



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

**FIRST SECTION**

**DECISION**

Application No: 2013/2294

Date of Decision: 8/5/2014

## **FIRST SECTION**

### **DECISION**

**President** : Serruh KALELİ  
**Members** : Zehra Ayla PERKTAŞ  
Burhan ÜSTÜN  
Hicabi DURSUN  
Zühtü ARSLAN  
**Rapporteur** : Cüneyt DURMAZ  
**Applicant** : İsmet KAYA

#### **I. SUBJECT OF APPLICATON**

1. The applicant asserted that his rights to property and a fair trial were violated and requested compensation by asserting that he had been forced to leave his village in 1992 due to terrorism incidents, that he did not get a result out of the application he filed before the compensation commission in order for the damages he incurred to be recovered and of the case he filed subsequently and that the conclusion of his application nearly lasted for 9 years.

#### **II. APPLICATION PROCESS**

2. The application was lodged by the counsel of the applicant to the Constitutional Court through the 1st Administrative Court of Diyarbakır on 26/3/2013. In the preliminary examination in terms of administrative aspects, it has been determined that there is no circumstance to prevent the submission of the application to the Commission.

3. It was decided by the First Commission of the First Section on 27/6/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 17/9/2013, 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 of Justice on 25/9/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 25/11/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 26/11/2013. The applicant submitted his counter statements to the Constitutional Court on 4/12/2013.

#### **III. FACTS AND CASES**

## **A. Facts**

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

8. While the applicant was residing in Akbulak village of Kulp district of Diyarbakır province, he immigrated from his village due to the terrorism incidents which took place in 1992.

9. The applicant applied to the Presidency of Damage Detection (Commission) of the Governor's Office of Diyarbakır which was established on 7/9/2004 within the scope of the Code on the Recovery of Damages Arising From Terrorism and Fight Against Terrorism numbered 5233 with a request for the recovery of the damages he incurred due to the fact that he could not have access to his assets between the years of 1992 and 2002.

10. The commission determined through its decision dated 5/3/2008 and numbered 2008/4-9745 that the settlement in question was not evacuated due to terrorism, that the house of the applicant was intact in the viewing and detection report, but decided that 6.880,20 TL be paid in order to recover his damages which occurred due to the fact that he could not cultivate his lands for a period of time due to terrorism concern and could not have access to his assets. Upon the fact that the applicant did not accept the amount of damage determined by the Commission, the minute of dispute dated 19/1/2009 was drawn up.

11. The applicant filed a case before the Administrative Court of Diyarbakır on 11/2/2009 with a request for the cancellation of the partial dismissal decision that the Commission issued. Through its decision dated 6/7/2010, numbered M.2009/293 and D.2010/1256, the Court decided on the dismissal of the case on the ground that the settlement in question was not one of the places which were completely evacuated and that it would not be possible that the damages that the applicant incurred due to the fact that he immigrated because of his subjective security perception be recovered by the administration within the scope of the Code numbered 5233.

12. The decision which was appealed by the applicant was approved through the decision of the 15th Chamber of the Council of State dated 6/11/2012, numbered M.2011/6356 and D.2012/7180.

13. Upon the decision of approval, the applicant did not resort to the remedy of correction by thinking that it was not a compulsory legal remedy and that he would not get any result.

14. The applicant lodged an individual application on 26/3/2013 after the decision of the 15th Chamber of the Council of State in relation to the dismissal of his request for appeal was notified to him on the date of 27/2/2013.

## **B. Relevant Law**

15. Article 1 of the Code numbered 5233 with the side heading "Aim" is as follows:

*"The aim of this Code is to determine the principles and procedures with regard to the recovery of the damages of the persons who have incurred this financial damage due to terrorist actions and the activities which are carried out within the scope of fight against terrorism."*

16. Article 2 of the same Code with the side heading "Scope" is as follows:

*"The damages stated below shall not be covered by this Code:*

...

*d) The damages incurred due to economic and social reasons other than terrorism and the damages that those who leave the places in which they are present on their own incur for this reason except for security concerns."*

17. Article 4 of the same Code with the side heading "Damage detection commissions" is as follows:

*"Damage detection commissions shall be established in provinces within ten days upon applications to be filed within this Code. A commission shall be composed of a president and six members. The deputy governor that a governor will assign shall be the president of the commission; a person to be determined by the governor among the public officers who are specialized in each of the fields of finance, public works and settlement, agriculture and rural affairs, health, industry and commerce and work in that province and an attorney who will be assigned by the board of the bar association among those who are registered in the bar association shall be the member of the commission. President and members of the commission shall be redetermined in the first week of January each year. Former members can be reassigned. Depending on the workload, more than one commission can be established in the same province."*

18. Article 6 of the same Code with the side heading "Term, form, examination and conclusion of an application" is as follows:

*"(Amended: 28/12/2005 - 5442/3 art.) In the event that the injured or his/her heirs or authorized representatives apply to the governor's office of the province in which the damage has occurred or the incident which is the subject matter of the damage has taken place within sixty days following the date on which the incident which is the subject matter of the damage has become known or within one year following the occurrence of the incident in any case, necessary actions shall be initiated. Applications to be filed after these periods shall not be accepted.*

..."

19. Article 7 of the same Code with the side heading "Damages to be Recovered" is as follows:

*"The damages which can be recovered amicably according to the provisions of this Code are as follows:*

*a) All kinds of damages incurred on animals, trees, products and other movable and immovable properties.*

*b) The damages incurred in cases of injury, being disabled and death and treatment and funeral expenses.*

*c) Financial damages arising out of the fact that persons cannot have access to their assets due to the activities which are carried out within the scope of fight against terrorism."*

20. Article 8 of the same Code with the side heading "*Determination of Damage*" is as follows:

*"The damages stipulated in article 7 shall be determined by the commission directly or through an expert by considering the statement of the injured, information and documents in judicial, administrative and military authorities, depending on the form of occurrence of the incident and the measures that the injured has taken, also by taking into account of the fault or negligence of the injured, if any, in a way which is suitable for equity and the economic conditions of the time."*

21. Provisional article 1 of the same Code is as follows:

*"Real persons and private law legal persons who incurred damages due to the actions that were committed between the date of 19.7.1987 and the date on which this Code enters into force and which are covered by articles 1, 3 and 4 of the Code on Fight Against Terrorism dated 3713 or due to the activities which were carried out within the scope of fight against terrorism between the mentioned dates apply to the relevant governor's offices and district governor's offices within one year following the date on which this Code enters into force, the provisions of this Code shall also apply on their financial damages.*

*The applications which are filed according to this article shall be concluded within two years following the date of application."*

22. Provisional article 3 of the same Code is as follows:

*"The period for the conclusion of the applications which are filed in accordance with provisional article 1 of this Code and provisional article 1 which is added into this Code with the Code dated 28/12/2005 and numbered 5442 has been extended by one year following the end of the period for conclusion prescribed in the articles. In the event that this period also comes to an end and the applications cannot be concluded, the Council of Ministers can extend this period on the condition that it does not exceed one year each time."*

23. Provisional article 4 of the same Code is as follows:

*"(Additional: 24/5/2007-5666/1 art.) Real persons and private law legal persons who incurred damages due to the actions that were committed between the date of 19/7/1987 and the date on which this Code enters into force and which are covered by articles 1, 3 and 4 of the Code on Fight Against Terrorism dated 3713 or due to the activities which were carried out within the scope of fight against terrorism between the mentioned dates apply to the relevant governor's offices and district governor's offices within one year following the date on which this Code enters into force, the provisions of this Code shall also apply on their financial damages.*

*The applications which are filed according to this article shall be concluded within two years following the date of application. In the event that this period also comes to an end and the applications cannot be concluded, the Council of Ministers can extend this period on the condition that it does not exceed one year each time."*

24. Through article 1 of the Decision which is the annex of the Resolution of the Council of Ministers dated 24/6/2013 and numbered 2013/5034 which was published in the

Official Gazette dated 20/7/2013 and numbered 28713, the period for the conclusion of the applications which are filed in accordance with provisional article 4 of the Code numbered 5233 was lastly extended by one year following the end of the period extended through the Resolution of the Council of Ministers dated 2/4/2012 and numbered 2012/2996.

25. The decision of the 10th Chamber of the Council of State dated 30.12.2008 and numbered M.2008/4141, D.2008/9584 is as follows:

*“...On the other hand; as the compensation of the damages that persons have incurred as they cannot have access to their assets in accordance with the Code numbered 5233 can be possible in the event that the village is completely evacuated by the administration or the people in the village; it is natural that upon the decision of dismissal by the Court, a decision needs to be issued after an investigation is conducted on whether or not the village that the plaintiff resided was evacuated.*

*...”*

26. The decision of the 10th Chamber of the Council of State dated 31/12/2008 and numbered M.2008/5548, D.2008/9733 is as follows:

*“...Through the evaluation of the aforementioned articles of the Code numbered 5233; it is concluded that the compensation of the damage that persons have incurred due to the fact that they cannot have access to their assets in accordance with the Code numbered 5233 is subject to the condition that it has occurred due to the activities which are carried out within the scope of fight against terrorism; that in other words, **the remedy of the compensation of the damages in question can be resorted to in the event that the village is completely evacuated by the administration or the people in the village**; that it is possible to compensate the damage that those who leave the village as a result of terrorism incidents has incurred, even if it is based on security concern, due to the fact that they cannot have access to their assets only in the event that the village is completely evacuated by the administration or the people in the village and only for the period which has elapsed from the evacuation of the village to the date on which returning to the village has commenced. Because, the commencement of returning to an evacuated village means that the facilities of being able to live in that village in a secure way have been achieved. It is also natural that the criterion of minimum security level which has to be achieved for returning to the village needs to be objective; that in other words, it should not change depending on the persons who return and do not return to the village.*

*According to this acknowledgment, in the incident which is the subject matter of the dispute, as the compensation of the damage of the plaintiff arising from the fact that he could not have access to his assets which were present in Yoncalıbayır Village that he left as a result of terrorism incident was found to be possible only on the condition that it was limited to the process which elapsed from the evacuation of the village to the date on which returning to the village commenced, there is no contrariety with the law on the action which is the subject matter of the case in relation to the payment of the amount calculated over a period of 1 year.*

*...”*

27. The decision of the 10th Chamber of the Council of State dated 20.2.2009 and numbered M.2008/6679, D.2009/1227 is as follows:

*"...In the incident which is the subject matter of the case; as specified also in the minutes drawn up by the commission, there is no debate on the fact that no terrorism incident took place in Alluç Village; that however, temporary village guarding system was introduced in village due to the terrorism incidents which took place in the region in 1993, that those who accepted to be guards continued to reside in the village, that others immigrated from the village as they did not accept to be guards and due to the security concern that they felt as a result of the terrorism incidents which took place.*

*Accordingly, although it is clear that a village in which only temporary village guards live cannot be considered as a secure settlement and there is no compatibility with the law in the action which is the subject matter of the case in relation to the dismissal of the application of the plaintiff who left the village due to his security concern while it was necessary to determine whether or not he had a damage which he incurred within the scope of the Code numbered 5233 and to compensate the damage which was determined; this matter is not considered to have a quality which will require the reversal of the decision which is the subject matter of the appeal.*

*..."*

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

28. The individual application of the applicant dated 26/3/2013 and numbered 2013/2294 was examined during the session held by the court on 8/5/2014 and the following were ordered and adjudged:

##### **A. Claims of the Applicant**

29. The applicant asserted that his right to a fair trial and property regulated in the Constitution were violated and requested compensation by stating that Akbulak village had been evacuated in 1992 due to security concern because of terrorism actions and the military operations which were conducted by the administration within the scope of fight against terrorism, that he could not have access to his assets which remained in the village until the year of 2002, that he did not get a result from the administration which he filed in order for the damages that he incurred to be compensated and of the case he filed subsequently and that the conclusion of his application nearly lasted for 9 years.

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

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

###### **a. His Claim as to the Effect that His Right to Property was Violated**

30. The applicant asserted that citizens had been subjected to forced migration due to terrorism incidents, that Akbulak village had been unofficially evacuated, that he could not get a result from the administrative application which he filed in order for the damages that he incurred to be recovered and of the case which he filed subsequently because they were dismissed on the ground that Akbulak village was not one of the settlements which completely became empty, that however, more than one terrorist action and armed conflict took place in Akbulak village, that Akbulak Primary School had remained closed between the years of 1992 and 2003, that for these reasons, he had been forced to leave the village and he could not make use of his assets which were not present in the village, that due to all of these, his right to property was violated.

31. In the opinion of the Ministry, while the complaint as to the effect that the right to property was violated was evaluated, the principles that the European Court of Human Rights (ECtHR) adopted in terms of the right to property were mentioned, it was stated that the right to the protection of property was not an absolute right and that the authority of using the properties that belonged to private and legal persons under the conditions stipulated in codes and even of depriving these persons of them could also be granted to the state, that in this scope, some villages and towns in the Eastern and Southeastern regions of the country were evacuated from the year of 1985 due to security problems and that the ECtHR came to the conclusion that the dismissal of the entry of the relevant persons into their villages constituted an intervention in the rights to property of the applicants, that after this decision, the Code numbered 5233 was enacted in order for the damages of these persons to be recovered.

32. In the opinion of the Ministry, it was stated that the ECtHR came to the conclusion that when in particular, armed conflicts, general violence, the violations of human rights were taken into consideration, this intervention which forced competent authorities to take exceptional measures in order to ensure security in a region of state of emergency was not devoid of basis, that the domestic legal remedy which was created in order to redress the damages which occurred due to this intervention was accessible and effective, that evaluations in terms of subjects such as the determination of main incidents or the calculation of financial compensation would be carried out by the Commission as the domestic legal remedy.

33. In the opinion of the Ministry, the following evaluations were briefly made with regard to the concrete incident: In the current application, while the applicant was residing in Akbulak village of Kulp district of Diyarbakır province, he left his village due to the terrorism incidents which took place in 1992. As a result of the investigations conducted by the Commission upon the application of the applicant, although it was determined that Akbulak village was not completely evacuated because of terrorism, it was decided that 6.880,20 TL be paid in order to recover his damage which was determined to have occurred due to the fact that he could not cultivate his lands for a period of time due to terrorism concern. Upon the fact that this amount was not accepted by the applicant, the minute of dispute was drawn up by the Commission, the applicant filed a case before the administrative court against this decision. In the investigation conducted by the administrative court in relation to the case, information and documents were supplied from the relevant institutions and organizations in line with article 8 of the Code numbered 5233, it was determined that Akbulak village was not evacuated, that the elections of mukhtars were held every five years, that the system of guarding was not introduced in the village, that the population of the village was reported by years. Following all these concrete investigations, the Court dismissed the case of the applicant by concluding that the village in question was not one of the villages which completely became empty because of terrorism incidents. Even if an appeal application was filed by the applicant against this decision, this request was dismissed by the Council of State. Thus, it was ascertained through a finalized decision that the application was not within the scope of the Code numbered 5233.

34. In his statement which he submitted against the opinion of the Ministry on the merits of the application, the applicant stated that he did not agree with the opinion of the Ministry of Justice, summarized and repeated the claims which he had included in the case petition that he had submitted to the Administrative Court.

35. 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 by the Court on the inadmissibility of the applications which are clearly devoid of basis (App. No: 2012/1027, 12/2/2013, § 24).

36. In accordance with the aforementioned rules, as a principle, the proof of the material incidents and cases 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 or not the consequence reached as regards the dispute by the courts of instance is fair in terms of merits cannot be a subject matter of the examination of an individual application. The only exception of this is the fact that the determinations and consequences of the courts of instance contain an evident discretionary mistake in a way which disregards justice and common sense and that this matter automatically violates the rights and freedoms within the scope of the individual application. In this framework, unless the applications with a quality of legal remedy complaint contain an evident discretionary mistake or an obvious arbitrariness, they cannot be examined by the Constitutional Court in terms of merits (App. No: 2012/1027, 12/2/2013, § 26).

37. When the claims of the applicant are examined, it is asserted that the damage he incurred due to the failure to have access to his immovable properties could not be duly determined in the phase of administrative application and trial, that witnesses were not heard in the phase of commission and court although it was requested, that the claims that he asserted and the evidence he submitted were not sufficiently investigated and his damage was not recovered, that for these reasons, his right to property was violated.

38. When the decision of the Commission dated 5/3/2008 and the justifications of the decisions of the courts of instance in relation to the dismissal of the requests of the applicant are examined, it is understood that the essence of the claims was not fixed in the interpretation by the Commission and the courts of instance of the expression "*The damages incurred due to economic and social reasons other than terrorism and the damages that those who leave the places in which they are present on their own incur for this reason except for security concerns.*" as stipulated in subparagraph (d) of paragraph two of article 2 of the Code numbered 5233 that contains provisions in relation to its scope and the evaluation thereby of the claims and evidence that were asserted and was in essence relevant to the consequence of the trial.

39. Although the applicant asserted his claims based on the right to property, it is understood that these claims of the applicant which he asserted *verbatim* in the case and appeal petitions were relevant to the evaluation of the evidence by the administrative authorities and courts and to the interpretation by the court of legal rules in relation to the subject, that finally, the consequence of the court decision which was not in his favor was complained about, that however, the claims and evidence that the applicant asserted were evaluated and answered by the courts of instance.

40. As a matter of fact, in the decision of the 1st Administrative Court of Diyarbakır dated 6/7/2010 and numbered M.2009/293, D.20102/1256, in which cases the damages incurred could be recovered within the scope of the Code numbered 5233 was stated as follows:

*"From the evaluation of the aforementioned articles of the Code numbered 5233; it is necessary that the financial damage incurred by persons who fail to have access to their assets due to the fact that a settlement becomes completely empty/is completely evacuated as a result of "terrorism actions" or "the activities which are carried out within the scope of fight*

*against terrorism" be paid amicably by the administration according to the mentioned provisions of the Code. In other words, in the event that a settlement is "completely" evacuated by the administration due to security or by the people living in that settlement due to security concern, it is possible that the financial damage which is stipulated in the Code one by one from the evacuation of the settlement to the date on which returning to the settlement starts be recovered by the administration. Therefore, there is no legal basis for the payment by the administration of the financial damage arising from the failure to have access to assets due to the fact that a settlement is partially evacuated based on security concern.*

*The fact that a settlement is partially evacuated is an objective indication of the fact that minimum security conditions which provide the possibility of being able to live in that settlement in a safe way have been fulfilled by the administration. Security concern should not change depending on the persons who continuously live in a settlement and the persons who leave the same settlement due to the concern in question. It is possible that each individual can show a different reaction in the face of the fear and worry that occurs in the society due to terrorism incidents. For this reason, it is compulsory that the security concern which is a feeling that can vary from person to person be based on an objective criterion as specified above. However, in the event that only village guards and their families stay in a settlement, other people from the village leave the settlement due to the terrorism incidents which take place in the settlement, that is to say, if a settlement becomes partly empty in this way, it is clear that it will be accepted that the people from the village who have partly left the settlement have left the village due to security concern and that the financial damage arising from the failure to have access to assets for this reason will be recovered by the administration according to the provisions of the Code numbered 5233."*

41. In the decision of the Court, by including the following evaluations in relation to Akbulak village of Kulp district of Diyarbakır province, it was decided that it was not possible to compensate the damages that the plaintiff (applicant) claimed to have incurred within the scope of the Code numbered 5233 and that the case be dismissed:

“... ”

*From the information and documents included in the case file; it was seen that Akbulak village of Kulp district of Diyarbakır province was not evacuated, that temporary village guarding system was not introduced in the village, that according to General Population Censuses and determinations, 970 people lived in the village in 1990, 639 in 1997, 877 in 2000, that 241 ballots were cast in General Elections for Deputies in 1995, 246 in General Elections for Deputies in 1999. For this reason, as Akbulak village of Kulp district is not one of the settlements which became empty according to the explanations given above, there is no possibility that the damage that the plaintiff claimed to have incurred due to the fact that he immigrated from the village because of his subjective concern be recovered within the scope of the Code numbered 5233.*

...”

42. Within the scope of the interpretation of the relevant provision (article 2 of the Code numbered 5233), this decision of the Court complies with the established case-law of the Council of State (§§ 25–27) which seeks the condition of a village or hamlet being completely empty/be completely evacuated or only temporary village guards remaining in the settlements in question in order for the damage of applicants to be compensated and does not contain any arbitrariness.

43. Thus, it was determined through the court decision which became final as a result of the approval of the Council of State that the applicant did not leave the assets which were in his possession due to terrorism. As also specified in the opinion of the Ministry, the natural consequence of this is the fact that an intervention was not made in the right to property of the applicant in a way which would be within scope of the Code numbered 5233. As there is no matter which will require deviation from this determination on the part of the Constitutional Court, no separate evaluation will be made in terms of the right to property (For a decision of the ECtHR in the same vein, see *Akbayır and Others v. Turkey*, 30415/08, 28/6/2011, § 85-88).

44. For the reasons explained, as it is understood that the claims asserted by the applicant have a quality of legal remedy complaint, that it is not possible to make an examination within the scope of the right to property and that the decision of the court of instance does not contain any evident discretionary mistake or obvious arbitrariness, it should be decided that the application is inadmissible due to the fact that "*it is clearly devoid of basis*" without examining it in terms of other conditions of admissibility.

#### **b. The Claim As to the Effect that the Right to Trial in a Reasonable Time**

45. As a result of the examination of the application, as it is understood that the claims in relation to the right to trial in a reasonable time are not clearly devoid of basis and that there is no other reason which will require that a decision be issued on its inadmissibility, it should be decided that this part of the application is admissible.

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

46. The applicant asserted that the examination of the commission to which he applied for the compensation of the damage that he incurred due to terrorism incidents and the subsequent trial lasted for nearly 9 years and that his right to a fair trial was violated as this period was long.

47. In the opinion of the Ministry, while evaluating the admissibility of the complaint as to the effect that the right to trial in a reasonable time was violated, first of all, the principles that the ECtHR and the Constitutional Court adopted on venue in terms of time were mentioned, it was stated that it was necessary to make an evaluation within the scope of "*the right to trial in a reasonable time*" which was one of the sub-elements of a fair trial and that in cases where the length of trial period was examined, not only the period after the date of 23/9/2012 which was the beginning of individual application, but also the period that elapsed until this period were taken into account.

48. In the opinion of the Ministry, it was stated that as a rule, the period of civil and administrative cases started at the moment when the case was brought to the court according to the ECtHR, that however, the period of administrative cases may also start when an application is filed before the administration against the action in question before a case is filed before the administrative justice.

49. Moreover, in the opinion of the Ministry, the opinion was included that whether the trial period was reasonable or not would be decided by taking into consideration criteria such as the specific conditions of each incident and in particular, whether the case was complicated or not, the attitudes and behaviors that the applicant exhibited during trial, the

attitudes of public authorities and in particular, of judicial bodies, importance that the applicant holds in terms of the applicant.

50. Paragraph one of Article 36 of the Constitution with the side heading "*Freedom to claim rights*" 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."*

51. As specified in the decisions that the Constitutional Court previously issued on this subject, it is clear that 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 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, § 35-39).

52. The aim of the right to trial in a reasonable time is the protection of the parties against physical and moral pressures and distresses to which they will be exposed due to the long-lasting trial activity and the complexity of a case, how many instances the trial has, the attitude of the parties and the relevant authorities in the trial process and the quality of the interest of the applicant in the speedy conclusion of the case are the elements which need to be taken into consideration in the determination of whether or not the period of a case is reasonable (App. No: 2012/13, 2/7/2013, § 40-46). For this reason, whether or not the trial period which is the subject matter of the application will be evaluated by considering these elements.

53. 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).

54. In the evaluation of reasonable period with regard to disputes related to civil rights and liabilities, while the beginning of the period is as a rule the date on which the trial process that will conclude the dispute is commenced to run, that is, the date on which the case is filed, in some special cases, by taking into account the quality of attempt, a previous date on which the dispute occurs can be accepted as the date of beginning (App.No: 2012/1198, 7/1/2013, § 45). There is a similar situation in terms of the concrete application, the date of beginning of the time frame to be taken into consideration for the evaluation of reasonable period is the date of 9/9/2004 on which the applicant applied to the Commission in order for the damages that he asserted to have incurred due to terrorism incidents to be recovered and which was recorded. In this respect, the process which commences with application to an administrative authority and the periods which elapse in trial should be separately evaluated.

55. In the concrete application, it is seen that the applicant applied to the Commission on the date of 9/9/2004 in order for the damages which he incurred due to terrorism incidents to be recovered, that the Commission decided through its decision dated 5/3/2008 that a total of 6.880,20 TL be paid "*due to inaccessibility to his assets for 2 years*", that the dispute minute dated 19/1/2009 was drawn up due to the fact that the applicant did not accept the draft letter of negotiated settlement, that the conclusion of the administrative application lasted for 4 years, 4 months and 10 days in this way.

56. While the delays which can be attributed to competent authorities in the prolongation of administrative decision-making and trial process can result from the failure to show due diligence for the speedy conclusion of actions, they can also arise from structural problems and lack of organization. Because, article 36 of the Constitution imposes on the state the responsibility of regulating the legal system in a way which can fulfill the conditions of a fair trial including the liability of courts to conclude administrative applications and cases in a reasonable time (App. No: 2012/13, 2/7/2013, § 44). Within this scope, also in the event that the reasonable period is exceeded in trial due to insufficiency in the number of personnel and judges and the severity of workload, the responsibility of competent authorities comes to the fore (App. No:2012/1198, 7/11/2013, § 55).

57. In the decisions that the Constitutional Court previously issued in relation to other applications which are similar to this application (App. No: 2013/3007, 2013/3008, 2013/3202 and 2013/3309, 6/2/2014), on the condition that necessary effort was exhorted on this subject and sufficient measures were taken in time, it was accepted that the responsibility of the state would not occur because of delays which took place up to a certain period arising from an extraordinary increase that temporarily took place in the workplace, that however, in the event that such delays turned into a structural problem and the methods which were applied at the time proved to be insufficient, the state would become responsible for the delays that took place (App. No: 2013/3007, 6/2/2014, §§ 65-67).

58. In the framework of the aforementioned principles, it is seen that an increase in the workload in relation to the administrative application remedy which has been created for the recovery of the damages incurred in accordance with the Code numbered 5233 is temporary, that while making an evaluation of reasonable period with regard to the delays which occur in terms of the conclusion of each application, this phenomenon needs to be taken into account. In this case, in order to be able to come to a conclusion on whether or not the delays which occur have resulted in the violation of the right to trial in a reasonable time, it is necessary to reveal whether or not authorized persons have exhorted sufficient effort in terms of the functioning of this system which has been established through the Code numbered 5233 in an effective way and whether or not they have taken necessary measures. However, while making this evaluation, it is certainly necessary that the total period which elapses until the finalization of the administrative application filed in order for the financial damages claimed to have been incurred to be compensated and, in the event that the remedy of administrative case is resorted to, of the trial process is not very long, in other words, it is necessary to accept that there is a certain limit of delays which can be considered as reasonable for some reasons in terms of the rights of applicants to trial in a reasonable time.

59. In the applications which are filed within the scope of the Code numbered 5233, it is seen that the commissions which are established within the scope of this code determine the damages to be recovered in line with articles 7 and 8 of the mentioned Code, that in this scope, depending on the request made in each application, they perform viewings in order to determine the damages incurred, separately receive technical expert reports such as agriculture, cadastre, construction and so on, calculate the value of the immovable properties of applicants and the revenues of those with a quality of agricultural land out of these immovable properties depending on their characteristics (on the fact that field plants, industrial plants, vegetables, fruit trees are cultivated). It is obvious that these actions which are carried out in order to determine the damages of each application by way of performing very variable and detailed calculations for more than 360.000 applications are quite complicated and time-consuming for the commissions (App. No: 2013/3007, 6/2/2014, § 69).

60. As seen in the examinations which were carried out within the scope of the applications that were previously filed on this subject, applications were intensively filed to the commissions for a certain period; however, a very limited increase occurred in the number of applications after a certain date (30/5/2008). The commissions have been working for the conclusion of current applications following this date. In periods during which the number of applications was very high, as seen in the examples of Batman and Siirt (App. No: 2013/3007, 6/2/2014, § 70, App. No: 2013/2625, 8/5/2014, § 73), it is seen that the number of commissions established in the provinces was increased, that this number was reduced following the decrease of workload and that the commission whose work was completed were closed down. When the number of the applications which have not been concluded in the commission both in the entire country and the provinces of Siirt, Batman and Diyarbakır is taken into account, it is understood that a very low number of applications remain.

61. When the number of applications which were concluded in the entire country and the province of Diyarbakır and the actions which need to be separately carried out within the scope of each application are taken into consideration, it is necessary to accept that the commissions have worked very intensively. As stipulated in article 4 of the Code numbered 5233 which regulates the formation of commissions, when the fact that only persons with certain qualifications can be the members of commission in order to be able to fulfill the actions that these commissions carry out and that these commission members are public officers who work on part-time basis is taken into consideration, it does not seem possible that the number of commissions established within a province be increased over a certain number (App. No: 2013/3007, 6/2/2014, § 72).

62. In the concrete incident, as understood from the records of the Commission, it is seen that an application was filed to the Commission on the date of 9/9/2004, that the Commission decided through its decision dated 5/3/2008 that a total of 6.880,20 TL be paid to the applicant "*due to inaccessibility to his assets for 2 years*", that the dispute minute dated 19/1/2009 was drawn up nearly 10 months later due to the fact that the applicant did not accept the draft letter of negotiated settlement, that the conclusion of the administrative application lasted for 4 years, 4 months and 10 days in this way.

63. When the trial process which is the subject matter of the application is examined, it is understood that this process commenced by way of the submission of the case petition to the Administrative Court of Diyarbakır on the date of 11/2/2009 after the dispute minute was drawn up by the Commission, that the first examination of the file and the actions of its notification to the parties were carried out, that the Administrative Court of Diyarbakır decided through its interim decision dated 13/11/2009 that information and documents be requested from the relevant authorities in accordance with article 8 of the Code numbered 5233 and decided that the case be dismissed on the date of 6/7/2010.

64. Upon the decision being appealed by the applicant on the date of 5/10/2010, the first appeal examination minute was drawn up by the Court of First Instance on the date of 13/10/2010, the file was sent to the Council of State for appeal examination on the date of 29/11/2010. In relation to the request for appeal, the decision of approval was issued by the 15th Chamber of the Council of State nearly 2 years later on the date of 6/11/2012.

65. It is understood that the trial activity which became final with this decision lasted for a total period of 3 years, 8 months and 25 days (11/2/2009 - 6/11/2012).

66. When the trial process which is the subject matter of the application is evaluated, it is understood that the decision on merits in relation to the relevant case file was issued in nearly 1 year and 5 months due to the fact that information and documents were requested through the interim decision issued by the 1st Administrative Court of Diyarbakır, that the request for appeal with regard to the decision was concluded by the Council of State nearly two years later.

67. It is seen that the total period which elapsed for the conclusion of the administrative application of the applicant and the finalization of the case which was subsequently filed (9/9/2004 - 6/11/2012) was nearly 8 years and 2 months.

68. In the decisions that the Constitutional Court issued on this subject, by taking into consideration of all conditions of a case such as the total number of applications examined by the commissions in the process of administrative application, the fact that detailed calculations which needed to be made and the actions were complicated when all activities such as the viewings which were carried out within the scope of each application in the commission, the reception of expert reports and son on, the fact that many applications were filed and concluded before the applications in question and the conclusion and in addition, the finalization of the trial process by passing through the stages of first instance, appeal and decision correction in a relatively short period of time, it was concluded that the period for the conclusion of the applications which were filed in period that was less than 8 years in total did not result in the violation of the right to trial in a reasonable time (App. No: 2013/3007, 2013/3008, 2013/3202 and 2013/3309, 6/2/2014).

69. However, as specified above (§ 58), such an acceptance does not mean that an evaluation as to the effect that the delays which temporarily occur depending on the workload are reasonable will be made in any case and that the violation of the right to trial in a reasonable time will not occur. Although there are reasons which make it possible to make an evaluation as to the effect that delays such as an extraordinary increase having occurred in the workload both in the Commission and the trial process and many detailed actions which needed to be carried out within the scope of each application (in order to determine whether or not it was possible to pay the damage within the scope of the Code numbered 5233 and the amount of financial damage incurred) having been present are reasonable, as in the incident which is the subject matter of the application, in cases where although it was one of the first applications which were filed to the Commission (The file rank number of the applicant is 691.), the periods which elapsed both in the Commission and the trial phase were relatively long and therefore, the conclusion of the application in final fashion occurred in a period which exceeded 8 years in total, it cannot be mentioned that the conclusion of the application occurred in a reasonable time.

70. Due to the reasons explained, it should be decided that the right to trial in a reasonable time required by Article 36 of the Constitution was violated.

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

71. The applicant requested that compensation be adjudged in order for the damages which he incurred to be recovered.

72. In the opinion of the Ministry of Justice, no evaluation was made in relation to the requests of the applicant for retrial and compensation.

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

*"If the determined violation arises from 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."*

74. When the fact that the conclusion of the application that the applicant filed in order for the damages that he asserted to have incurred to be compensated within the scope of the Code numbered 5233 lasted for 8 years and 2 months in total is taken into account, it should be decided by discretion that a moral compensation of 3.500,00 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.

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

## V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 8/5/2014

**A.** That the applicant's

1. Claims as to the effect that his right to property was violated are **INADMISSIBLE** as "*they are clearly devoid of basis*",

2. That the claims of the applicant as to the effect that his right to trial in a reasonable time was violated are **ADMISSIBLE**,

**B.** That the right to trial in a reasonable time of the applicant was **VIOLATED**,

**C.** That a moral **COMPENSATION** of 3.500,00 TL **BE PAID** to the applicant, that his other requests for compensation be **DISMISSED**,

**D.** That the trial expense which was made by the applicant, composed of the fee of 198,35 be **PAID TO THE APPLICANT**,

**E.** That the payments be made within four months as of the date of application by the applicant to the Ministry of Finance 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.** That a copy of the decision be sent to the relevant court.

President

Member

Member

Application Number : 2013/2294  
Date of Decision: 8/5/2014

Serruh KALELİ

Zehra Ayla PERKTAŞ

Burhan ÜSTÜN

Member  
Hicabi DURSUN

Member  
Zühtü ARSLAN