



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

**FIRST SECTION**

DECISION

Application No: 2013/2253

Date of Decision: 15/4/2014

**FIRST SECTION**

DECISION

**President** : Serruh KALELİ  
**Members** : Nuri NECİPOĞLU

Hicabi DURSUN

Erdal TERCAN

Zühtü ARSLAN

**Rapporteur** : Recep ÜNAL  
**Applicant** : Mehmet Ali İNCESU  
**Counsel** : Att. İnan AKMEŞE

## **I. SUBJECT OF APPLICATON**

1. The applicant asserted that the right to trial in a reasonable time was violated due to the fact that the trial conducted on him lasted for seven years and seven months, filed a request for compensation.

## **II. APPLICATION PROCESS**

2. The application was directly lodged to the Constitutional Court on 26/3/2013. As a result of the preliminary administrative examination of the petition and its annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

3. It was decided by the Second Commission of the First Section on 30/5/2013 that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. In the session held by the First Section on 24/7/2013, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application were notified to the Ministry on 30/7/2013. The Ministry presented its written opinion to the Constitutional Court on 23/8/2013.

6. The opinion letter of the Ministry was notified to the applicant on 13/9/2013. The applicant submitted his petition including his answers to the opinion of the Ministry on 23/9/2013.

## **III. FACTS AND CASES**

### **A. Facts**

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

8. The applicant was taken into custody on 22/3/2005 with the suspicion that he sold books without banderoles and his statement was taken.

9. A public case was filed on the applicant, through the indictment of the Chief Public Prosecutor's Office of Istanbul dated 23/3/2005 and numbered H.2005/13340, M.2005/5572, with the claim that he committed the crime of contravening the Code on Intellectual and Artistic Works numbered 5846 by selling books reproduced in contrary to the provisions of the Code numbered 5846 and with the request that he be sentenced due to this

crime. In accordance with the provisions of the abolished Code of Procedure on Flagrant Crimes dated 8/6/1936 and numbered 3005, the applicant was taken before the 3rd Criminal Court of Intellectual and Industrial Rights of Istanbul (the Court numbered 3) on the same date. The defense statement of the applicant was taken and he was released at the hearing held on 23/3/2005 according to the provisions of the abolished Code numbered 3005.

10. By concluding that the applicant committed the crime of contravening the Code numbered 5846 through the decision of the Court numbered 3 dated 25/5/2010 and numbered M.2005/367, D.2010/249, it was decided that he be sentenced to a judicial fine of 5.000,00 TL in accordance with article 81 of the same Code. The applicant appealed the decision through a petition dated 24/6/2010.

11. Through the decision of the 7th Criminal Chamber of the Supreme Court of Appeals which conducted the appeal examination dated 30/10/2012 and numbered M.2012/24087, D.2012/26176, it was decided that the continuing criminal case on the applicant "*be removed*" due to the fact that extraordinary statute of limitations expired.

12. The applicant declared that he was informed of the decision of the Supreme Court of Appeals upon receiving a copy of the file through a petition dated 28/2/2013 and no finding could be determined as to the effect that the applicant had been previously informed of the decision.

#### **B. Relevant Law**

13. Paragraph nine of article 81 of the Code numbered 5846 is as follows:

*"A person who produces, puts up for sale, sells, distributes, purchases, accepts or uses fake banderoles shall be punished with an imprisonment of three years to seven years and a judicial fine of up to five thousand days."*

#### **IV. EXAMINATION AND JUSTIFICATION**

14. The individual application of the applicant dated 26/3/2013 and numbered 2013/2253 was examined during the session held by the court on 15/4/2014 and the following were ordered and adjudged:

##### **A. Claims of the applicant**

15. The applicant asserted that the trial process on him started on 22/3/2005 and came to an end with the writ of the Supreme Court of Appeals dated 30/10/2012, that in this way the trial process lasted for seven years and seven months, that it was necessary to evaluate whether the trial process was reasonable or not within the framework of the specific conditions of the case and to evaluate in particular the complexity of the case and the attitude of the applicant and other relevant persons and authorities, that the case through which he was tried was not complex, that for this reason the right to personal liberty and security regulated in article 19 of the Constitution and the right to trial in a reasonable time regulated in article 36 were violated, filed a request for moral compensation.

##### **B. Evaluation**

###### **1. In Terms of Admissibility**

16. The applicant claimed that the right to personal liberty and security regulated in article 19 of the Constitution was violated. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it appraises the legal definition of the facts and cases itself. In this respect, as the facts and cases that the applicant touched upon in his application petition are in essence related to the field of protection of the right to trial in a reasonable time which is an element of the right to a fair trial regulated in article 36 of the

Constitution, it has not been considered necessary to conduct a separate examination in terms of article 19 of the Constitution.

17. The complaint of the applicant is not clearly devoid of basis. It should be decided that the application, where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible.

## **2. In Terms of Merits**

18. In the opinion letter of the Ministry, it was stated that the Constitutional Court examined not only the period following the date of 23/9/2012 which was the beginning of lodging individual applications, but also the period that elapsed until this date while examining the complaints of long trial, that the European Court of Human Rights (ECtHR) and the Constitutional Court decided on whether the trial period was reasonable or not by considering the specific conditions of each incident and especially criteria such as whether the case was complex or not, the attitude and behaviors that the applicant showed during the trial, the attitudes of public authorities and in particular trial bodies, the importance that the case had in terms of the applicant and if the trial in question is a criminal trial, whether the applicant was under detention or not, that the trial which was the subject of the concrete application started on 22/3/2005, came to an end on 30/10/2012, that the trial lasted for seven and a half years, that the Constitutional Court had discretion over the determination of whether the trial period in question was reasonable or not and the amount of the compensation to be ruled upon.

19. The applicant, in his declaratory petition dated 23/9/2013, stated that it was necessary that the Constitutional Court decide in accordance with its decision dated 2/7/2013 and numbered App. No: 2012/13 by repeating his claims and requests in his application petition.

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

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

21. Paragraph (1) of article 6 of the European Convention on Human Rights (Convention) with the side heading "*Right to a fair trial*" is as follows:

*"In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

22. In paragraph one of article 36 of the Constitution, it is stated that everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means. As the scope of the right to a fair trial is not regulated in the Constitution, the scope and content of this right should be determined within the framework of article 6 of the Convention with the side heading "*Right to a fair trial*" (App. No: 2012/1049, 26/3/2013, § 22; App. No: 2012/13, 2/7/2013, § 38; App. No: 2013/695, 9/1/2014, § 27).

23. Article 141 of the Constitution which stipulates that the right to trial in a reasonable time which constitutes the basis for the concrete application is covered by the right to a fair trial and also states that the conclusion of cases with minimum expense and as soon as possible is the duty of the judiciary should also be taken into account in the evaluation of the right to trial in a reasonable time as per the principle of holism of the Constitution (App. No: 2012/1198, 7/11/2013, § 39; App. No: 2013/695, 9/1/2014, § 28).

24. As the aim of the right to trial in a reasonable time is the protection of the parties against material and moral pressures and distresses to which they will be exposed due to the long-lasting trial and the provision of justice as necessary and the maintenance of confidence in law and as the requirement of showing due diligence in the settlement of a legal dispute cannot be ignored in the trial activity, it is necessary to evaluate whether the trial period is reasonable or not individually for each application (App. No: 2012/673, 19/12/2013, § 27; App. No: 2013/695, 9/1/2014, § 29).

25. Matters such as the complexity of a case, how many levels the trial has, the attitude of the parties and the relevant authorities during the trial and the quality of the interest of the applicant in the speedy conclusion of the case are the criteria to be taken into account for the determination of whether the period of a case is reasonable or not (App. No: 2012/13, 2/7/2013, §§ 41-45; App. No: 2013/695, 9/1/2014, § 30).

26. However, none of the specified criteria is conclusive by itself in the evaluation of reasonable period. By evaluating the total impact of these criteria through the determination of all delay periods in the trial process individually, which element is more effective in the delay of trial should be determined (App. No: 2012/13, 2/7/2013, § 46; App. No: 2013/695, 9/1/2014, § 31).

27. In order to determine whether the trial activity is conducted within a reasonable time or not, it is primarily necessary to determine the dates of beginning and completion which may vary depending on the type of dispute.

28. While evaluating whether the trial period in criminal procedure is reasonable or not, the beginning of the period is the moment of notification of a person by competent authorities that s/he has committed a crime or application of a series of measures such as search and custody during which s/he has been initially affected by the allegation. The date on which the period comes to an end in criminal procedure is the date on which the basis of incrimination is finally concluded or, in terms of cases pending trial, the date on which the Constitutional Court delivers its decision relevant to the complaint of reasonable time (App. No: 2013/695, 9/1/2014, § 35).

29. Nevertheless, the date of the basis of incrimination and the date on which the jurisdiction *ratione temporis* of the Constitutional Court for the examination of individual

applications started can be different. As for criminal cases whose date of incrimination is prior to the date of 23/9/2012 on which the jurisdiction *ratione temporis* of the Constitutional Court started, but whose trial is pending or whose final decision has not been finalized yet, the period to be taken into account in terms of the complaints as to the effect that the right to trial in a reasonable time has been violated is not the period that has elapsed after the date of 23/9/2012, but the period that has elapsed as of the date on which the crime is alleged. Therefore, in the complaints as to the effect that the trial period in criminal procedure is not reasonable, on the condition that they were pending on the date of 23/9/2012, the date on which the basis of incrimination occurs and the period which elapses until the date on which the final decision as regards the basis of incrimination is learned by the concerned or, as for the pending cases, until the date on which the Constitutional Court concludes the application will be taken into account (App. No: 2013/695, 9/1/2014, § 36).

30. In the incident which is the subject of the application, the applicant was taken into custody on 22/3/2005 and the public case filed on him was finalized with the writ of the Supreme Court of Appeals dated 30/10/2012. In this context, the period that needs to be taken into account as regards the complaint of the applicant as to the effect that the right to trial in a reasonable time was violated is the total trial period of seven years, seven months and eight days which elapsed between 22/3/2005 and 30/10/2012.

31. As the delays which can be attributed to competent authorities in the prolongation of the trial process can result from the failure to show due diligence for the speedy conclusion of trial, so can they also arise out of structural problems and lack of organization. Because, article 36 of the Constitution and article 6 of the Convention imposes the responsibility of regulating the legal system in a way which can fulfill the conditions of fair trial including the liability of courts to conclude cases in a reasonable time (App. No: 2012/13, 2/7/2013, § 44; App. No: 2013/695, 9/1/2014, § 39).

32. Within this scope, in the event that reasonable period is exceeded in trial due to reasons such as the structure of judicial system, disruptions during routine duties at the clerk's office of the court, delays in the writing of a judgment, in the sending of a file or document from one court to another and in the appointment of a rapporteur, insufficiency in the number of judges and personnel and the severity of workload, the responsibility of competent authorities comes to the fore (App. No: 2012/1198, 7/11/2013, § 55; App. No: 2013/695, 9/1/2014, § 40).

33. The applicant was taken into custody on 22/3/2005 and a public case was filed on him on 23/3/2005 after his statement was taken. In accordance with the provisions of the abolished Code numbered 3005, he was taken before the Court numbered 3 on the same date and his interrogation was conducted and he was released. At the same hearing, it was decided that an expert review be carried out on the criminal evidence. During the interval in between hearings, the criminal record of the applicant reached to the Court, his census record and the letters of response written to the law enforcement unit did not reach. At the hearing dated 27/12/2005, it was decided that the previous letter be renewed and that an expert review be made to be carried out on the criminal evidence. The expert report was submitted prior to the hearing dated 9/10/2007. The expert report was notified to the applicant prior to the hearing dated 3/4/2008. It was decided that the applicant be brought by force for additional defense at the same hearing and an arrest warrant was issued on the applicant at the hearing dated 27/10/2008. The applicant was arrested in Arguvan district of Malatya province on

19/11/2009 and he was taken before the Criminal Court of First Instance of Arguvan and his defense statement was taken, no question was separately directed for additional defense. At the hearing dated 16/2/2010, it was decided that the indictments and last hearing minutes of the applicant in his files as regards similar cases be requested, that the hearing be postponed to the date of 25/5/2010. It was decided that the applicant be sentenced to a judicial fine of 5.000,00 TL through the decision of the Court dated 25/5/2010 and upon the appeal of the applicant, it was decided that the criminal case "*be removed*" through the writ of the 7th Criminal Chamber of the Supreme Court of Appeals dated 30/10/2012.

34. In this way, when the fact that the part of the trial with a period of five years, two months and three days between the dates of 22/3/2005 and 25/5/2010 passed in the Public prosecutor's office and the courts of first instance; the part thereof with a period of two years, five months and five days between the dates of 25/5/2010 and 30/10/2012 passed in the examination of legal remedy is taken into account, delays which are caused by structural problems and lack of organization that need to be evaluated especially in terms of the concrete application have also been subjected to examination by the ECtHR numerous times. In this context, in the event that reasonable period is exceeded in trials as a result of the existence of a structural problem and the increase and accumulation of the disputes which await solution in the trial system, it is concluded that article 6 of the Convention has been violated. Because, the state is responsible for taking all measures required for the performance of its trial activity in a reasonable time although the disputes which await solution in the trial system increases in terms of quantity. This liability is a manifestation of the responsibility of regulating the legal system in a way which can fulfill the conditions of fair trial (App. No: 2012/1198, 7/11/2013, § 55; App. No: 2013/695, 9/1/2014, § 40).

35. When, within the scope of the first instance trial, replacements of judges in the periods where hearing is adjourned, delays in responses to warrants, the fact that the hearing intervals were long, the fact that the evidence and documents which formed the basis for trial could not be collected at once in a speedy way, especially the exhaustion of the period of approximately three years and four months of the trial between the hearings dated 16/10/2006 and 16/2/2010 by waiting for the conclusion of the procedures of bringing by force and arrest for taking additional defense statement, which did not have any effect on the outcome as understood from the judgment ruled, the fact that the expert whose assignment was decided at the hearing dated 27/12/2005 could submit his/her report only prior to the hearing dated 9/10/2007 and no essential procedure could be performed as regards the trial within these period and consequently the fact that the first instance trial lasted for five years, two months and three days are taken into account together, it is understood that the workload and lack of organization caused by the structure of the judicial system has a dominant effect on the prolongation of the trial period as regards the concrete application especially in terms of the trial process that passed before the court of first instance. In accordance with article 36 of the Constitution and article 6 of the Convention, when the obligation of regulating the trial system in a way which can fulfill the conditions of fair trial including the liability of courts to

conclude cases in a reasonable time is taken into account, it is clear that the structural and organizational deficiencies which are present in the legal system will not be able to justify the trial activity not be carried out in a reasonable time.

36. It could not be determined that the attitude of the applicant had a special effect on the prolongation of the trial.

37. None of the elements such as the number of the accused in a case, the complexity of a case, the quality and nature of the alleged crime, the amount of the penalty prescribed for the crime in question which are required to be taken into account in the evaluation of whether the trial period is reasonable or not allows for the evaluation of the trial period of the concrete criminal case as reasonable. It is concluded that, in terms of the trial where a single accused was tried and which did not have a complex quality, there was an unreasonable delay in the trial process in question which exceeded nine years.

38. Due to the reasons explained, it should be decided that the applicant's "*right to trial in a reasonable time*" which is enshrined in article 36 of the Constitution was violated.

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

39. The applicant requested that a moral compensation of 20,000.00 TL be adjudged due to the long-lasting trial.

40. Paragraph (2) of article 50 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 with the side heading of "*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 liable to hold 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."*

41. At the end of the examination of the application, although it has been determined that article 36 of the Constitution was violated, as it is understood that there is no causal relation between the violation determined and the material damage claimed, it should be decided that the request of the applicant for material compensation be dismissed.

42. When the trial process which was conducted on the applicant and lasted for approximately seven years and seven months is taken into account, it should be decided by discretion that a moral compensation of 5.850,00 TL be paid to the applicant in return for his moral damage which cannot be compensated only by the determination of the violation due to the lengthiness of the trial activity.

43. It should be decided that the trial expenses of 1,698.35 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL which were made 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 is UNANIMOUSLY decided on 15/4/2014

**A.** That the application is ADMISSIBLE,

**B.** That the right to trial in a reasonable time enshrined in Article 36 of the Constitution WAS VIOLATED,

**C.** That a MORAL COMPENSATION OF 5,850.00 TL BE PAID to the applicant,

**D.** That the other requests of the applicant for compensation BE DISMISSED,

**E.** That the trial expenses of 1,698.35 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL, which were made by the applicant be PAID TO THE APPLICANT,

**F.** That the payments 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.

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