REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

DECISION

Application No: 2013/2738

Date of Decision: 16/7/2014

SECOND SECTION

DECISION

President	: Alparslan ALTAN
Members	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Engin YILDIRIM
Rapporteur	: Şebnem NEBİOĞLU ÖNER
Applicant	: Mesude YAŞAR
Counsel	: Att. Saim Bozkurt

I. SUBJECT OF APPLICATON

1. The applicant asserted that her rights defined in articles 2, 7, 10, 35, 36, 87, 125 and 141 of the Constitution were violated, requested that a decision be issued on the determination of the violation and the compensation of the material damage she incurred by stating that the request which she filed within the scope of the Code on the Recovery of Damages Arising Out of Terrorism and Fight Against Terrorism numbered 5233 was dismissed, that the trial acts with regard to the case she filed against this act were not fair, that the acts were not finalized in a reasonable time and that she was deprived of her right to property.

II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on the date of 29/4/2013. As a result of the preliminary examination that was carried out on administrative grounds, it was determined that there was no situation to prevent the submission of the application to the Commission.

3. It was decided by the Second Commission of the First Section to send the file to the Section in order for its admissibility examination to be carried out by the Section.

4. On the date of 17/9/2013, it was decided by the Section that the examination of admissibility and merits be carried out together.

5. The facts and cases, which are the subject matter of the application, and a copy of the application were sent to the Ministry of Justice. The letter of the Ministry of Justice dated 25/11/2013 was notified to the counsel of the applicant on the date of 2/12/2013, a petition for declaration was submitted by the counsel of the applicant against the opinion of the Ministry of Justice on the date of 6/12/2013.

III. FACTS AND CASES

A. Facts

6. The relevant facts as determined from the application form and the annexes thereof and the content of the trial file which is the subject matter of the application are summarized as follows:

7. On the date of 3/1/2006, the applicant applied to the Damage Detection Commission of the Governor's Office of Batman with a request for the recovery of her damages which fall into the scope of the Code numbered 5233.

8. It was detected that the applicant had a damage of 15.781,22 TL in the construction expert report dated 15/7/2010 as provided within the scope of the application, a damage of 22.364,00 TL in the agriculture expert report dated 20/7/2010.

9. In the Decision of the Damage Detection Commission dated 27/8/2010 and numbered 2010/1-45, it was decided that the request be dismissed by stating, in line with the information and documents included in the file, that Erdemli village of Sason District did not become empty, that there was no threat and attack towards the person, that the village was a quarter affiliated under the district center of Sason and that families other than the families of guards resided in the village.

10. The case which was filed by the applicant against the mentioned act before the 3rd Administrative Court of Diyarbakır on the date of 24/3/2011 was transferred to the Administrative Court of Batman with a decision of lack of venue.

11. Through the decision of the Administrative Court of Batman dated 25/11/2011 and numbered M.2011/45, D.2011/1331, it was decided that the case be dismissed on the ground that the village in which the applicant was residing did not completely become empty, that no objective security concern occurred in the settlement in question and that there was no terrorism threat or attack towards the applicant.

12. Upon the appeal of the decision, it was decided that the request for appeal be dismissed through the decision of the 15th Chamber of the Council of State dated 13/6/2012 and numbered M.2012/1779, D.2012/4575.

13. The request for the revision of decision was dismissed with the decision of the 15th Chamber of the Council of State dated 25/12/2012 and numbered M.2012/10867, D.2012/14757.

14. It is understood that the decision of dismissal was notified to the counsel of the applicant on the date of 2/4/2013 and that an individual application was filed on the date of 29/4/2013.

B. Relevant Law

15. Article 1 of the Code numbered 5233 with the side heading of "*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 of "*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 of "*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 of *''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 of "*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 of "*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 does not mean 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 out of 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 29/4/2013 and numbered 2013/2738 was examined during the session held by the court on 16/7/2014 and the following were ordered and adjudged:

A. Claims of the Applicant

29. The applicant claimed that her rights defined in articles 2, 7, 10, 35, 36, 87, 125 and 141 of the Constitution were violated by stating that the request which she filed within the scope of the Code numbered 5233 and the case which she filed following it were dismissed, that the decision issued without considering the reports with regard to the detection of damage and the documents which specified that the village was evacuated due to security in the file and without taking into account her subjective situation as to the effect that her son was killed by the members of the terrorist organization, based on the abstract justification that the village was not completely evacuated, without evaluating the documents submitted by her, by taking into consideration the documents submitted by the administration and without allowing her to make a defense by way of notifying the submitted documents to her was not fair, that the decisions did not contain sufficient justification, that the court which issued the decision based on the documents submitted by the administration without considering the documents which she submitted was not impartial, that the principle of equality was contravened by way of her application having been dismissed although compensation was ruled in similar applications, that she was deprived of her right to property as a result of the failure of the administration to fulfill the liability to ensure the security of life and property and that her

damage was not compensated due to the wrongful evaluation that the courts of instance had made, that moreover, the acts carried out on the application which she filed were not finalized in a reasonable time.

30. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant and as a result of the examination of the claims of the applicant, as it is understood that the essence of her claims was related to the violation of her rights to a fair trial and property and the principle of equality, it has been deemed appropriate that the claims in question be subjected to evaluation within the specified scope.

B. Evaluation

1. In Terms of Request for Legal Aid

31. The applicant filed a request for legal aid and in line with the decisions which the Constitutional Court previously issued, in order for a request for legal aid to be accepted, the applicant needs to be deprived of the ability to pay the required trial expenses partially or completely without putting his/her and his/her family's subsistence into trouble in a considerable way and moreover, the requests that s/he has filed within the scope of the individual application should not be without a basis (App. No: 2012/1181, 7/11/2013, § 23).

32. The fact that a request which is the subject matter of legal aid is not without a basis has a different meaning from "*being clearly devoid of basis*" stipulated in the rule as to the effect that "*The Court can rule on the inadmissibility of applications that are clearly devoid of basis*" as stipulated in paragraph (2) of article 48 of the Code numbered 6216 with regard to individual applications and the fact that an individual applications lodged to the Constitutional Court does not have a basis has a meaning which is limited to the examination to be made within this scope and does not necessarily bear the consequence that the application which is the subject matter of legal aid is clearly devoid of basis. On the other hand, it is clear that the fact that the subject matter of the application through which legal aid is requested does not have a basis will not be decisive in terms of the admissibility of the individual application (App. No: 2012/1181, 7/11/2013, § 24).

33. In the applications which are lodged with a request for legal aid, it is primarily necessary to decide on the temporary exemption of the applicant from the fee of individual application within the scope of legal aid and then, to make an examination on the admissibility of the application. At this phase, it should be examined whether or not the request for legal aid has a basis prior to the examination of admissibility and in an independent manner (App. No: 2012/1181, 7/11/2013, § 26).

34. In her application petition dated 29/4/2013, the applicant filed a request for legal aid and the interim decision dated 28/3/2011 in relation to the acceptance of her request for legal aid as issued by the 3rd Administrative Court of Diyarbakır within the scope of the certificate of poverty as to the effect that she was deprived of the ability to pay the trial expenses was submitted as an annex to the application form. It is necessary to decide on the acceptance of the request for legal aid of the applicant who is understood to be deprived of the ability to pay the trial expenses without putting her subsistence into trouble in a considerable manner within the scope of this certificate and decision.

2. In Terms of Admissibility

a. The Claim of the Violation of the Right to a Fair Trial and the Right to Trial in a Reasonable Time

35. As a result of the examination of the application form and the annexes thereof, it must be decided that this part of the application, which is not clearly devoid of justification and where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible.

b. The Claim of the Violation of the Right to Trial by an Impartial Tribunal

36. The applicant claimed that the Court which issued a decision according to the documents that were submitted by the administration and not notified to her was not impartial.

37. In its opinion, the Ministry of Justice submitted no opinion on the claim of the applicant as to the effect that her right to trial by an impartial tribunal was violated.

38. In article 6 of the Convention, the right to request the trial of a case by an impartial tribunal is clearly stated as an element of the right to a fair trial. Although the impartiality of courts is not clearly stated in article 36 of the Constitution, in accordance with the case-law of the Constitutional Court, this right is also an implicit element of the right to a fair trial (the CC, M. 2002/170, D. 2004/54, D.D. 5/5/2004). Moreover, when the fact that the impartiality and independence of courts are two elements which complement each other is taken into consideration, in line with the principle of holism of the Constitution, it is clear that articles 138, 139 and 140 of the Constitution should also be considered in the evaluation of the right to trial by an impartial tribunal (CC, M. 2005/55, D. 2006/4, D.D. 5/1/2006; M. 1992/39, D. 1993/19, D.D. 29/4/1993).

39. In general, impartiality means the fact that no prejudice, partiality and interest which will affect the settlement of a case is present and that no thought or interest in the face of the parties to the case and for and against them is present.

40. Impartiality has two aspects as subjective and objective and in this context, the personal impartiality of the judge as an individual in the current case as well as the impression left by the court as an institution on the person should be taken into consideration (CC, M. 2005/55, D. 2006/4, D.D. 5/1/2006).The fact that the members of the court which conducts the trial have a material or immaterial close tie with one of the parties or the subject of dispute or arouse a legitimate conviction that they will not be impartial through the expressions which they utter in the process of trial as well as the fact that they are at a position which is directly related to the case prior to the case may violate impartiality. However, as long as there is no evidence indicating that a prejudicial and partial attitude, a personal conviction or interest and thus, a personal partiality of a judge who conducts the trial in a certain dispute towards one of

the parties is present and this matter is not proven, it is obligatory to assume as a presumption that s/he impartial. Moreover, it is necessary for a judicial authority to present sufficient guarantees which will eliminate any legitimate concern or fear in relation to its impartiality and this matter points to the objective aspect of impartiality (For the decisions of the ECtHR in the same vein, see *Gregory v. the United Kingdom*, App. No. 22299/93, 25/02/1997, §§ 43–49; *Fey v. Austria*, App. No. 14396/88, 24/2/1993, §§ 28–36; *Hauschildt v. Denmark*, App. No. 10486/83, 24/5/1989, §§ 46–48; *McGonnell v. the United Kingdom*, App. No. 28488/95, 08/2/2000, §§ 55–57).

41. In the trial which is the subject matter of the application, while the courts of instance acted based on the criterion of objective security concern created by the Council of State at the point of whether or not the request of the applicant will be accepted within the scope of the Code numbered 5233 and a decision was issued on the dismissal of the request of the applicant on the ground that an objective security concern did not occur in the settlement in question by way of evaluating the documents submitted by the administration and the applicant in order for this matter to be determined, in this context, the trial authorities which conducted the trial activity which is the subject matter of the application in accordance with the relevant procedural provisions in terms of the trial activity did not have an impression which would have a negative effect on the legitimate expectations of the parties in relation to fair trial, as it is understood that no finding indicating that a prejudicial and partial attitude, a personal conviction or interest and thus, a personal partiality of the judge who conducted the trial was not detected in a way which would eliminate presumption in relation to the impartiality of the judge, it should be decided that this part of the application is inadmissible due to the fact that "*it is clearly devoid of basis*".

c. The Claim of Violation of the Principle of Equality

42. The applicant claimed that her right defined in article 10 of the Constitution was violated by stating that the request for remedy which she filed within the scope of the Code numbered 5233 was dismissed on the ground that the village in which she was residing was not completely evacuated, that however, payment was made to some applicants who were living in the mentioned village within the scope of the aforementioned Code.

43. According to the provisions of paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code numbered 6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the European Convention on Human Rights (Convention) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application, which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18). For this reason, in the determination of the content of the rights within the scope of individual application, it is necessary to evaluate the provisions of the Constitution and the Convention together and to determine the common field of protection.

44. Paragraphs one and five of Article 10 of the Constitution with the side heading of "*Equality before law*" are as follows:

> "*Everyone is equal before law without being subject to any discrimination based on language, race, colour, gender, political opinion, philosophical belief, religion, sect or similar grounds.*

…

The State organs and administrative authorities must act in compliance with the principle of equality before law in all their proceedings."

45. Article 14 of the Convention with the side heading *of ''Prohibition of discrimination''* is as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or otheropinion, national or social origin, association with a national minority, property, birth or other status."

46. When the aforementioned provisions are taken into consideration, it is not possible to evaluate in an abstract way the claim of the applicant which needs to be examined within the scope of the prohibition of discrimination and it is necessary to handle it in connection with the other fundamental rights and freedoms included within the scope of the Constitution and the ECHR (App. No: 2012/1049, 26/3/2013, § 33).

47. However, the fact that the prohibition of discrimination does not have an independent protective function in the examination of an individual application does not constitute an obstacle for the subjection of this prohibition to an expansive interpretation. Even if a conclusion can be reached as to effect that a constitutional right has not been violated when the claim that a right has been violated is examined, this situation does not prevent the examination of a discriminative practice towards that right. In this context, even if the relevant fundamental right and freedom has not been violated, a conclusion can be reached as to effect that the discriminative attitude shown in a subject related to that right has violated article 10 of the Constitution (App. No: 2012/606, 20/2/2014, § 48).

48. In order to discuss whether or not the prohibition of discrimination is violated, as a rule, it is necessary to determine on which fundamental right and freedom and also, on which basis the person has been subjected to discrimination. In order for a claim of discrimination to be taken seriously, it is not sufficient for the applicant to state that there is a difference between the treatment applied to other persons who are in the same situation with him/her and the treatment applied to him/her and moreover, s/he needs to put forth through reasonable evidence that this difference is based on a basis of discrimination such as race, colour, gender, religion, language and so on without any legitimate basis. In the concrete incident, although it was stated by the applicant that she was subjected to discrimination on the ground that it was ruled that compensation be paid in some similar applications which had been filed within the scope of the Code numbered 5233, while she did not make any statement in relation to on which basis she was discriminated, as it is understood that she did not present any concrete finding and evidence which would constitute a basis for her claim in question, it should be decided that this part of the application is inadmissible due to the fact that "*it is clearly devoid of basis*".

3. In Terms of Merits

49. By taking into consideration the claims of the applicant as to the effect that the documents which contained determinations on whether or not the village which is the subject matter of the application was completely evacuated and were submitted by the administration were used in the trial without being notified to her, that the Court decisions did not contain sufficient justification, that the administrative process and trial process in relation to her application were not finalized in a reasonable time and that the application which she filed within the scope of the Code numbered 5233 was dismissed by ignoring the fact that her son was killed by the members of the terrorist organization and on the basis of the wrongful assumption by the Court that the village in which she was residing was not completely evacuated, it has been deemed appropriate to evaluate the claims of the applicant within the scope of the right to a fair trial in terms of the right to trial in a reasonable time and the conformity of the trial with equity.

a. The Claim of Violation of the Right to Trial in a Reasonable Time

50. The applicant claimed that her right to trial in a reasonable time defined in article 36 of the Constitution was violated due to the fact that the administrative process and trial procedure on the evaluation of the request for remedy which she filed within the scope of the Code numbered 5233 were not finalized in a reasonable time.

51. In the opinion of the Ministry of Justice, by referring to the criteria in relation to the right to trial in a reasonable time as specified in the case-law of the ECtHR and the Constitutional Court, it was stated that the part of the concrete application process of nearly four years and seven months passed before the commission, its part of one year and nine months before the trial authorities and that especially the intensity of applications filed to the relevant Commissions within the scope of the Code numbered 5233 needed to be taken into consideration.

52. According to the provisions of paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code numbered 6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the European Convention on Human Rights (Convention) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application, which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18).

53. Paragraph one of Article 36 of the Constitution with the side heading of *"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."*

54. Paragraph four of article 141 of the Constitution with the side heading of *''Publicity of hearings and the need for verdicts to be justified''* is as follows:

> *"It is the duty of the judiciary to conclude cases with minimum cost and as soon as possible."*

55. The relevant part of article 6 of the Convention with the side heading of *"Right to a fair trial"* is as follows:

"In the determination of his civil rights and obligations or 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."*

56. The sub-principles and rights, which stem from the text of the Convention and the judgments of the ECtHR and are concrete manifestations of the right to a fair trial, are also, in principle, elements of the right to a fair trial stipulated under article 36 of the Constitution. In many decisions where it carried out the examination as per article 36 of the Constitution, the Constitutional Court refers, within the scope of article 36 of the Constitution, to the principles and rights that are either contained within the wording of the Convention or incorporated in the right to a fair trial through the case law of the ECtHR by interpreting the relevant provision in the light of article 6 of the Convention and the case law of the ECtHR (App. No: 2012/13, 2/7/2013, § 38).

57. The right to trial in a reasonable time which constitutes the basis of the concrete application also falls into scope of the right to a fair trial in accordance with the aforementioned principles and moreover, it is clear that article 141 of the Constitution which stipulates 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: 2012/13, 2/7/2013, § 39).

58. As 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 and the provision of justice as necessary and the maintenance of confidence in law and 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: 2012/13, 2/7/2013, § 40).

59. 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).

60. 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).

61. 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.

62. In accordance with article 36 of the Constitution and article 6 of the Convention, it is necessary to conclude disputes in relation to civil rights and liabilities in a reasonable time. The cases which are included in the field of "*public law*" as per the provisions of the legislation included in the legal system, but which are about disputes that are decisive on the rights and liabilities of a special character also fall into the scope of the protection of article 36 of the Constitution and article 6 of the Convention. In this respect, the guarantees included in the specified regulations will also apply on the cases filed against an administrative decision which is claimed to have damaged the rights of the applicant. As it is seen that the

process which is the subject matter of the application is related to a request for compensation filed within the scope of the Code numbered 5233, there is no doubt that there is a trial which is about civil rights and liabilities (App. No: 2012/1198, 7/11/2013, § 44).

63. 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. 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 3/1/2006 on which the request for compensation within the scope of the Code numbered 5233 was conveyed by the applicant to the Commission (App. No: 2012/1198, 7/11/2013, § 45). The date of expiry of the period is the date on which the trial comes to an end by also covering the phase of execution most of the time; in terms of the concrete application, this date is the date of 25/12/2012 which is the date of decision of the 15th Chamber of the Council of State numbered M.2012/10867, D.2012/14757 on the dismissal of the request of the applicant for the correction of decision that is the final decision issued in the judicial process initiated against the decision of the Commission.

64. It is provided in provisional article 1 of the Code numbered 5233 that the applications lodged to the commissions shall be finalized within two years following the date of application, that in the event that the period stipulated in provisional article 4 of the mentioned Code expires and the applications cannot be finalized, the Council of Ministers can extend this period on the condition that it does not exceed one year at each time. 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 finalization of the applications which are lodged within this scope 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. However, the periods in question do not have a quality of foreclosure, but have a quality of regulation (App. No. 2013/3007, 6/2/2014, § 61-62).

65. 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, so can they also arise out of 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 intensity of workload, the responsibility of competent authorities comes to the fore (App. No:2012/1198, 7/11/2013, § 55).

66. However, the delays which take place based on the accumulation of application due to the fact that there a temporary and extraordinary increase in the number of applications lodged to an administrative or judicial decision-making body in an unforeseeable way cannot be said to create the responsibility of the state in terms of the right to trial in reasonable time on the condition that timely and sufficient measures are taken (App. No:2013/3007, 6/2/2014, § 61-62).

67. Within the framework of the aforementioned principles (§ 53, 59-60), in order to be able to come to a conclusion on whether or not the delays which occur in the mechanism created in accordance with the Code numbered 5233 have resulted in the violation of the right to trial in reasonable time, it is necessary to reveal whether or not public authorities have exhorted sufficient effort and taken necessary measures in terms of the functioning of this mechanism established through the Code numbered 5233 in an effective way.

68. The applications on the fact that the requests for compensation filed within the scope of the Code numbered 5233 were not redressed within reasonable time were previously made the subject of examination by the Constitutional Court and it was stated that a total of 361.279 applications were lodged to all commissions until October 2012 following the entry into force of the mentioned Code, that 307.789 of these applications were concluded, that similarly as of this date, 66 of a total of 105 commissions established across the country completed their works and that 39 commissions were continuing to perform their works, that in accordance with article 2 of the Code numbered 5233, compensation commissions were established so as to redress in an amicable way the financial damages of the real persons and private law legal persons that incurred damages due to the actions which fell under the scope of articles 1, 3 and 4 of the Code on the Fight Against Terrorism dated 12/4/1991 and numbered 3713 or the activities carried out within the scope of fight against terrorism, that however, most of the applications that were received by the commissions comprised of the applications lodged so as to compensate the damages which occurred due to the actions and activities within the same scope that took place between 1987 and 2004 based on provisional article 1 of the Code numbered 5233, that together with the entry into force of the mentioned Code, many applications were lodged in relation to the mentioned period, that although it was stated that the applications in relation to this period could be lodged within 1 year following the entry into force of the mentioned Code through provisional article 1 of the Code numbered 5233, this period was lastly extended until the date of 30/5/2008 through provisional article 4 added into the Code numbered 5233 with the Code numbered 5666, that therefore, although lots of applications were lodged to commissions within a certain period, it was not possible for the intensity of applications in question to continue. Moreover, it was indicated that in the applications which were lodged within the scope of the Code numbered 5233, the relevant commissions determined the damages to be recovered in accordance with articles 7 and 8 of the mentioned Code, that in this scope, depending on the request filed in each application, they performed viewings in order to determine the damages incurred, separately received technical expert reports such as agriculture, cadastre, construction and so on, calculated 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, that for this reason, these actions which were carried out out to determine the damages of each applicant by way of making very variable and detailed calculations for more than 360.000 applications in total were quite complicated and time-consuming for the commissions (App. No:2013/3007, 6/2/2014, § 66-69).

69. Within this scope, in relation to the implementation of the Code numbered 5233 and in the scope of the individual applications lodged on the applications which were lodged about the applications that had similar nature with the concrete application as of Batman province, it was determined that a commission was established in Batman province in accordance with article 4 of the mentioned Code, that the number of commissions was increased up to 4 on the date of 3/2/2006 due to the high number of applications, that works were performed under 4 commissions until the date of 17/8/2010, that a total of 18.450

applications were lodged to the established commissions, that nearly 8.000 applications were lodged from the date of 27/7/2004 which was the date of enforcement of the Code numbered 5233 until the date of 29/9/2005, that applications could be lodged to the Commission in relation to the incidents prior to 2004 until the date of 30/5/2008, that following this date, within the scope of the Code numbered 5233, applications could be lodged only in relation to the incidents which newly occurred, that therefore, increase in the total number of applications was very limited, that 18.410 of a total of 18.450 applications lodged were concluded as of the date of 10/1/2014, that for this reason, the number of Commissions was decreased to one and that only 39 applications were pending before the commission. Consequently, it was determined that there was a very high number of applications for a certain period of time, that however, there was a very limited increase in the number of applications after the date of 30/5/2008 and that the Commissions worked in order to conclude the current applications after this date, that the number of commissions established in provinces was increased in the periods during which the number of applications was very high as seen in the example of Batman, that following the reduction of workload, this number was decreased and that the commissions whose work was completed were closed, that within this scope, there was a low number of applications which were not concluded both across the country and before the Damage Detection Commission of Batman (App. No:2013/3007, 6/2/2014, § 70-72).

70. In terms of the concrete application, it is understood that following the application lodged by the applicant to the Commission on the date of 3/1/2006, after some procedures also including viewings and expert reviews were performed in accordance with the procedure prescribed by the Code numbered 5233, the request of the application was dismissed on the date of 27/8/2010, that the trial process initiated against the mentioned decision of dismissal on the date of 24/3/2011 was completed with the decision of the 15th Chamber of the Council of State on the dismissal of the request of the applicant for the correction of decision dated 25/12/2012 and numbered M.2012/10867, D.2012/14757, that within this scope, the total period which needs to be taken into consideration within the scope of the right to trial in reasonable time is an approximate period of time of seven years.

71. Although it is seen that the evaluation of the request for compensation filed by the applicant within the scope of the Code numbered 5233 covered an approximate process of seven years, within the framework of the aforementioned determinations (§ 62-63), when the number of concluded applications, the procedures which need to be separately performed within the scope of each application, the fact that only the persons who have certain qualifications can be the member of commissions and the fact that the members of these commissions are public officials who take part therein on part-time basis are taken into consideration, when it is taken into consideration that it is not possible to increase the number of commissions established within a province over a certain number, that a series of administrative examinations including viewing and expert review were also performed in terms of the concrete incident, that the judicial process following the administrative application was completed within a process of one year and nine months in a trial procedure of two instances and that the delay which took place in the conclusion of the application essentially occurred due to the examination of other applications which were previously lodged to the Commission, that within this framework, the workload increase which temporarily occurred turned into a structural problem, that however, the public authorities resorted to necessary measures in terms of the execution of the relevant procedure, as it has not been determined that there was no delay which could be attributed to the public authorities and, in particular, judicial bodies in terms of the conclusion of the dispute in an approximate process of seven years that elapsed in terms of the conclusion of the request which is the

subject matter of the application, it should be decided that the right to trial in reasonable time enshrined in article 36 of the Constitution was not violated.

b. The Claim as Regards the Violation of the Right to a Fair Trial

72. The applicant claimed that the principle of adversarial trial was violated by stating that the documents submitted by the administration were taken as the basis for judgment by the court of first instance without them being notified to her.

73. In the opinion of the Ministry of Justice, it was stated that the applicant's right to participate in the case was respected, that she was allowed to present her own opinions in order to be able to defend her rights and that within this framework, her claims in relation to the subject were heard and examined by the Court.

74. The principle of adversarial proceedings which is one of the elements of the right to a fair trial requires the granting to the parties of the right to have information and to comment about the case and accordingly, the participation of the parties in the entire trial in an active way (App. No: 2013/4424, 6/3/2013,§ 21). This principle and the right to actively participate in the trial which is relevant with this principle are the concrete manifestations of the right to a fair trial. In many decisions where it carried out the examination as per article 36 of the Constitution, the Constitutional Court refers, within the scope of article 36 of the Constitution, to these principles and rights that are either contained within the wording of the Convention or incorporated in the right to a fair trial through the case law of the ECtHR by interpreting the relevant provision in the light of article 6 of the Convention and the case law of the ECtHR (App. No: 2012/13, 2/7/2013, § 38).

75. Within the scope of the right to adversarial proceedings, the failure of courts to hear the parties, the failure to allow them to present their claims and to object against the evidence could result in the fact that the trial activity is contrary to fairness (For the decisions of the ECtHR in the same vein, see *Ruiz-Mateos v. Spain*, App. No: 12952/87, 23/06/1993, § 63; *Feldbrugge v. Netherlands*, App. No: 8562/79, 29/05/1986, § 44). The principle of adversarial proceedings is also closely related to the principle of equality of arms and these two principles are complementary to each other. Because in the event that the principle of adversarial proceedings is violated, balance between the parties in terms of defending their cases will be disrupted. The fact that adversarial proceeding is also accepted in the cases which are related to civil rights means the fact that the parties appear at the hearing also in a trial related to a civil right and in more general terms, the fact that they actively participate in the entire proceeding and that within this scope, they are granted with the opportunity of having access to the trial documents and of commenting thereon (App. No: 2013/4424, 6/3/2013,§ 21).

76. In terms of the concrete application, it is understood that the criterion of "*the fact that the settlement is completely empty/evacuated*" which was a jurisprudential criterion created by the Council of State was used on whether or not the request of compensation which is the subject matter of the application was satisfied within the scope of the Code numbered 5233, that the results of examination received from some administrative units were relied upon for the determination of this matter, that these documents were the letter of the Provincial Gendarmerie Command of Batman dated 25/3/2011 on the villages which became abandoned and were evacuated, the letter of the same unit dated 1/10/2009 and its attached minute dated 17/11/2009 and the letter of the District Election Board Presidency of Sason dated 4/9/2009. In the letter of the Administrative Court of Batman dated 20/1/2014, it is seen that it was stated that the application of pilot case was performed due to the high number of

files before the Court in relation to the settlement in question. Although it was stated by the applicant that the mentioned documents were taken as the basis for judgment without them being notified to her and without being granted with the opportunity of making a defense against these documents, it is seen that the contents of the mentioned documents were transferred into the decision of the court of first instance and that within this scope, it was out of question that the settlement in question became abandoned or was evacuated completely, that for this reason, it was concluded that the people from the village did not experience an objective security concern which could result in the fact that they left the settlement, that in this way, the applicant who was understood to have known the relevant documents and the contents thereof through the decision of the court of first instance at the latest found the opportunity of putting forth her objections and defenses against the determinations made in the evidence of these documents both in the petitions of appeal and request for the correction of decision, that within the scope of the petitions of evidence and declaration submitted by the applicant, the documents submitted by the administration and the applicant were evaluated by the court and the applicant was granted with the opportunity of examining and declaring in relation to the case material, that within this framework, from the scope of the application file, it is understood that the applicant was not deprived of a procedural opportunity which would affect the result of the trial.

77. Moreover, the applicant claimed that sufficient justification was not included in the court decisions in relation to the matters which affect the result of the request.

78. In the opinion of the Ministry of Justice, it was stated that there was no obligation of responding to all claims of the parties in court decisions and that in terms of the concrete proceedings, the court of first instance put forth why it dismissed the case and how it assessed the evidence in its reasoned decision composed of three pages together with its bases, that it was decided by the authority of legal remedy that the judgment which was in accordance with the procedure and law be approved.

79. The right to a reasoned decision is one of the concrete manifestations of the right to a fair trial (App. No. 2013/1213, 4/12/2013, § 25).

80. The fact that court decisions are reasoned is related to the interest of both the parties and the public in terms of being able to use the opportunity of resorting to the legal remedy in an effective way and of ensuring trust in courts and the failure to have information about the justification of a decision will render the opportunity of resorting to the legal remedy non-functional. For this reason, it is obligatory that the bases of court decisions are shown in a sufficiently clear way (App. No. 2013/1780, 20/3/2014, § 67).

81. While the fact that the decisions of the court are reasoned is one of the elements of the right to a fair trial, this right cannot be construed as responding to all kinds of claims and defenses asserted in the trial in a detailed way. For this reason, the scope of the obligation of showing a justification can vary depending on the quality of a decision. Nevertheless, the fact that the claims of the applicant as regards procedure or merits which require a separate and clear response have been left unresponded will result in the violation of a right. Moreover, the fact justifications of the decision issued by the courts of legal remedy are not detailed should not be construed as the violation of this right, either. It is appropriate to construe these kinds of decisions issued by the courts of legal remedy in a way that the justifications included in the decisions of the courts of first instance have been accepted and in this case, it should be

accepted that the justification of the decision of the previous court has been adopted by the higher court (App. No. 2013/1213, 4/12/2013, § 26).

82. In the incident which is the subject matter of the application, it is understood that the courts of instance acted based on the criterion of objective security concern created by the Council of State on whether or not the request of the applicant would be accepted within the scope of the Code numbered 5233, that as for the determination of this matter, whether or not the settlement in question completely became abandoned/was evacuated was evaluated within the scope of the minutes and documents drawn up by various administrative institutions, that it was specified and considered by the courts of instance why the documents that the applicant relied upon for the claim that the settlement in question was one of the places which became abandoned/was evacuated and especially, the minute dated 20/9/2010 containing the signatures of some village mukhtars, members, village people and gendarmerie officials with regard to the fact that the settlement in question became completely abandoned were not taken into consideration, that by acting based on the criterion of objective security concern, the special situation of the applicant was not subjected to a separate evaluation, that in this way, the request which was asserted by the applicant and claimed to have affected the result of the judgment was reviewed and dismissed in the decision of the court of first instance, that as the decision created by the court of first instance and the justification thereof were found to be compliant with the law, it became final by going through the review of the courts of legal remedy, that within this scope, a detailed justification was not included in the decisions by the authority of legal remedy which was understood to have adopted the justification of the local court.

83. Within the scope of the claim that the trial was not fair, the applicant also claimed that the right to a fair trial defined in article 36 of the Constitution and the right to property defined in article 35 of the Constitution were violated by stating that the application which she had filed within the scope of the Code numbered 5233 was dismissed by the Court based on the objective criterion as to the effect that the village where she was residing was not completely evacuated without taking into consideration the subjective case in relation to the killing of her son by the members of the terrorist organization, that this style of interpretation was clearly contrary to the aim of the Code and the regulations that it brought and that the facility of providing a remedy was not recognized in the face of the state of being deprived of the right to property to which she was exposed due to the fact that the administration did not fulfill its responsibility of ensuring the security of life and property as a result of the issued decision of dismissal.

84. In the opinion of the Ministry of Justice, it was pointed out that the claims of the applicant especially with regard to whether or not the village which was the subject matter of the application was evacuated and the actions and determinations of the court in this scope were considered as complaints on the result of the trial, that as for the violation of the right to property, the principles which the European Court of Human Rights adopted in relation to the right to property were touched upon, that the right to the protection of property was not an absolute right and that the authority of using the properties which belonged to private and legal persons under the conditions specified 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 were evacuated in Eastern and Southeastern regions as of 1985 due to security problems and the ECtHR came to the conclusion that the prevention of the relevant persons from entering into

their villages constituted an intervention in the rights to property of the applicants, that following the mentioned decisions, the Code numbered 5233 was enacted for the compensation of the damages of these persons, that it was concluded by the ECtHR that especially when armed conflicts, general violence, the violations of human rights were taken into consideration, this intervention which obligated competent authorities to take extraordinary measures so as to ensure security in a region of state of emergency was not devoid of basis and 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 moreover, evaluations in terms of subjects such as the determination of main incidents or the calculation of financial compensation would be carried out by the relevant Commissions as the domestic legal remedy and it was specified that within the framework of the mentioned determinations, as for the concrete application, it needed to be taken into consideration that the fact that the application did not leave her village within the scope of terrorist acts or the activities of fight against terrorism was determined through the decision of the Commission and this determination was also approved by judicial authorities.

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

86. It is clear that applications, which do not contain a claim of violation of a constitutional right, where it is simply requested that the decisions of the courts of instance be reexamined, are clearly devoid of basis and that they relate to matters, which are left outside the venue of the Court by the Constitution and the Code. In this scope, proving the incidents that are contained within the case that is the subject of the individual application, interpretation and application of the rules of law, the admissibility and evaluation of evidence during the trial and whether or not a solution brought by courts of instance to an personal dispute is fair from a merits point of view shall not be subjected to assessment during the individual application examination. As long as the rights and freedoms stipulated in the Constitution are not violated and unless they contain any evident discretionary mistake, material and legal mistakes in decisions of courts of instance cannot be handled in the examination of an individual application. In this framework, unless an evident discretionary mistake is present in the evaluation of the evidence by the courts of instance, the Constitutional Court cannot intervene in this discretion (App. No: 2012/1027, 12/2/2013, §§ 25-26).

87. The Code numbered 5233 is aimed at the determination by the administration of the financial damages of real persons and private law legal persons that incur damage due to terrorist acts or the activities performed within the scope of fight against terrorism as soon as possible and in full without the need for resorting to a legal remedy and prescribes principles and procedures in line with the mentioned aim.

88. In order for the requests of applicants to be redressed in accordance with the mentioned Code, it is primarily necessary to determine that the claimed damage has occurred due to terrorist acts or the activities performed within the scope of fight against terrorism and it is clearly specified in article 2 of the Code that the damages which are incurred due to economic and social reasons other than terrorism and the damages of those who leave the

places in which they reside on their own volition except for security concerns have incurred due to this reason are outside the scope thereof.

89. The trial authorities which took into consideration the incidents of migration that formed the basis for the creation of the procedure specified in relation to compensation in particular and occurred due to economic and social reasons other than terrorist acts or the activities performed within the scope of fight against terrorism as of the region from which the applications lodged to the ECtHR were filed and the presence of damages arising out of this fact resorted to determining an objective criterion in order for the applications lodged within the scope of the Code numbered 5233 to be accepted and made the fulfilment of this criterion conditional on *"the fact that the village or hamlet becomes completely abandoned/is evacuated or only temporary village guards remain the settlements in question"*. In line with the mentioned assumption, it is necessary that the financial damage incurred by persons who fail to have access to their assets/properties due to the fact that a settlement becomes completely empty/is completely evacuated as a result of "*terrorist acts*" or "*the activities which are performed within the scope of fight against terrorism*" be paid amicably by the administration according to the mentioned provisions of the Code. 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.

90. As a matter of fact, in the face of the intensity of the incidents of migration which occurred due to economic and social reasons in particular in terms of the region from which requests have been filed and of the damages arising thereof, it seems to be compulsory to create an objective criterion to be taken as the basis for the determination of damages which can be compensated within the scope of the Code numbered 5233. In this scope, the judicial authorities which acted based on the requirement as to the effect that security concern did not need to vary depending on the persons who continuously resided in a settlement and on the persons who left the same settlement due to the mentioned concern and on the fact that it was possible for each individual to have a different reaction against fear and worry that occurred in the society to due to terrorist acts, by seeing that it was compulsory to attribute to an objective criterion the security concern which was a feeling that could vary from one person to another as specified above, adopted the principle that there was no legal possibility for the payment of financial damages by the administration within the scope of the Code numbered 5233 in the event that a settlement was partly empty based on security concern.

91. By stating that discretion over the issue of whether or not the requests filed in accordance with the Code numbered 5233 will be evaluated within the scope of the mentioned Code and the interpretation of the provisions of legislation in relation to the determination of the scope of the Code and the determination of a precedent criterion in this respect and the evaluation of the concrete incident in accordance with this criterion essentially belongs to the courts of instance and that as a result of the evaluations made by the Constitutional Court with regard to the requests which are previously made the subject of an individual application within the scope of the implementation of the Code numbered 5233, claims in relation to the mentioned issued are related to the issues which need to be evaluated by the courts of legal remedy within the interpretation and implementation of the material incident and legal rules, it is understood that they are clearly devoid of basis (App. No: 2013/3007, 6/2/2014, §§ 45-50; For the decision of the ECtHR in the same vein, see *Akbayır v. Turkey*, App. No: 30415/08, 28/06/2011, § 88).

92. However, it is understood that the applicant asserted that she left her village with security concern in relation to the abduction of her son by the members of the terrorist organization and the killing of him near the settlement in question and that her damage incurred in this framework needed to be evaluated within the scope of the Code numbered 5233 and submitted the minutes and investigation documents in relation to the mentioned incident to the courts of instance and requested that her subjective case as to the effect that she left the settlement due to the security concern arising out of terrorist incidents be taken into consideration.

93. While discretion over the necessity of providing a remedy as a result of the interpretation of the mentioned provisions of the Code, the evaluation of material incidents within the framework of the criteria determined and investigations performed with regard to the determination of assets and damages in terms of an application which can be accepted within the scope of the Code numbered 5233 essentially belongs to the Courts of instance, in the event that the decisions of the court of instance contain an evident discretionary mistake, in relation to the determination of whether or not a Constitutional fundamental right or freedom has been violated, it may be necessary to make a different evaluation.

94. In this framework, from the minutes of determination included in the trial file, it is understood that the applicant left the settlement in question after the abduction and killing of her son by the members of the terrorist organization. Nevertheless, it is understood that the fact that a conclusion was reached by making an examination into whether or not the village was completely evacuated so as to determine whether or not the applicant left the settlement due to terrorist acts or the activities performed within the scope of fight against terrorism in order for her request to be evaluated within the scope of the Code numbered 5233 was not suitable for the aim of the Code in question. Although it is clearly understood from the documents within the scope of the file that the applicant whose son had been killed by the members of the terrorist organization left the settlement due to the security concern arising from the terrorist incidents, when the trial is considered as a whole as a contrary decision was issued, it is necessary to decide that the applicant's right to a fair trial guaranteed in article 36 of the Constitution was violated.

95. As it has been concluded that the applicant's right to a fair trial guaranteed in Article 36 of the Constitution was violated, it has not been deemed necessary to separately evaluate the merits of the claim that her right to property was violated.

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

96. The applicant requested that a material compensation of 38,145.00 TL together with its legal interest which will be applied as of the date of decision of the Commission be adjudged.

97. In the opinion of the Ministry of Justice, no opinion was expressed as regards the request of the applicant for compensation.

98. Paragraph (2) of Article 50 of the Code numbered 6216 with the side heading *"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."

99. As it has been determined in the current application that the right to a fair trial guaranteed in article 36 of the Constitution was violated, it should be decided that the file be sent to the relevant Court in order to hold a retrial for the violation and the consequences thereof to be removed.

100. Even though a request for material compensation was filed by the applicant, as it has been understood that the fact that a decision be delivered to send the file to the relevant Court for holding a retrial constituted a sufficient compensation with a view to the claim of violation of the applicant, it should be decided that the request for material compensation by the applicant be dismissed.

101. It should be decided that the trial expense which was made by the applicant, determined in accordance with the documents in the file and composed of the counsel's fee of 1.500,00 TL be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 16/7/2014 that;

A. That the applicant's request for legal aid be ACCEPTED,

B. That the applicant's

1. Claims as to the effect that her right to a fair trial and right to trial in a reasonable time were violated are ADMISSIBLE,

2. Claim as to the effect that her right to trial by an impartial tribunal was violated is INADMISSIBLE as "*it is clearly devoid of basis*",

3. Claim as to the effect that the principle of equality was violated is INADMISSIBLE as "*it is clearly devoid of basis*",

C. That the applicant's

1. Right to trial in a reasonable time enshrined in Article 36 of the Constitution WAS NOT VIOLATED,

2. Right to a fair trial enshrined in Article 36 of the Constitution WAS VIOLATED,

D. That the file be sent to the relevant Court for holding a retrial in order for the violation and the consequences thereof to be removed,

E. That the requests of the applicant for compensation BE DISMISSED,

F. That the trial expense which was made by the applicant and composed of the counsel's fee of 1.500,00 TL BE PAID TO THE APPLICANT, that the applicant whose request for legal aid has been accepted be exempted from the fee,

G. That the payment 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.

President	Member	Member
Alparslan ALTAN	Serdar ÖZGÜLDÜR	Osman Alifeyyaz PAKSÜT

Member	Member
Recep KÖMÜRCÜ	Engin YILDIRIM