as a result of unjust act, the viewings conducted by the court, the expert reports that were obtained, the statements of witnesses, the examination of relevant documents; it was determined that rehabilitation work was carried out in the area, which appears as river and

road in the records and surrounds one side of the immovable that belongs to the applicant, in order to prevent water accumulation and that during this work a total of 229,01 m² of the immovable belonging to the applicant was confiscated in the form of a strip of 1,5-2 meters; that moreover there was water accumulation in the area accepted by the administration as riverbed, which was the subject of the rehabilitation work, that in winter season it completely filled with water, that in summer season this area was used as road and the case was handled as an action for compensation due to confiscation without expropriation by means of determining that public benefit lied in the action of confiscation.

37. In addition, the Court conducted the required research during the trial, carried out on-site viewings two times, obtained two expert reports; moreover, it obtained an additional expert report upon the request of the applicant for the determination of the price of reverting the immovable to its former state and it gave the applicant the opportunity to submit his objections at all stages and evaluated these objections. As a consequence, the Court delivered its decision by conducting a trial that is in conformity with its due procedure.

38. With the justification that there was no inappropriateness concerning the ruling on the collection of the price of the immovable due to the fact that the cost of reverting to former state was determined at the appeal stage to be superior to the cost of the immovable, that moreover, a part of the immovable, which is the subject of the case, was confiscated as a result of the work conducted in an area where it was necessary to carry out river rehabilitation, that since the confiscated part was transformed into road, it could not be the subject of private property as per article 999 of the Turkish Civil Code, it was decided that it be canceled off the land registry and that the decision of the court of instance be approved with correction.

39. As per the principle of being brought by the parties included under article 25 of the Code numbered 6100, the judge cannot take into consideration a thing or incidents not stated by either one of the parties and cannot display behavior which may remind these. Apart from the situations described by law, the judge cannot automatically collect evidence. The meaning of this principle is that the authority to collect the case material, which is composed of the incidents and evidence that will form the basis for the judgment, belongs not to the judge but to the parties. As per this principle, the judge is liable to consider the case material brought by the parties as the basis for the judgment "as they bring it". In the incident, which was made the subject of the concrete individual application, the Civil Court of First Instance delivered its decision by relying on the evidence that was brought by the parties.

40. Although it is clear that the judge cannot take into consideration the incidents that are not brought by the parties as per the above mentioned principle of being brought by the parties, delivering a decision regarding the dispute by means of examining the existing case material as per article 33 of the Code numbered 6100, that is, the implementation and interpretation of law are matters, which the judge will ex officio observe. Within this framework, the legal qualification and interpretation of the dispute that is the subject of the case and the solution brought to it are within the discretionary authority of the judge. Unless an obvious arbitrariness is present in the legal qualification and interpretation of the subject of dispute by the courts of instance, the Constitutional Court cannot intervene in this discretion.

41. For the explained reasons, as it is understood that the claim of the applicant as regards the qualification of the case is related to the matters that need to be taken into account in the legal remedy, that the decisions of the court of instance do not contain any obvious arbitrariness, it should be decided that the complaint of the application pertaining to the freedom to claim rights is

inadmissible due to the fact that *"it is clearly devoid of basis"* without examining it in terms of other conditions of admissibility.

b. In Terms of the Right to Property

42. The complaint of the applicant to the effect that his right to property was violated as a result of him being deprived of his property by means of confiscation without expropriation instead of the expropriation procedure contained within the Constitution is not clearly devoid of basis, neither any other reason for inadmissibility is present for this complaint. For this reason, it is necessary to deliver a decision of admissibility as regards this part of the application.

2. Examination in Terms of Merits

43. In the case he filed with the request that the damage incurred as a result of the negligent and unjust act of the administration be compensated, the applicant indicated that the Court ruled on compensation by taking into account the principle of confiscation without expropriation and by relying on the agricultural net income method without the request of the parties, that delivering a decision in this manner would pave the way for arbitrary practices, that in this way the administration could acquire any immovable of its choosing by infringing upon it and then paying the expropriation price and alleged that his right to property was violated.

44. In its opinion letter, the Ministry of Justice indicated that the legal way in intervention to the right to property with a view to immovables is to conduct an action of expropriation, that, in practice, interventions in the form of confiscation do exist, that this situation is criticized in the judgments of the ECtHR, that in the concrete case, the only matter that legitimizes the confiscation of the immovable belonging to the applicant without an action of expropriation was the court decision that determined that this situation was not legal and ruled on the payment of compensation, that in this way the legal assurance was ensured by establishing a reasonable balance between the applicant's right to property and the public benefit and provided a statement to the effect that these matters are submitted to attention when examining the applicant's complaint regarding the right to property.

45. In his statements against the opinion letter of the Ministry of Justice, the applicant indicated that the land, which was confiscated, was at a distance of 1000 meters to the sea, that he had not wanted its expropriation, that neither himself nor the administration had a request for expropriation, that the fact that the Court delivered a decision in a way that was not requested by the parties was arbitrary.

46. Article 35 of the Constitution with the side heading "Right of Ownership" is as follows:

"Everyone has the right to property and inheritance.

These rights may be restricted by law only for the purposes of public interest.

The exercise of the right to property cannot be contrary to public interest."

47. Article 46 of the Constitution with the side heading "Expropriation" is as follows:

"When the public interest requires so, the State and public entities are entitled to completely or partly expropriate real estate under private ownership and establish

administrative easement on them on the condition that their real value is paid in advance and in accordance with the principles and procedures set forth by law.

The expropriation compensation and the fee for increase as it is finally decided are paid in cash and in advance. ...In such cases where the law may allow payment in installments, the period of installments cannot exceed five years; in such a case, the installments are paid in equal amounts.

...

48. Article 1 of the Additional Protocol 1 to the Convention with the side heading "*Protection of property*" is as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

49. Following the violation of the immovable pertaining to the applicant during the rehabilitation work conducted on the riverbed and the field road, which surround the immovable that the applicant uses as field, and the subsequent handling of the case by the court as an action for compensation due to confiscation without expropriation, the ownership of the part of the immovable that was confiscated as a result of the trial was taken from the applicant and it was transformed into road. In this case, although it is clear that there is an intervention to the applicant's right to property, whether or not this intervention violated the applicant's right to property should be examined.

50. It is stipulated under article 35 of the Constitution that the right to property is not an absolute right and that it can be restricted for public benefit purposes. Whereas article 13 of the Constitution determines the general principles in restricting the fundamental rights and freedoms, article 46 of the Constitution, which grants the authority to expropriate immovables under private ownership to the State and public legal entities and determines the principles of expropriation, contains special provisions as to the restriction of the right to property. As per the principle of the holism of the Constitution, articles 13 and 46 of the Constitution need to be taken into consideration along with article 35 in the evaluation of the mentioned request of the applicants (App. No: 2013/817, 19/12/2013, § 28).

51. Modern democracies are regimes in which fundamental rights and freedoms are ensured and guaranteed in the broadest manner. Restrictions, which restrict fundamental rights and freedoms to a great extent and render them non-exercisable, bear prejudice to the essence of the right. Not only the measure of the restrictions imposed upon fundamental rights and freedoms, but its conditions, reason, method and assurances such as the legal remedies that are prescribed against the restriction should all be evaluated within the scope of a democratic societal order. As a result, the fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the requirements of the democratic societal order and only with law. It is unthinkable in a democratic society that a restriction imposed upon fundamental rights and freedoms be in excess of what is required by the purpose that is sought with this restriction. In a democratic state of law, regardless of what the sought after purpose is, restrictions should not be imposed

via methods that are not specific to these regimes and they should not be taken to a level where they would render the exercise of a particular freedom significantly difficult or completely remove it (CC, M.2012/108, D.2013/64, D.D.22/5/2013).

52. Whereas it is adjudged under article 35 of the Constitution that restrictions to be imposed upon the right to property must be introduced for public benefit purposes and via law, article 1 of the Protocol (1) stipulates that deprivation from property can be realized for public benefit, under circumstances envisaged in the code and in compliance with international conventions. While the ECtHR acknowledges that principles, which have been developed based on case law that relies on judicial decisions that have become stable, by interpreting conditions envisaged in code, in other words, lawfulness in a large manner (see *Malonei v. the United Kingdom*, App. No: 8691/79, 2/8/1984, §§ 66-68), the Constitution provides a wider protection than the Convention by stipulating that all restrictions are to be imposed absolutely by code (App. No: 2013/817, 19/12/2013, § 31).

53. The regulation of rights and freedoms and interventions and restrictions to be imposed on these by code is one of the most important elements of the democratic state of law that prevents arbitrary intervention to these rights and freedoms and ensures legal security. Nevertheless, the obligation to regulate with code does not prevent the implementation of an intervention to be made to a right via secondary arrangements to be issued by the executive organ such as regulations, by-laws, communiqués and circulars in such a way as not to exceed the framework of the code (App. No: 2012/1246, 6/2/2014, § 60)

54. The principles of legal security and certainty are among the preconditions of a state of law. The principle of legal security, which aims to ensure the legal security of individuals, 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. The principle of certainty refers to legal regulations being explicit, clear, understandable and implementable in a way that will not give rise to any interruption and doubt in terms of both individuals and the administration, moreover, to them including protective guarantees against arbitrary practices of public authorities. (CC, M.2013/39, D.2013/65, 22/5/2013).

55. The action of confiscation of immovables that are the subject of private ownership by the State, public legal entities, public institutions, which are authorized to carry out expropriations, or by real and private law persons to the benefit of whom expropriation can be carried out on the condition that public benefit exists, in violation of article 46 of the Constitution or the Code of Expropriation numbered 2942, partially or completely, *de facto* or legally without a price is called “confiscation without expropriation”.

56. Confiscation without expropriation is a method which offers a lesser assurance compared to expropriation and which is not legal. Indeed, as per the Code numbered 2942, in order for a decision of expropriation to be delivered, first the administration needs to have the value of the immovable determined, in the event of a conflict, the administration needs to request the determination of the price by applying to the court. The decision of expropriation becomes final with the depositing of the determined price to the bank in advance. For this

reason, a public administration will not be able to make a decision of expropriation unless it possesses sufficient allowance to pay for the expropriation price. On the other hand, the burden of settlement and applying to the case remedy in relation to immovables that have been confiscated without expropriation is attributed to owners. For this reason, the liability of paying case fees also belongs to owners (See CC, M.2010/83, D.2012/169, 1/11/2012).

57. Confiscation without expropriation provides the administration with the opportunity of utilizing the immovable and acquiring the immovable without performing an action of expropriation. Since there is no such action of expropriation, the only element that offers the opportunity of legitimizing the transfer of the immovable that is used and providing a certain legal guarantee is the court decisions, which determine that the utilization by the administration is not legal and rule on the payment of “compensation due to confiscation without expropriation” to individuals. The practice of confiscation without expropriation forces the applicants, who remain as the owner of immovables on the legal front, to file cases against the administration, which does not render its action rightful with any justification of public benefit. The authenticity of such a public benefit justification is evaluated only later by the courts. In other words, whatever the case might be, confiscation without expropriation leads to legally accepting an unlawful situation that is voluntarily created by the administration and providing the administration with the opportunity to benefit from its unlawful action. This kind of a practice, which provides the administration with the opportunity of trespassing beyond the official rules of expropriation bears the danger of coming across unpredictable and arbitrary situations for individuals. The practice in question is not of the quality to provide a sufficient degree of legal guarantee and to constitute an alternative to an expropriation that is duly realized (See ECtHR, Sarıca and Dilaver v. Turkey, 11765/05, 27/5/2010, §§ 40, 43, 45).

58. Articles 35 and 46 of the Constitution make it obligatory for interventions that would terminate ownership of immovables to be legal. This obligation is a requirement of the state of law. As per the provision of article 46 of the Constitution and the Code numbered 2942, what is essential is the administration acquiring the immovable by means of conducting an action of expropriation. As it is a question of conducting an action of expropriation that is compliant with the Constitution and codes as per the method, confiscation without expropriation, which is a practice that is not based on the Constitution or codes and terminates individuals' right to property, cannot be considered within the same legal framework as an expropriation that is compliant with the codes. This kind of a practice, which provides administrations with the opportunity of trespassing beyond the official rules of expropriation bears the danger of an intervention that is unpredictable and arbitrary for owners of immovables.

59. When the documents present in the application file are examined; it is understood that the administration's confiscation of the immovable in the form of a strip of approximately 1,5-2 meters occurred as a result of the perception by the administration that a part of the immovable belonging to the applicant was road due to the fact that the wire fence of the adjacent immovable was put up in such a way as to violate the road and that a sufficient

measurement was not performed, that is, as a result of neglect and that this situation is also acknowledged by the applicant.

60. In the incident that is the subject of the application, it is determined with court decision that while the administration was conducting rehabilitation work in order to prevent water accumulation that had the potential of harming areas used as agricultural land in the area that appears as road on the section and was registered as İrimi Creek and Road in the field sketch during cadastre work, used as road in dry weather, part of which was determined to have the appearance of a riverbed, that is, while conducting riverbed rehabilitation work for a legitimate public benefit purpose, it caused loss of fertile soil by means of confiscating without expropriation a strip of 229,01 m² of the immovable with an area of 5.207 m² pertaining to the applicant, fertile soil was taken away, it was replaced with fill material, in this manner the immovable that is under the ownership of the applicant was confiscated without expropriation without following the processes stipulated by the Constitution and codes.

61. As a result, it has been concluded that the administration's confiscation without expropriation of a part of the immovable belonging to the applicant within the framework of river rehabilitation work as a result of its negligence is an intervention that does not conform to the procedure indicated under articles 35 and 46 of the Constitution and the Code numbered 2942 and that the intervention made to the right to property violated the principle of lawfulness.

62. For the aforementioned reasons, it should be decided that the applicants' right to property guaranteed by Article 35 of the Constitution was violated by means of not abiding by the principle of lawfulness.

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

63. The applicant alleged that his right to property was violated as a result of confiscation without expropriation by means of the administration's filling a 229,01 m² part of the immovable belonging to himself with fill material within the scope of river rehabilitation work, requested that the expropriation decision be annulled and the 229,01 m² part of the immovable be returned to him and that 13.444,65 TL be paid to him by applying interest to the sum obtained after the deduction of expenses from the price that is necessary to revert the damage inflicted to his field.

64. Despite not making an explanation directly related to compensation, the Ministry of Justice made an assessment in its opinion to the effect that there was no arbitrariness in the Court's hearing and concluding of the case as a case of confiscation without expropriation and that the expropriation price determined as per the Code numbered 2942 along with its interest was paid to the applicant in exchange for the part of the immovable that was confiscated and that therefore a balance was struck between the benefit of the public and the benefit of the individual.

65. Paragraph (2) of Article 50 of the Code numbered 6216 with the side heading "*Decisions*" is as follows:

"If the determined violation arises 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 the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. 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."

66. It has been decided that the intervention to the immovable belonging to the applicant in the form of confiscation without expropriation, which is not envisaged in the Constitution and the Code numbered 2942, violated the right to property.

67. In addition, a fair balance needs to be struck with the mentioned intervention between the desired public benefit that is in the form of preventing water accumulation and overflows by rehabilitation of the riverbed and the applicant's right to property. This balance is achieved by paying the real equivalent of the part of the immovable that was confiscated determined by the court to the applicant. The fact that courts decide on the payment of compensation due to confiscation without expropriation achieves a fair balance between the public benefit and the benefit of the individual, it also provides a certain legal guarantee by means of determining that the utilization by the administration is not legal.

68. Even though the applicant alleges that the immovable is more valuable, there is no doubt regarding the fact that the Court and experts who carry out price determinations need to carry out price determinations by relying on objective criteria. In the concrete case, the expropriation price, which was calculated as compensation according to the agricultural income method in compliance with the price determination principles stipulated in the Code numbered 2942 for the 229,01 m² part of the immovable that was taken away from him with the confiscation, was paid to the applicant along with its legal interest that would accumulate starting from the date of the case. The Court concluded the price determination by carrying out two viewings, resorting to expert reports and allowing the applicant to submit his objections at all phases and taking these objections into consideration.

69. In this case, when it is taken into consideration that a reasonable proportion is established between the desired public benefit and the applicant's right to property, to which an intervention was made, by paying to the applicant the expropriation price determined according to the date of the case along with its interest that accrued starting from the date of the case in exchange for the part of immovable 229,01 m² that was confiscated, that the confiscation action of the administration stemmed from negligence and that a violation decision was delivered with regard to the unlawful confiscation, it should be decided that there is no need to separately pay compensation to the applicant.

70. It should be decided that the trial expense composed of the fee of 198,35 TL which was incurred by the applicant and determined in accordance with the documents in the file be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it was decided **UNANIMOUSLY** on 06/03/2014 that;

A. The application

1 - is **INADMISSIBLE** in terms of its complaint regarding the right to a fair trial due to it being "*clearly devoid of basis*" without examining it in terms of other conditions of admissibility,

2- is **ADMISSIBLE** in terms of the complaint pertaining to the right to property,

B. That the applicant's right to property enshrined in Article 35 of the Constitution WAS VIOLATED,

C. The compensation requests of the applicant be **DISMISSED**,

D. that the trial expense composed of the fee of 198,35 TL, which was incurred by the applicant be **PAID** to the applicant,

E. The payment be made within four months as of the date of application by the applicant to the State Treasury following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment.

F. A copy of the decision be sent to the relevant court.

President

Serruh KALELİ

Member

Burhan ÜSTÜN

Member

Nuri NECİPOĞLU

Member

Hicabi DURSUN

Member

Erdal TERCAN