REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

IN THE APPLICATION OF İLKER BAŞER AND OTHERS

(Application Number: 2013/1943)

Date of Judgment: 9/9/2015

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FIRST SECTION

JUDGMENT

President	**:** Burhan ÜSTÜN
Judges	**:** Hicabi DURSUN
	Erdal TERCAN
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Rapporteur	**:** Cüneyt DURMAZ
Applicants	**:** İlker BAŞER
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Representative	**:** Atty. Mihraç AKBAŞ

I. SUBJECT-MATTER OF THE APPLICATION

1. The application concerns the allegations that the right to life and the right to protect the individual's material and spiritual entity were violated on the ground that although the fact that the unborn entity be born disabled could have been detected during pregnancy, it had not been detected due to the physician's negligence, and that their right to a fair trial was violated on the grounds that the decision which was rendered in respect of the action for damage brought in this regard includes contradictions, the judgments of the Court of Cassation are unreasoned, their request for a hearing was not taken into account and the proceedings were not concluded within a reasonable time.

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II. APPLICATION PROCESS

2. The application was lodged with the Constitutional Court on 14/3/2013. It was decided at the end of the preliminary examination made on the petition and annexes thereto that the application had no deficiency which would prevent its submission to the Commission.

3. The Third Commission of the First Section decided on 10/12/2013 that the examination on admissibility be made by the Section, and accordingly the case-file be referred to the Section.

4. It was decided at the meeting held by the Section on 6/2/2014 that the examination on the admissibility and merits of the application be jointly made, and one copy thereof be submitted to the Ministry of Justice ("the Ministry") for receiving its opinion.

5. The opinions submitted by the Ministry to the Constitutional Court were served on the applicant on 7/4/2014. The applicants submitted their counter-statements on 5/5/2014.

III. THE FACTS

A. The circumstances of the Case

6. The facts of the case, as stated in the application form and annexes thereto and within the framework of the information and documents obtained via UYAP (National Judiciary Informatics System), may be summarized as follows:

7. One of the applicants, Meliha Başer, found out that she was pregnant as a result of the tests which were done at the Ankara Maternity and Gynaecological Diseases Training Hospital on 4/3/2002, and necessary medical controls during her pregnancy period were performed by the Doctor H.İ.A. ("the physician"). At the end of this pregnancy period, İlker Başer was born on 5/11/2002.

8. Upon observing that İlker Başer displayed abnormal behaviours during the postpartum period, the applicants took the baby to several medical institutions in order to find out the reason thereof. It was subsequently detected that the baby was born with a birth defect, namely "*agenesis of the corpus callosum*" and is not therefore healthy.

9. Thereupon, the applicants brought an action for pecuniary and non-pecuniary damages against the Ministry of Health and the physician before the Ankara 2nd Civil Court of First Instance on 12/10/2005.

10. After the action had been brought, both defendants raised objections that the administrative court had jurisdiction over the case; however, these objections were dismissed by the Ankara 2nd Civil Court of First Instance.

11. The court requested a report from the Ankara University Gynaecological Diseases and Maternity Department in order to ascertain whether the physician had any fault and neglect in baby's unhealthy birth. The report which was drawn up on 21/5/2007 indicates that there is no fault and neglect attributable to physician.

12. Upon the objection to the above-cited report, the case was referred to the Presidency of the İstanbul Forensic Medicine Institute for preparation of a new expert report. The report dated 12/5/2008, no. 1503 and drawn up by the Presidency of the İstanbul Forensic Medicine Institute found both the physician and the Ministry of Health faulty at equal rates of 4/8.

13. In line with the Aktüer Expert Report of 29/6/2007, the applicants amended their claim for pecuniary damage of TRY 2,000.00, which is requested in their petition, as TRY 310,228.17 with their petition dated 2/11/2007 for correction of the amount.

14. The court held with its decision dated 31/12/2008, (docket no. 2005/380 and decision no. 2008/463) that the action brought against the Ministry of Health be dismissed for lack of jurisdiction and that the action brought against the physician be dismissed as the conditions required for bringing an action were not fulfilled due to absence of any dispute because the applicants were not entitled to directly bring an action against the physician.

15. Upon the appeal of the decision by the applicants, the 4th Civil Chamber of the Court of Cassation held by its judgment dated 8/6/2009, (docket no. 2009/6105 and judgment no. 2009/7682) that the first instance decision, in respect of the defendant physician, be quashed on the ground that *"... although it must be assessed whether the damage sustained by the applicants occurred due to personal fault of the defendant or not, and subsequently a decision must be given in line with the conclusion reached, dismissal of the action due to absence of*

any dispute is contrary to procedure and the law". On the other hand, it was decided in respect of the Ministry of Health that the applicants' request for appeal be dismissed.

16. Upon quashing of the decision, the Ankara 2nd Civil Court of First Instance continued to deal with the case under the case-file docket no. 2009/482.

17. The conclusion part of the Medical Board Report for the Disabled dated 22/10/2009 and no. 4401 and drawn up in respect of İlker Başer by the Ankara University Medical Faculty İbni Sina and Cebeci Hospital, include these findings: *"... severely disabled... permanently... validity period of the report: permanent. Whole Body Function Loss Rate: 99%"*.

18. The Ankara 2nd Civil Court of First Instance, at this time, requested the Neurology Unit of the Hacettepe University Medical Faculty Paediatrics Department to issue a report in order to ascertain whether the relevant physician had any fault and negligence in unhealthy birth of the baby or not. In the report of 12/7/2011, it is concluded that findings of the patient's development loss cannot be only explained with "*agenesis of the corpus callosum*", and this factor would not be, on its own, sufficient for the indication for termination of the pregnancy.

19. Relying on the expert report received from the Hacettepe University, the above-cited court decided to dismiss the action with its decision dated 21/12/2011, (docket no. 2009/482 and decision no. 2011/615) in which it reaches the following conclusions: *" H.İ.A. detected a lateral ventricular extension during the pregnancy of 31 weeks as a result of his medical examination dated 24/08/2002 and subsequently requested further examination. The measurement carried out by the Ankara Maternity Hospital affiliated to the Social Insurance Institution on 12/09/2002 indicated that the ventricular extension of 18 mm was a pathology which could not automatically disappear. During the subsequent examinations, this defect continued to be observed. However, it cannot be assessed that the child's developmental loss is solely resulted from "the agenesis of the corpus callosum", and this is not, on its own, sufficient for termination of the pregnancy. Therefore, there is no fault attributable to the relevant physician who did not terminate the pregnancy."*

20. As the applicants appealed against the above-cited decision, the 4th Civil Chamber of the Court of Cassation held in its judgment dated 3/7/2012, docket no. 2012/8346 and judgment no. 2012/11540: *"... All objections raised be dismissed as being found unjustified*

according to the documents in the case-file and to the fact that the decision is in line with the previous quashing decision of the Court of Cassation and there does not exist any non-conformity in assessment of the evidence, and the decision found in compliance with the procedure and the law be upheld."

21. The applicants' request for rectification of the decision was dismissed by the judgment of the same Chamber, dated 19/12/2012, (docket no. 2012/15982 and judgment no. 2012/19604).

22. The judgment in question was notified to the applicants' representative on 13/2/2013, and an individual application was lodged with the Constitutional Court on 14/3/2013 in due course of time.

23. Furthermore, the applicants brought a full remedy action before the Ankara 3rd Administrative Court on 2/9/2009 upon the judgment of the 4th Civil Chamber of the Court of Cassation dated 8/6/2009 upholding the decision of the Ankara 2nd Civil Court of First Instance which dismissed the action brought against the Ministry of Health for lack of jurisdiction.

24. By the decision of the Ankara 3rd Administrative Court, dated 4/2/2013, (docket no. 2009/1139 and decision no. 2013/164), it was admitted that tests and treatments performed in the hospital were not carried out with due diligence and care and that there was deficiency in delivery of the medical service. Although the amount of damage sustained by the applicants was determined to be TRY 893,199 in the expert report of 9/11/2012 requested by the court, the applicants were awarded pecuniary damage of TRY 360,000 and non-pecuniary damage of TRY 25,000 in line with their claim for damage. The applicants maintained that they had not been notified of the reasoned decision by the application date.

25. The report of the Forensic Medicine Institute dated 12/5/2008, which was requested by the Civil Court of First Instance and taken a basis for the decision by the Administrative Court, is summarized in the decision as follows:

"... The disorder suffered by İlker Başer is not, in fact, easy to be detected during pregnancy while the fetus is in the womb. If it is detected in the first ultrasonographic examination that there appears a lateral ventricular extension of at least 10 mm in the fetus's

brain, the physician must become suspicious of the situation and MRI examination of fetal brain must be made with a further obstetrical examination. H.İ.A detected lateral ventricular extension in the 31st week of pregnancy during his examination of 24/08/2002 and therefore requested advanced-level test. Thereupon, the pregnant, Meliha Başer, was referred to the Perinatology unit of the same hospital. As a result of the USG examinations carried out by this unit, the lateral ventricular extension was measured as 18 mm, and it was noted that a lateral ventricular extension of such size was a pathology which could not automatically disappear. Ventriculomegaly was continued to be observed during the subsequent examinations. Assessing all of these findings and tests and treatment methods applied as a whole, it was therefore concluded that pregnancy controls of the pregnant, Meliha Başer, were deficiently performed; that there was neglect of duty in respect of the medical service rendered; and that fault rates of the H.İ.A. and the defendant administration were severally 4/8."

26. The above-cited decision was partially upheld by the judgment of the Fifteenth Chamber of the Council of State, dated 1/10/2013, (docket no. 2013/9520 and judgment no. 2013/6570). Relevant part of this judgment is as follows:

> *"In the decision subject to appeal, the case was decided to be accepted; however, amounts of the pecuniary and non-pecuniary damages awarded were respectively by mistake specified as TRY 360,000.00 and TRY 25,000.00. As it has been revealed that the applicants' claims for damage are TRY 340,000.00 for pecuniary damage and TRY 45,000.00 for non-pecuniary damage, this mistake of fact in the reasoning of the decision be rectified as "pecuniary damage of TRY 340,000.000 and non-pecuniary damage of TRY 45,000.000" in pursuance of Article 49 § 2 of the Law no. 2577 on Administrative Proceedings.*
>
> *Under these circumstances, part of the court's decision on acceptance does not contain any grounds for quashing of the decision set out in Article 49 of the Law no. 2577 on Administrative Proceedings.*
>
> *As to the complainants' request for correction of the amount of pecuniary damage,*
>
> *...*

..., In respect of the complainants all of whose requests were accepted during the trial, the application petition submitted for availing themselves of the legal amendments must be assessed within the scope of the amendment to the Law no. 6459. After the unpaid part of the fee is paid by the complainants, the petition is submitted to the defendant administration and a reply is received in this regard, a further decision must be given according to the compensation amount that have been increased (by making an assessment as to whether there exist conditions requiring compensation to be awarded or not).

For the above-mentioned reasons, it has been unanimously decided on 01/10/2013 that the defendant administration's and the intervening party's requests for appeal be dismissed pursuant to Article 49 of the Law no. 2577; and that the decision of the Ankara 3rd Administrative Court on acceptance of the case, dated 07/02/2013, docket no. 2009/1139 and decision no. 2013/164, be UPHELD after the statement included therein "request for pecuniary and non-pecuniary damage, which are respectively TRY 360,000.00 and TRY 25,000.00" be rectified as "request for pecuniary and non-pecuniary damage, which are respectively TRY 340,000.00 and TRY 45,000.00". It is also stated that the case-file be remitted to the Administrative Court in question with a view to rendering A FURTHER DECISION concerning the amount of pecuniary damage increased pursuant to Article 16 of the same Law, which was amended by the Law no. 6459."

27. The request for rectification of the above-cited decision was dismissed by the judgment of the Fifteenth Chamber of the Council of State, dated 21/4/2015, docket no.2014/7330 and judgment no. 2015/2321.

B. Relevant Law

28. Article 13 § 1 of the Law on Administrative Proceedings, dated 6/1/1982 and no. 2577, entitled "directly bringing a full remedy action" reads as follows:

"Anyone who has sustained damage as a result of any administrative act is to apply, before bringing an administrative action, to the relevant administration and ask it to fulfil his rights within one year as from the date he becomes aware of these acts upon written notification or by any other means and in any event within five years as from the date of the act. If this request is rejected in whole or in part, an action may be brought in due

course of time as from the day following the notification of this rejection or if no reply is received within sixty days, following the expiry of this sixty-day period."

29. Article 16 § 4 of the Law no. 2577, entitled "notification and reply" reads as follows:

"The parties cannot stake any claim relying on defences or second petitions to be submitted by them after expiry of the relevant period (Additional sentence: On 11/4/2013 – By Article 4 of the Law no. 6459) However, in full remedy actions, the compensation amount specified in the petition may be increased for only once by means of paying the relevant fee, regardless of time or other procedural rules, until the final decision is rendered. The petition for increasing the amount shall be notified to the other party in order to receive reply within thirty days."

30. Article 49 of the Turkish Code of Obligations dated 11/1/2011 and no. 6098, which is entitled "Obligation" and governs liability relation stemming from tortious act is as follows:

"Anyone who causes someone else to suffer loss or harm due to any negligent and unlawful act is liable to indemnify this loss or harm.

Even if there is no legal rule prohibiting the act which causes loss or harm, anyone who intentionally causes someone else to suffer loss or harm due to an immoral act is also liable to indemnify this loss or harm."

31. The judgment of the General Assembly of Civil Chambers of the Court of Cassation dated 13/4/2011, docket no. 2010/13-717 and judgment no. 2011/129 provides for:

"…

To assess material facts relied on in a specific case within the framework of the law and to determine and apply the relevant legal provisions are directly tasks of a judge in pursuance of Article 76 of the Code of Civil Procedure. Maintaining that he was to undergo surgery once again as a foreign body had been forgotten in the surgical part of his body during the surgery performed by the defendant physician, the complainant claimed pecuniary and non-pecuniary damage. The contract of mandate forms the basis for the case, and the case concerns the breach of the duty of care (Articles 386 -390 of the Turkish Code of Obligations). Although the agent (physician) is not responsible for failing

to obtain the result he has aimed at, he shall be responsible for the damages resulting from lack of diligence in endeavours he has made, the acts, actions he has performed and behaviours he has displayed. Liability of the agent is generally subject to the rules pertaining to the workers. The agent must act diligently like a worker and is even responsible for his slightest negligence (Article 1 of the Turkish Code of Obligations). For that reason, all negligence of the physician falling into scope of his profession, even the slight ones, must be accepted as an element of his liability. The physician is to fulfil all requirements of his profession, to designate medical status of the patient in due course of time and without any delay, to precisely take measures required by the patient's case and to determine and apply the appropriate treatment without delay in order to avoid his patient suffering any loss or harm. In case of any situation leading to hesitation even if at a minimum level, he is liable to conduct researches which would eliminate his hesitations and meanwhile to take preventive measures. In making a choice among various treatment methods, characteristics of the patients and of his disease must be taken into consideration, the behaviours and conducts likely to endanger the patient must be avoided, and the safest approach must be followed. Indeed, the client (patient) is entitled to expect meticulous diligence and care from his agent, the physician performing a professional practice, at all stages of the treatment. The agent who has not shown due diligence must be deemed not to have duly performed his task under Article 394 § 1 of the Turkish Code of Obligations. If the same result is obtained when the requirements and the rules of medicine are complied with, the physician should not be held responsible.

..."

32. The judgment of the General Assembly of the Civil Chambers of the Court of Cassation dated 1/2/2012, docket no.2011/4-592 and judgment no. 2012/25 is as follows:

"The case concerns the claim for damage on the basis of the allegation that the patient died as a result of wrong treatment. The dispute focuses on the question as to whether the claim could be put forward against the physician or not in this action for damage brought due to the act of the physician who was a public official.

The complainants brought an action for damage in question against the physician with the allegations that the physician did not perform a medical intervention to the patient

despite of having bleeding and being in need of immediate treatment but took care of another patient with ectopic pregnancy and that the physician therefore led to death of the patient on account of his recklessness and negligence.

Taking into account the facts that any personal fault falling outside the scope of the physician's profession is not attributed to the defendant, the impugned act was performed in the exercise of his duties and concerns his profession even if caused from recklessness and negligence and is classified as neglect of duty, the one who may be a party to the present case is not the public official but the administration. Accordingly, the action must be brought against and the dispute must be put forward against the administration. The dismissal by the first instance court of the action brought against the physician on account of absence of any dispute is in accordance with law.

..."

33. The judgment of the 13th Civil Chamber of the Court of Cassation, dated 16/2/2012, docket no. 2011/19947 and judgment no. 2012/3097 is as follows:

"… According to the assertions and acknowledgment in the case, the contract of mandate forms the basis for the case which concerns the breach of the duty of care (Articles 386 -390 of the Turkish Code of Obligations). Although the agent (physician) is not responsible for failing to obtain the result he has aimed at, he shall be responsible for the damages resulting from lack of diligence in endeavours he has made, the acts, actions he has performed and behaviours he has displayed. Liability of the agent is generally subject to the rules pertaining to the workers. The agent must act diligently like a worker and is even responsible for his slightest negligence (Article 1 of the Turkish Code of Obligations). For that reason, all negligent acts of the physician falling into scope of his profession, even the slight ones, must be accepted as an element of his liability. The physician is to fulfil all requirements of his profession, to designate medical status of the patient in due course of time and without any delay, to precisely take measures required by the patient's case and to determine and apply the appropriate treatment without delay in order to avoid his patient suffering any loss or harm. In case of any situation leading to hesitation even if at a minimum level, he is liable to conduct researches which would eliminate his hesitations and meanwhile to take preventive measures. In making a choice

among various treatment methods, characteristics of the patients and of his disease must be taken into consideration, the behaviours and conducts likely to endanger the patient must be avoided, and the safest approach must be followed. Indeed, the patient is entitled to safely expect due diligence and care, as a requirement of the physician's profession, from his physician undertaking his treatment at all stages of his treatment and to be informed of possible threats to his physical and mental health. The agent who has not shown due diligence must be deemed not to have duly performed his task under Article 394 § 1 of the Turkish Code of Obligations. If the same result is obtained when the requirements and the rules of medicine are complied with, the physician should not be held responsible…"

IV. ASSESSMENT AND GROUNDS

34. At the meeting held by the Constitutional Court on 9/9/2015, the applicants' individual application dated 14/3/2013 and No. 2013/1943 was assessed, and the Constitutional Court accordingly held:

A. The Applicants' Allegations

35. The applicants maintain that their rights guaranteed under Articles 5, 17, 36, 56 and 141 of the Constitution were breached by alleging that the pregnancy could have been terminated if the physician had made the right diagnosis when the fact that the birth defect, "*agenesis of the corpus callosum*", could continue developing until 20th week of pregnancy and dimension of the defect were taken into consideration; however as this diagnosis was not made due to the physician's negligence, İlker Başer was born with a birth defect; that the decision rendered in respect of the actions for pecuniary and non-pecuniary damages they brought thereupon includes contradictions; that the judgment of the Court of Cassation is unreasoned; that their request for holding a hearing was not taken into account; and that the case was concluded within a period of more than 7 years, which is incompatible with the "reasonable time" requirement. They claimed compensation in this regard.

B. Assessment

36. The Constitutional Court is not bound by the legal classification of the case made by the applicants and, itself makes an assessment as to legal definition of the facts.

37. In pursuance of the right to life enshrined in Article 17 of the Constitution, the State has a negative obligation not to intentionally and unlawfully end the life of any individual within its jurisdiction as well as a positive obligation to protect the right to life of all individuals within its jurisdiction against the risks likely to result from acts of public officials, other individuals or the individual himself / herself (*Serpil Kerimoğlu and Others*, no. 2012/752, 17/9/2013, §§ 50 and 51). These obligations may be, under certain circumstances that must be separately considered for each case, attributed to the state even if any death has not occurred in the relevant case. In this respect, where the state has not taken measures likely to prevent an individual's life from undergoing a direct risk or from being exposed to third parties' acts which could potentially cause his death or to any fatal disease, the obligations to protect the individual's life and, in conjunction thereof, to conduct an effective investigation into the acts and negligence alleged to have led to this incident may arise in respect of the state even if there is no loss of life (for the ECtHR's judgments in similar cases, see *L.C.B. v. the United Kingdom*, no. 23452/94, 9/6/1998, §§ 36-41; *Makaratzis v. Greece*, no. 50385/99, 20/12/2004, § 51; *Mustafa Tunç and Fecire Tunç v. Turkey*, no. 24014/05, 14/4/2015, § 171).

38. In the present case which is subject-matter of the application, it has been revealed that one of the applicants, the mother Meliha Başer, suffered harm or loss in terms of her material and spiritual entity due to possibility of termination of her pregnancy; and that life of the other applicant, İlker Başer, is at risk and his material and spiritual entity has been damaged on account of the risk of death during and after his birth and his disability of ninety nine percent, as indicated in the medical reports.

39. Within the scope of the above-cited assessments, it has been concluded that the allegations put forward by the applicants in conjunction with the rights enshrined in Articles 5, 36 and 56 of the Constitution fall into scope of the individual's right to life and the right to protect his material and spiritual entity guaranteed under Article 17 of the Constitution, and the allegations were assessed in this scope. On the other hand, the allegations that the judgments rendered by the Court of Cassation are unreasoned and the applicants' request for holding a hearing was not taken into account were examined within the scope of the right to a fair trial.

1. Admissibility

a. Allegations Put Forward Under Article 17 of the Constitution

i. Allegation that necessary steps were not taken for protection of the right to life and the right to protect the individual's material and spiritual entity

40. First and second paragraphs of Article 17 of the Constitution entitled *"Personal inviolability, material and spiritual entity of the individual"* read as follows:

"Everyone has the right to life and the right to protect and improve his/her material and spiritual entity.

The material integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent."

41. The individual's right to life and right to protect material and spiritual entity are inalienable rights which are closely interrelated. As stated by the Constitutional Court, the fundamental right on life and physical integrity is one of the rights imposing positive and negative obligations on states (the Constitutional Court, docket no. 2007/78, judgment no. 2010/120, date of judgment 30/12/2010).

42. The objective of Article 17 of the Constitution is principally to avoid arbitrary interventions likely to be made by the state against the material and spiritual entity of the individuals. The state also has positive obligations to effectively protect and respect the individual's material and spiritual entity against physical and sexual assault, medical interventions and attacks having an impact on the individual's honour and reputation, all of which are directed towards the physical and mental integrity (*Adnan Oktar (no. 3),* no. 2013/1123, 2/10/2013, § 32).

43. According to the main approach adopted by the Constitutional Court in respect of the positive obligations the state has within the scope of the right to life, Article 17 of the Constitution imposes on the state the task to take efficient administrative and judicial measures which would enable duly implementation of legal and administrative framework established in this regard, in case of deaths occurring under conditions for which the state may be held responsible, with a view to protecting those whose lives are in danger and eliminating the violations of this right and punishing those responsible by using all means at its hand. This

obligation is also applicable to any acts or actions, public or not, likely to endanger the right to life. However, taking into account the unpredictability of human behaviours most particularly and the preference of the act to be carried out or the action to be performed by evaluating priorities and resources, the positive obligation should not be interpreted in a manner which would impose excessive burden on the authorities (*Serpil Kerimoğlu and Others,* §§ 52 and 53).

44. The positive obligation in question also covers the activities carried out in the health sector. Article 56 of the Constitution sets out that everyone has the right to live in healthy, balanced environment and that "*the state shall regulate central planning and functioning of the health services to ensure that everyone leads their lives in conditions of physical and mental health …*". It is also stated in this provision that the state shall fulfil this task by utilizing and supervising the health and social assistance institutions in both the public and private sectors.

45. The State is obliged to regulate health services, whether they are provided by public or private health institutions, in a way which would ensure that necessary measures can be taken in order to protect the lives of patients and their material and spiritual entity under the individuals' rights to life and to protect their material and spiritual entity (*Nail Artuç*, no. 2013/2839, 3/4/2014, § 35).

46. Moreover, where the administrative authorities and first instance courts find a violation by means of taking any action or decision in favour of the applicants and this violation is indemnified in an appropriate and sufficient manner by the decision taken, the relevant party could no longer claim to have victim status in respect of the constitution. On condition that these two requirements are fulfilled, there would be no need for examination by the Constitutional Court due to the subsidiary nature of the individual application mechanism. Accordingly, an administrative remedy which is applied following a comprehensive criminal investigation to be conducted when necessary and in which a reasonable amount of compensation is awarded is an effective remedy which may remove the victim status for the complaints raised under Article 17 of Constitution (*Serpil Kerimoğlu,* §§ 61 and 74; *Sadık Koçak and Others*, no. 2013/841, 23/1/2014, § 83).

47. Removal of the victim status depends especially on the nature of the right alleged to be breached, justification of the decision finding a violation and the fact whether the losses suffered by the relevant party continue or not subsequent to this decision. The conclusion as to whether the redress provided for the applicants is appropriate and sufficient or not may be reached after all circumstances of the case are assessed by having regard to the nature of the breach of the fundamental right and freedom in question. In this framework, the victim status of an applicant may depend on compensation awarded by an administrative or judicial decision for the complaints he has raised before the Constitutional Court (*Sadık Koçak and Others*, § 84).

48. In the present case, the applicants maintain that the physician providing medical care for Meliha Başer in her pregnancy period did not detect any health problem in the fetus; that it is considered that the birth defect, "*agenesis of the corpus callosum*" may medically develop until the 20th week of pregnancy; that failing to detect this birth defect at the right time has been caused by gross negligence when regard is paid to the 18-mm lateral ventricular extension in the brain of the fetus. They allege that if this birth defect had been detected at the right time, the pregnancy could have been terminated in a safely manner; however İlker Başer was born with a severe disability on account of this negligence; and that both İlker Başer and his relatives especially his mother have sustained significant damage in respect of their material and spiritual entity.

49. It is stated in the Ministry's opinion that the applicants brought an action for pecuniary and non-pecuniary damages against the relevant administration which is still pending. It is also noted by referring to the relevant ECtHR's case-law that the requirement of non-exhaustion of legal remedies must also be taken into account in examination as to the admissibility of the complaints that the applicants' rights to life and to protect and develop their material and spiritual entity have been breached.

50. It is observed that in the present case, the decision of the Ankara 3rd Administrative Court, which was upheld after being rectified by the Fifteenth Chamber of the Council of State, accepted the complainants' claims for pecuniary and non-pecuniary damage as the diagnosis and treatments applied to the applicant were found to be incompatible with the rules of medicine and there was gross neglect of duty in the instant case. It is therefore held that the complainants be paid TRY 340,000.00 for pecuniary damage and TRY 45,000.00 for non-

pecuniary damage plus any legal interest likely to incur as from 12/10/2005 when the action was brought before the civil court.

51. In the report of the Forensic Medicine Institute dated 12/5/2008 which was taken a basis for the decision, it is revealed that pregnancy controls of the pregnant, Meliha Başer, were incompletely performed and there was neglect of duty in the medical service rendered.

52. It is observed that there is no obvious disproportionality between the compensation amounts and the circumstances of the case as well as the damage suffered by the applicants. Consequently, as there is no obvious deficit or arbitrariness in the assessment in the decision of the Ankara 3rd Administrative Court, the Constitutional Court cannot interfere in the discretionary power of the relevant court in determination of the compensation amounts and distribution of fault rates (*Özkan Şen, Özkan Şen,* no. 2012/791, 7/11/2013, § 45; *Sadık Koçak and Others*, § 87). In the present case, referral of the case-file to the Administrative Court for rendering a further decision concerning the amount of pecuniary damage increased upon the applicants' request for correction would not have any influence on removal of the applicants' victim status; nevertheless the total amount of compensation falls within the scope of the discretionary power of the first instance court.

53. Accordingly, in the present case, the applicants had at their disposal an administrative remedy which finds a violation in respect of the complaints concerning the obligation to protect life and awards a reasonable amount of compensation paying regard to the principles it has determined. Thereby, the applicants' victim status has been removed.

54. For the above-mentioned reasons, this part of the applicant must be declared inadmissible as it has been revealed that the applicants can no longer claim to be a victim in respect of the obligation to protect individuals' life and material and spiritual entity.

ii. Alleged Violation of the Obligation to Conduct an Effective Investigation

55. Relying on Article 48 of the Code on Establishment and Rules of Procedures of the Constitutional Court no. 6216 and dated 30/3/2011, this part of the application which is found not to be manifestly ill-founded and includes allegations that there has been a breach of Article 17 of the Constitution for not conducting an effective investigation must be declared admissible.

b. Allegations Raised Under Article 36 of the Constitution

i. Allegation that Judgments Rendered by the Court of Cassation were Unreasoned

56. The applicants maintain that there has been a breach of the right to a reasoned decision in the present case due to lack of sufficient reasoning of the judgments rendered by the Court of Cassation.

57. The third paragraph of Article 141 of the Constitution reads as follows:

"The decisions of all courts shall be written with a justification."

58. The freedom to claim rights guaranteed under Article 36 of the Constitution is not only a fundamental right enshrined in the Constitution but also one of the most effective guarantees ensuring duly enjoyment and protection of other fundamental rights and freedoms. Accordingly, it is obvious that Article 141 of the Constitution which sets out that the decisions of all courts shall be written with a justification must be taken into account in determination of the scope of the freedom to claim rights (*Vedat Benli*, no. 2013/307, 16/5/2013, § 30).

59. The appellate court may be of the same opinion with the trial court and mention this opinion in its judgment by either using the same justification or making a simple reference in this regard. What is significant for the appellate court at this stage is to indicate that it has already examined the main issues put forward at the appellate stage and upheld or quashed the trial court's decision upon examining it (*Yasemin Ekşi*, no. 2013/5486, 4/12/2013, § 57).

60. In the instant case, the first instance court assessed the applicants' claims and provided the factual and legal reasons for dismissal of the applicants' action. On the other hand, the Court of Cassation mentioned the following reasons in its judgment upholding the trial court's decision on the applicants' action: *"...All objections raised be dismissed as being found unjustified according to the documents in the case-file and to the fact that the decision is in line with the previous quashing decision of the Court of Cassation and there does not exist any non-conformity in assessment of the evidence, and the decision found in compliance with the procedure and the law be upheld."* Therefore, the Court of Cassation referred to the first instance court's decision and the previous quashing judgment instead of writing a separate

justification. The applicants' request for rectification of the decision was dismissed by the Court of Cassation in the same manner.

61. For the above-mentioned reasons, this part of the application must be declared inadmissible for "*being manifestly ill-founded*", without making any examination as to the other admissibility criteria, as any obvious and explicit breach has not been found in respect of the applicants' right to a reasoned decision.

ii. Alleged Violation of the Right to A Fair Trial

62. The applicants also alleged that there has been a breach of their right to a fair trial on the ground that the appellate review was concluded without holding a hearing although they had appealed the court's decision on dismissal of their action with a request for a hearing.

63. One of the main elements of the right to a fair trial enshrined in Article 36 of the Constitution is the principle that the hearings shall be open to public and trial proceedings shall be conducted with a hearing, which is set out in Article 141 of the Constitution. The principle of publicity of the hearings is to secure the transparency of the trial proceedings and avoid arbitrariness in the trial by means of exposing the functioning of the judicial mechanism to the public scrutiny. From this aspect, it is one of the most significant means to achieve a state of law. Carrying out trial proceedings, especially in criminal proceedings, with hearing and open to public secures the principle of equality of arms and the right to defence. However, this does not mean that all trial proceedings are to be held with a hearing. Due to reasons such as procedural economy and reducing the workload, exempting certain proceedings from hearing and concluding the proceedings without making a trial do not constitute a breach of the constitutional rights provided that principles of fair trial are complied with. Especially where the appellate review is carried out over case-file after the first instance courts carry out trial proceedings with a hearing and render the decision, it cannot be concluded that there has been a breach of the right to a fair trial (*Nevruz Bozkurt,* no. 2013/664, 17/9/2013, § 32).

64. In the present case, the applicants were granted the opportunity to adduce their evidence; a hearing was held; the expert reports were received and the applicants were allowed to raise an objection against these reports during the action for damage brought by the applicants. The applicants thereupon submitted their evidence. At the end of the trial

conducted, the Court decided to dismiss the action relying on the whole content of the case-file and the quashing judgment after first appellate review which was abided by. Although the 4th Civil Chamber of the Court of Cassation concluded the appellate review without giving any decision on the request for an oral hearing, the applicants found the opportunity to put forward their allegations and evidence at two levels of jurisdiction, namely the first instance court and the appellate court, and their allegations and evidence were comprehensively assessed by these courts.

65. Moreover, the applicants did not make any explanation as to which additional arguments, which could not be submitted before the court, would have been put forward by them or which evidence capable of proving their allegations would have been submitted by them if the Court of Cassation had accepted the request for an appellate review with a hearing. Therefore, the applicants cannot be considered to have been deprived of a procedural opportunity which would influence the outcome of the proceedings. Accordingly, it cannot be concluded that the right to a fair trial has been breached only for the reason that the request for an appellate review with a hearing was not accepted.

66. In the light of the above-cited reasons, this part of the application must be declared inadmissible *"for being manifestly ill-founded"* as any violation has not been found in this regard.

2. Merits

67. The applicants complain that the action for damage they brought against the Ministry of Health and the relevant physician was not concluded within a reasonable time and became final within over 7 years.

68. The Ministry of Justice notes in its opinion that it has already received other applications including complaints similar to those of the applicant; that it submitted its opinions in this regard to the Constitutional Court, and the Constitutional Court ruled on these applications; and that it finds no particular circumstances in the instant case requiring it to depart from its findings in the above-mentioned cases.

69. The positive obligations of the state under the right to life and the right to protect the material and spiritual entity also have a procedural aspect. Within the framework of this

procedural obligation, the State is to conduct an official effective investigation capable of leading to the identification and, if need be, punishment of those responsible for the incidents which have led to loss or harm of the material and spiritual entity and for the unnatural deaths. Primary aim of such investigation is to ensure effective implementation of the law, which protects the individuals' right to life and their material and spiritual entity and to enable the public officials or institutions, in the incidents they have involved, to account for the deaths and the losses or harms to the individuals' material and spiritual entity, which are attributable to them (*Serpil Kerimoğlu and others*, § 54).

70. The procedural aspect of the positive obligations which are to be fulfilled by the state within the scope of the right to life and the right to protect the individual's material and spiritual entity as enshrined in Article 17 of the Constitution, requires conducting of an independent investigation capable of revealing all aspects of the incidents having led to death or causing harm or loss to the individuals' material and spiritual entity and of identification of those who are responsible (*Sadık Koçak and Others*, § 94).

71. It is necessary to determine the type of investigation required by the procedural obligation depending on whether the obligations as to the essence of the right to life requires a criminal sanction or not (*Serpil Kerimoğlu and others*, § 55).

72. In this respect, if the infringement of the right to life or physical integrity has not been caused intentionally, the positive obligation to "*establish an effective judicial system*" does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies are available to the victims (*Serpil Kerimoğlu and others*, § 59). As a rule, this principle is also applied in respect of deaths and losses or harms to the material and spiritual entity alleged to have occurred due to medical negligence (*Nail Artuç*, § 37).

73. However, the criminal investigations conducted to reveal the incident of death and the actions brought by the victims, on their own initiative, before the civil or administrative court should not be theoretical but should be practical and effective, and the authority applied should have the jurisdiction to deal with the essence of the alleged violation. A remedy may be deemed as effective only when it is capable of avoiding an alleged violation of any right, eliminating the violation if it is still prevailing or ruling on an alleged violation if the violation

terminates and providing an appropriate redress for it (*Tahir Canan*, no. 2012/969, 18/9/2013, § 26; *Filiz Aka*, no. 2013/8365, 10/6/2015, § 39).

74. Furthermore, the investigations to be conducted implicitly include the requirements to be conducted with a reasonable speed and with due diligence. Of course, there may be factors or difficulties which hinder progress of the investigation or the prosecution in certain specific circumstances. However, taking speedy actions by the authorities during the investigation and the subsequent stage, namely the prosecution, is of critical importance for clarification of the events in a more sound manner, maintenance of the individuals' commitment with the rule of law and hindering the impression that authorities tolerate and remain indifferent to the unlawful acts (*Deniz Yazıcı*, no. 2013/6359, 10/12/2014, § 96; *Filiz Aka*, § 29).

75. The actions for damage to be brought before the civil, criminal and administrative jurisdiction in order to reveal the legal responsibility must also fulfil, to a reasonable extent, the requirements of speediness and due diligence as well as the criminal investigations to be conducted within the scope of the right to life and the right to protect the individual's material and spiritual entity. The Constitutional Court must also assess whether the lower courts have acted and made examinations with due diligence, as required by Article 17 of the Constitution, in the proceedings carried out concerning such kinds of incident or to what extent they have made examinations. Indeed, due diligence to be displayed by lower courts in this regard would prevent the significant role of the prevailing judicial system in prevention of the similar violations of the right to life, which are likely to occur in future, from being damaged (*Cemil Danışman*, no. 2013/6319, 16//7/2014, § 110; *Filiz Aka*, § 33).

76. It must be also indicated in respect of the alleged violations caused by medical negligence that being aware of the negligent acts performed by the health institutions and medical personnel is of great importance as it enables these institutions and the medical personnel to eliminate their potential deficits and to prevent occurrence of similar negligent acts. Therefore, conducting speedy investigations into and trials concerning such kinds of incidents is extremely important for all individuals receiving medical services (for the ECtHR judgments in similar cases, see *Süleyman Ege v. Turkey*, no. 45721/09, 25/6/2013, § 53).

77. In the instant case, the applicants brought an action for pecuniary and non-pecuniary damage against the Ministry of Health and the relevant physician before the Ankara 2nd Civil

Court of First Instance on 12/10/2005. The objections raised by the defendants concerning the fact the administrative courts had jurisdiction over this case were dismissed by the court. Thereupon, the relevant department of the Ankara University was asked to draw up an expert report in order to ascertain whether the physician had any fault and negligence in unhealthy birth of the baby or not, and the expert report was submitted on 21/5/2007 (see above §§ 8-11). Upon the objection raised against this report, a second expert report dated 12/5/2008 was received from the Presidency of the İstanbul Forensic Medicine Institute. This report finds each of the physician and the Ministry of Health faulty at the equal rates, namely 4/8. Approximately 3 years, the above-mentioned court, by its decision dated 31/12/2008, docket no. 2005/380, decision no. 2008/463, decided to dismiss the action brought against the Ministry of Health for lack of jurisdiction and to dismiss the action brought against the physician for absence of any dispute as the applicants were not entitled to directly bring an action against the physician. The applicants appealed this decision, and thereupon the 4th Civil Chamber of the Court of Cassation decided to quash the first instance decision in respect of the physician and to dismiss the applicants' objections in respect of the Ministry of Health by its judgment dated 8/6/2009. Upon the quashing of the decision, the Ankara 2nd Civil Court of First Instance, at that time, requested a report from the relevant department of the Hacettepe University. By its decision dated 21/12/2011, the court decided to dismiss the action by relying on the expert report received from the Hacettepe University. The applicants' requests for appeal and rectification of the decision were dismissed by the judgment of the Court of Cassation dated 3/7/2012 and 19/12/2012 (see above § 12-21).

78. When the specific circumstances of the present case are considered within the scope of the above-mentioned principles, it may be concluded that the applicants' own negligent conducts play a role in the delay of having recourse to an administrative remedy and rendering a decision in this regard as they brought their action before a court not having jurisdiction over this case. As set out in Article 115 of the Civil Procedure Law no. 6100 and dated 12/1/2011, the courts *ex officio* examine at every stage of the proceedings whether conditions required for bringing an action, such as the requirement of competent authority, have been fulfilled or not; however, the parties may also assert lack of any requirements at all stages. In the instant case, this deficiency, which was also asserted by the defendants, was not taken into consideration by the court in the course of the preliminary examination, and therefore the action for damage brought against the administration was dismissed for lack of

jurisdiction after approximately three years. Finalization of this decision and initiating an administrative proceeding by the applicants took approximately 4 years, and the administrative proceeding was initiated on 2/9/2009. On the other hand, the decision on dismissal rendered by the civil court in respect of the relevant physician, for absence of any dispute, was quashed by the Court of Cassation on the ground that "*the matter whether the damage sustained by the complainants have been caused on account of the personal negligence of the defendant was not investigated*", and the dismissal decision concerning the claim for damage, which was rendered by the court in line with a new expert report upon the quashing judgment, became final within seven years and two months after being subjected to appellate review and rectification process.

79. In respect of the full remedy action brought by the applicants against the administration before the administrative court, the decision on acceptance of the claim for damage in line with the applicants' claim was rendered on 4/2/2013. However, this part of the decision became final on 21/4/2015 as being subjected to an appellate review by the relevant chamber of the Council of State and an examination for rectification of the decision. On the other hand, the relevant part of this decision on request for correction of the compensation amounts is still pending. Accordingly, it has been concluded that the actions brought by the applicants before the civil and administrative courts for the loss and damage they have sustained as a result of medical intervention are pending for approximately 10 years as of the date when the application was submitted to the examination of the Constitutional Court.

80. When all of the above-mentioned findings are assessed as a whole, the Constitutional Court reaches the following conclusions: The decision of the Civil Court of First Instance, which dismisses the applicants' claim for damage (resulting from tortious act), became final within 7 years and 2 months. It has been revealed that the applicants did not play any role in this delay. Although the case at hand is of a partially complex nature as examination of the case mainly depends on the determination of the medical responsibility, two expert reports requested for clarification of this matter could be received within a total period of 2 years and 8 months. Despite of all of these findings, 3 years after, the first instance court decided to dismiss the action on procedural grounds, without an examination on merits, for lack of jurisdiction and absence of any dispute. There was a delay in determination of the competent authority in respect of the action brought against the administration, which was partially

attributable to the applicants and capable of being removed by the lower courts in a short time (arising out of a matter which was put forward by the defendants by objection and which must be examined *ex officio* by the court on account of lack of conditions required for bringing an action). Therefore, the action that must be dealt with by the administrative court could only be initiated 4 years following the date of the first action brought. Although the administrative court relied on the technical expert report, which had been received in the course of the proceedings before the civil court, without requesting a new one, and only an expert report was requested for calculation of the amount of pecuniary damage sustained, the proceedings before the first instance court were concluded within 3 years and 5 months, and this decision apart from the relevant part for which correction was requested became final within 5 years and 7 months. Indeed, there is no factor which is attributable to the applicants in respect of this delay. It has been observed that relevant part of this decision concerning the correction request is still pending as of the date of the decision.

81. In the light of these findings, it is not possible to conclude that the proceedings before both the civil court and the administrative court have been carried out with due diligence and reasonable speediness. It is therefore held that the period of proceedings, as a whole, which lasted for approximately ten years before two levels of jurisdiction was excessively long and during the proceedings, speedy and sufficient examinations were not carried out as required by Article 17 of the Constitution by taking to account the applicants' interest in finalization of the proceedings before civil and administrative courts in a speedy and efficient manner, the applicants' having no substantial role in the delay taking place, limited number of parties to the proceedings and not very complex nature of the action brought.

82. For the above-mentioned grounds, it must be held that there has been a breach of the obligation to conduct an effective investigation, which is required by the right to life guaranteed under Article 17 of the Constitution.

3. In respect of Article 50 of the Law no. 6216

83. Article 50 § 2 of the Law no. 6216 reads as follows:

"Where the violation found stems from any decision rendered by the court, the case-file shall be referred to the relevant court for re-trial in order to eliminate the violation and consequences thereof. In the event that there is not any legal interest in making a re-trial,

the applicant may be awarded compensation or advised to open a case before the ordinary courts. The court in charge of making re-trial shall render a decision over the case-file, where possible, in a manner which would eliminate the violation specified in the Constitutional Court's judgment finding a violation and the consequences thereof."

84. In the present case, for the alleged violation of Article 17 of the Constitution, the applicants claim pecuniary damage of TRY 310,228 for expenses related to İlker Başer's treatment and care, and jointly non-pecuniary damage of TRY 45.000.

85. It has been concluded in the present case that the applicants' victim status were removed in respect of the obligation to protect life set out in Article 17 of the Constitution as they had at their disposal an administrative remedy by which a violation was found and the applicants were awarded a reasonable amount of compensation; however, there has been a breach of the procedural aspect of the above-cited Article. Therefore, the applicants' claims for pecuniary damage must be rejected. It has been also decided that, by taking into account the specific circumstances of the present case, the applicants be jointly paid TRY 25,000.00 for non-pecuniary damage on account of the excessive length of the civil and administrative proceedings initiated by the applicants in consideration of the non-pecuniary damage sustained by them which could not be redressed only by finding of a violation.

86. It has been also decided that the court expense of TRY 1,698.35, which is the total amount of the court fee and the counsel's fee of respectively TRY 198.35 and TRY 1,500.00, be reimbursed to the applicants, and one copy of the judgment be sent to the relevant court.

V. JUDGMENT

For the above-cited reasons, it has been **UNANIMOUSLY** held on 9/9/2015 that

A.

1. The part of the application concerning the alleged violation of the right to a fair trial enshrined in Article 36 of the Constitution be INADMISSIBLE;

2. The part of the application concerning the alleged violation of the right to the obligation to protect the life and the material and spiritual entity, guaranteed under Article17 of the Constitution, be INADMISSIBLE for removal of the victim status;

3. The part of the application concerning the alleged violation of Article 17 of the Constitution be ADMISSIBLE as the proceedings were not conducted in an effective manner;

B. The obligation to conduct an effective investigation under the right to life and to protect material and spiritual entity has been BREACHED;

C. The applicants be jointly awarded a net amount of TRY 25,000.00 as non-pecuniary damage pursuant to Article 50 § 2 of the Code no. 6216;

D. The applicants' surplus claims for damage be DISMISSED;

E. The court expense of TRY 1,698.35, which is the total amount of the court fee and the counsel's fee of respectively TRY 198.35 and TRY 1,500.00, BE JOINTLY REIMBURSED TO THE APPLICANTS;

F. The payments be made within four months as from the date when the applicants apply to the Ministry of Finance following the notification of the judgment plus legal interest payable for the period from the expiry of the above-mentioned four months until settlement date in case of any delay in the payment;

G. A copy of this judgment be submitted to relevant court.