REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

DECISION

Application No: 2013/2814

Date of Judgment: 18/6/2014

SECOND SECTION

DECISION

President : Alparslan ALTAN

Members : SerdarÖZGÜLDÜR

Osman Alifeyyaz PAKSÜT

Recep KÖMÜRCÜ

Engin YILDIRIM

Rapporteur : Serhat ALTINKÖK

Applicant : Hanefi AVCI

Counsel : Att. Refik Ali UÇARCI

I. SUBJECT OF APPLICATON

1. The applicant claimed that articles 19 and 36 of the Constitution were violated by asserting that the warrant of arrest issued on him was contrary to the law, that the objections which he filed against the court decisions as regards detention and the continuation of detention were dismissed through stereotype justifications, that no effective legal remedy was present in national law against these decisions, that he was detained for an unreasonable period of time, that the continuation of the state of detention although there was no physical evidence on his criminality damages the presumption of innocence, that he was still kept detained while some suspects who were accused of the allegation of being a member of an organized group within the scope of the same file were released.

II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on 2/5/2013. As a result of the preliminary administrative examination of the petition and its annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

3. It was decided by the Third Commission of the Second Section on 17/7/2013 that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. The Section, in the session held on 12/12/2013, 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 16/12/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 17/2/2014.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 18/2/2014. The applicant submitted to the Constitutional Court his statements against the opinion of the Ministry of Justice on 19/3/2014.

III. FACTS AND CASES

A. Facts

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

8. The applicant was detained on the ground of "*Knowingly and willingly helping the members of a terrorist organization, violating the confidentiality of an investigation file, influencing those who fulfill their judicial duties, the quality of the crimes charged on the suspect based on the allegation of pointing the persons involved in anti-terrorism as targets, the situation of existing evidence against him, the presence of phenomena attesting to strong suspicion of crime as to the effect that he committed the attributed crimes, the fact that some of the attributed crimes were among the crimes stipulated in article 100/3-a of the Code of Criminal Procedure, the fact that the evidences were not completely collected, the possibility of the destruction, concealment or alteration of some of the evidence by the suspect due to his position*" through the decision of the 14th Assize Court of Istanbul dated 28/09/2010 with the interrogation number of 2010/53 with the claim that he committed the crimes of knowingly and willingly helping a terrorist organization and its members, the violation of the confidentiality of the investigation file, the influencing of those who fulfill their judicial duties, pointing those who were involved in anti-terrorism as targets within the scope of the investigation of the Chief Public Prosecutor's Office of Istanbul numbered 2009/1868.

9. On 5/10/2010, the applicant filed a request for release against the warrant of arrest of the 14th Assize Court of Istanbul dated 28/09/2010 by stating "... *that the reasons for detention were not read to his face in his presence, that the existing evidence is in his favor, that during the interrogation he did not accept anything other than those written in the book authored by him, that there is no action which constitutes a crime in the book, that he reflected on future with the responsibility of an intellectual in this book based on the freedom of thought and expression within the scope of articles 9 and 10 of the European Convention on Human Rights ("ECHR"), that trial under detention is exceptional according to the regulatory provisions on the limitation of arrest in article 100 of the Code of Criminal Procedure within the framework of the libertarian understanding which brings the individual forward, that trial without detention has turned into a rule now, that the evidence on merits was completely collected, that there is no possibility of obfuscating the evidence, that detention is a measure, that it is highly probable for him to be acquitted in accordance with paragraph 2 of article 223 of the Code of Criminal Procedure as there is no concrete, sufficient and material evidence about him, that it should be decided that he be released rightfully or by resorting to bail or one of the judicial control measures if the distinguished court has a contrary opinion according to the provisions of article 200 and the subsequent articles of the Code of Criminal Procedure".*

10. As a result of the examination carried out as regards the detention of the applicant by the 9th Assize Court of Istanbul *ex officio* according to article 108 of the Code numbered 5271, it was decided on the continuation of the state of detention through the decision dated 26/11/2010 and numbered Miscellaneous Action 2010/1331 on the ground of "... *the quality and nature of the crime alleged to him, the fact that the crimes are among the crimes stipulated in paragraph (3) of article 100 of the Code numbered 5271, the fact that the reasons for detention are still going on, the fact that the investigation has not been completed yet, the fact that the measures which are alternative to detention will be insufficient in terms of the suspect".*

11. The indictment of the Chief Public Prosecutor's Office of Istanbul dated 24/1/2011 on 22 suspects also including the applicant was accepted by the 12th Assize Court of Istanbul on 4/2/2011.

12. The 12th Assize Court of Istanbul decided on the continuation of the state of detention of the applicant at the first hearing dated 13/4/2011.

13. On 19/4/2011, the applicant objected to the decision that the 12th Assize Court of Istanbul delivered on the continuation of the state of detention at the hearing dated 13/4/2011, his objection was dismissed through the decision of the 13th Assize Court of Istanbul dated 12/5/2011 and numbered Miscellaneous Action 2011/308 on the ground of "*... the sanction of the crime alleged to the suspect, the findings attesting to strong suspicion of crime and that the alleged crime is one of the crimes stipulated in article 100/3 of the CCP*".

14. The applicant applied to the court with the request for the termination of the state of detention on the dates of 17/11/2011, 6/2/2012, 30/4/2012, 6/7/2012, 7/8/2012, 5/10/2012, 26/11/2012, 4/1/2013, but these requests of his were dismissed by the relevant court. The objections filed by the applicant to the decisions of dismissal delivered by the courts were also dismissed.

15. Lastly, the applicant applied to the 9th Assize Court of Istanbul on 4/2/2013 with the request for the termination of his state of detention and his release. The 9th Assize Court of Istanbul decided on the continuation of the state of detention of the applicant at the 17th trial dated 4/2/2013.

16. The applicant objected to this decision on the continuation of the state of detention, his objection was dismissed through the decision of the 10th Assize Court of Istanbul dated 7/3/2013 and numbered Miscellaneous Action 2013/78. The decision of dismissal was notified to the applicant on 1/4/2013.

17. The state of detention of the applicant was also assessed by the 9th Assize Court of Istanbul *ex officio* on the dates of 22/6/2011, 21/7/2011, 10/1/2012, 21/6/2013, 19/7/2012, 6/9/2012, 20/11/2012, 18/12/2012, 22/1/2013, 26/2/2013 in accordance with article 108 of the Code numbered 5271 and a decision was delivered on the continuation of the state of detention.

18. It was decided through the decision of the 9th Assize Court of Istanbul dated 19/7/2013 that the applicant be punished with an imprisonment of five years and seven months due to the crime of "*aiding the illegal armed terrorist organization DevrimciKarargah (Revolutionary Headquarters) and its members*" in accordance with paragraph (7) of article 220, paragraph (2) of article 314 of the Turkish Criminal Code numbered 5237; with an imprisonment of five years and a judicial fine due to the crime of "*carrying unregistered fatal full-automatic and semi-automatic guns*"; with an imprisonment of two years and six months due to the crime of "*influencing the officials who perform their judicial duties*"; with an imprisonment of two years, two months and twenty days due to the crime of "*the violation of the confidentiality of the investigation*", that his *de jure* state of detention continue and that a criminal complaint be filed due to the crime of the forgery of official documents.

19. The case on the applicant is pending in the phase of appeal.

B. Relevant Law

20. Paragraph (7) of article 220 of the Code numbered 5237 is as follows:

> *"A person who, without being involved in the hierarchical structure within the organization, knowingly and willingly aids the organization shall be penalized as a member of an organized group. The penalty to be imposed due to becoming member to an organized group can, depending on the quality of the aid provided, be abated by up to one thirds.*

21. Article 314 of the Code numbered 5237 is as follows:

"(1) A person who forms or conducts an armed organization with the purpose of committing the crimes in the fourth and fifth chapters of this section shall be penalized with a prison sentence of ten to fifteen years.

(2) A prison sentence of up to ten years shall be imposed on those who join the organized group defined in paragraph one."

22. Article 100 of the Code of Criminal Procedure numbered 5271 is as follows:

"(1) A warrant of detention can be issued about the suspect or accused in the presence of facts indicating the existence of strong suspicion of a crime and the presence of a ground for detention. A warrant of detention cannot be issued in the event that importance of the case is not proportionate to the anticipated penalty and security measure to be imposed.

(2) Grounds for detention can be considered to exist in the following circumstances:

a) If there are concrete facts indicating that the suspect or accused will escape and arising suspicion towards the suspect or accused escaping or hiding.

b) If the suspect or accused's behaviors give rise to strong suspicion on the matters of;

1. Destruction, concealment or alteration of evidence,

2. Attempting to exert pressure on the witness, aggrieved or others.

(3) Grounds for detention can be considered to exist in the presence of grounds for strong suspicion that the crimes below have been committed:

...

11. Crimes Against the Constitutional Order and the Operation of Said Order (Articles 309, 310, 311, 312, 313, 314, 315),

..."

23. Article 108 of the Code numbered 5271 is as follows:

"...

(3) The judge or court shall decide ex officio whether or not the continuation of detention of the accused held in a detention house will be necessary in each session or between sessions when conditions thus require or within the time period prescribed under paragraph one."

IV. EXAMINATION AND JUSTIFICATION

24. The individual application of the applicant dated 2/5/2013 and numbered 2013/2814 was examined during the session held by the court on 18/6/2014 and the following are ordered and adjudged:

A. Claims of the Applicant

25. The applicant;

i. **Claimed that article 13 of the European Convention on Human Rights (Convention) was violated by asserting that the decisions delivered by the court on the restriction of his freedom were contrary to law, that his requests for release were**

dismissed through stereotype justifications and that there was no effective remedy to which he can resort in national law in order to object to the illegal decisions on detention and the continuation of detention,

ii. Claimed that paragraph (1) of article 5 of the Conventionwas violated by asserting that the decisions delivered as a result of the examinations as regards his state of detention carried out *ex officio* by the relevant court in accordance with article 108 of the Code numbered 5271 were not notified to him and that thus he could not find an opportunity of objecting to these decisions,

iii. Claimed that paragraph (1) of article 5 of the Convention was violated by asserting that his detention was contrary to law and that his requests for release were dismissed through stereotype justifications without being based on any cases,

iv. Claimed that paragraph (1) of article 5 of the Convention was violated by asserting that his objections as to the dismissal of his requests for release were also dismissed through stereotype justifications,

v. Claimed that paragraph (3) of article 5 of the Convention was violated by asserting that there was no sufficient reason and reasonable doubt that would justify the continuation of his state of detention, that the allegations on him were only based on the excerpts made from the book authored by him without investigating all positive and negative aspects in relation to the restriction of his freedom and without any evidence, that he was detained for an unreasonable period of time, that he was kept under detention while some suspects who were accused of the allegation of being a member of an organized group within the scope of the same file were released,

vi. Claimed that "*the presumption of innocence*" in paragraph (2) of article 6 of the Convention was violated due to the fact that his state of detention was continuing although no evidence was put forth as to the effect that he was guilty between the date on which he was taken into custody and the date of application by him to the Constitutional Court

and reserved the right to claim for damages.

B. Evaluation

1. In Terms of Admissibility

a. The Claim That There is No Effective Legal Remedy Against the Decisions of Detention

26. The applicant asserted that there was no effective remedy to which he can resort in order to object to the decisions of detention and the continuation of detention delivered in an illegal way **.**

27. **The Ministry of Justice stated that the complaint as to the effect that the decisions delivered as a result of the examination of detention carried out by the courts *ex officio* were not notified to the applicant was related to article 108 of the Code numbered 5271, that such complaints were examined by the European Court of Human Rights (ECtHR) in accordance with paragraph (4) of article 5 of the Convention, that paragraph (4) of article 5 of the Convention did not include the obligation of providing explanations for all justifications which detained persons asserted in all types of requests for release, that however it was necessary for the court which examined these requests to include**

concrete claims and findings that would not throw suspicion on the lawfulness of detention.

28. **The applicant repeated his claims in the application form and did not make a new declaration on this issue.**

29. In the examination of an individual application, the common field of protection of the Constitution and the Convention is taken as the basis for determining whether a claim of violation falls into the jurisdiction of the Constitutional Court in terms of subject or not (App. No: 2012/1049, 26/3/2013, § 18). The right to an effective remedy is regulated in article 40 of the Constitution and article 13 of the Convention.

30. It is not possible to evaluate in an abstract manner the claims of the applicant as to effect that the right to an effective remedy regulated in article 40 of the Constitution and article 13 of the Convention has been violated given the expressions in the aforementioned articles and it is absolutely necessary to discuss them in connection with other fundamental rights and freedoms stipulated within the scope of the Constitution and the Convention. In other words, in order to discuss whether the right to an effective remedy has been violated or not, it is necessary to answer the question on which fundamental right and freedom the right to an effective remedy has been restricted (App. No: 2012/1049, 26/3/2013, § 33).

31. **In the concrete case, the essence of the claim of the applicant is related to the fact that the objections which he filed to the decisions of detention were dismissed through stereotype justifications. It is necessary to examine this claim of the applicant within the framework of paragraph seven of article 19 of the Constitution.**

b. The Claim That He Could Not Find an Opportunity of Objecting to the Decisions Delivered by the Court of Instance as a Result of the Examinations of Detention Carried Out *Ex Officio* as These Decisions Were Not Notified to Him

32. The applicant asserted that the decisions delivered by the Court of Instance as a result of the examinations of detention carried out *ex officio* were not notified to him and that therefore he could not find an opportunity of objecting to these decisions.

33. In its opinion, the Ministry of Justice stated that the relevant complaint was related to the examination carried out by the Court of Instance according to article 108 of the Code numbered 5271, that the applications of objection as regards the lawfulness of detention filed before a certain court in a way that would cover the examination of the objections filed against both the requests for release and the continuation of detention were evaluated by the ECtHR within the framework of paragraph (4) of article 5 of the Convention and that the examinations which were periodically carried out on the continuation of detention were not covered by this right.

34. The applicant did not make any declaration against the opinion of the Ministry of Justice.

35. Paragraph eight of article 19 of the Constitution is as follows:

> *"For any reason whatsoever, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is made about his/her case as soon as possible and in order to be released immediately if such restriction is in violation of law."*

36. Paragraph (4) of article 5 of the Convention is as follows:

"Everyone who is deprived of his liberty by arrest or detentionshall be entitled to take proceedings by which the lawfulness ofhis detention shall be decided speedily by a court and his releaseordered if the detention is not lawful."

37. Paragraph eight of article 19 of the Constitution and paragraph (4) of article 5 of the Convention grant a person whose freedom is restricted for whatsoever reason the right to apply to a court which can speedily decide on the lawfulness of his detention and order his release if his detention is not lawful. The aforementioned provisions of the Constitution and the Convention essentially constitute a guarantee for the examination of the requests for release or the decisions on the extension of detention in the cases which are tried before a court upon an application of objection as regards the lawfulness of detention (App. No: 2012/1158, 21/11/2013, § 30).

38. In article 108 of the Code numbered 5271, it is provided that it shall be decided by the criminal judge of peace during the investigation stage whether the continuation of detention will be necessary or not in the period during which the suspect is in a detention house and at intervals of thirty days at the latest upon the request of the Public prosecutor by taking into consideration the provisions of article 100; that it shall be decided by the judge or the court *ex officio* during the prosecution stage whether the continuation of detention of the detained accused will be necessary or not at each session or between sessions when conditions thus require or within a period of thirty days at the latest.

39. The evaluation to be carried out according to article 108 of the Code numbered 5271 is carried out on its own motion (*ex officio*), it cannot be considered to be within the scope of the right to object before a judicial authority granted for a person whose freedom is restricted in accordance with paragraph eight of article 19 of the Constitution (App. No: 2012/1158, 21/11/2013, § 32).

40. Due to the reasons explained, it should be decided that the complaints of the applicant as to the effect that "*the decisions delivered as a result of the examinations as regards his state of detention carried out by the Court of Instance ex officio were not notified to him and that therefore he could not find an opportunity of objecting to these decisions*" are inadmissible due to "*lack of venue in terms of subject*".

c. The Claim of Being Deprived of Freedom Although There is no Strong Suspicion of Crime and Ground for Detention

41. The applicant asserted that he was deprived of his freedom although there was no strong suspicion of crime and ground for detention.

42. In its opinion, the Ministry of Justice stated that according to the decisions of the ECHR in order for a person to be deprived of his/her freedom with the suspicion that s/he has committed a crime, there need to be reasonable suspicion or plausible reasons (*raisons plausibles*) as to the effect that the relevant person has committed the alleged crime, that this requirement is a *sine qua non* in terms of detention and it needs to sustain its existence in every state during which detention continues, that the relevant person needs to be released at the moment at which reasonable doubt disappears, that reasonable doubt needs to be sufficient enough to convince an observer who overviews the incidents from outside and is completely objective also given the collected evidence and the unique conditions of the concrete case, that a person who is suspected of having committed a crime should not be detained through a judicial decision which is completely devoid of a justification, that however the detention of a suspect or accused by showing some justifications which legitimize detention cannot be

evaluated as arbitrary and that a similar approach has also been embraced by the Constitutional Court.

43. The applicant did not agree with the opinion of the Ministry by asserting that he did not have any relation with the alleged organized group, that he did not have any relation with the suspect N.K. who was claimed to be a member of the organized group except for friendship, that the allegation as to the effect that he violated the confidentiality of the investigation did not reflect the truth, that the alleged claim of possessing unregistered gun did not reflect the truth, that the guns were registered according to the legislation of state of emergency, that the other guns present in his house were registered in the name of his wife, that the suspicion of escape could not be mentioned as he had a fixed residence, that he did not have the possibility of influencing the evidence, that because taped recordings which were put forth as evidence, the book that he authored, the guns which were claimed to be seized in Eskişehir were already kept by the judicial authorities, that he was arbitrarily detained, that there was no public interest that would require detention, that the authorities of investigation created a perception of the presence of crime by leaking all data kept by them to the press.

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

> *"The Court can decide on the inadmissibility of the applications which are clearly devoid of basis."*

45. After the fact that everyone has the right to personal liberty and security is stipulated as a principle in paragraph one of article 19 of the Constitution, the cases in which persons can be deprived of their freedom are listed in a limited way in paragraphs two and three thereof on the condition that their forms and conditions are stipulated in law. Therefore, the restriction of the right to liberty and security of a person can only be the case in the event that one of the cases specified within the scope of the aforementioned article of the Constitution exists (App. No: 2012/239, 2/7/2013, § 43).

46. In paragraph three of article 19 of the Constitution, it is provided that individuals against whom there is strong evidence of delinquency can only be detained through a decision by a judge in order to prevent their escape, prevent the destruction or manipulation of evidence or in other cases specified in law which require detention. Accordingly, the detention of a person primarily depends on the presence of a strong indication that s/he has committed a crime. This is a *sine qua non* sought for the measure of detention. For this, it is necessary to support an allegation with plausible evidence which can be considered as strong. The quality of the cases and information which can be considered as plausible evidence is to a large extent based on the unique conditions of the concrete case.

47. However, it is not certainly necessary that the evidence be collected at a sufficient level at the moment of arrest or detention in order for a person to be accused of a crime depending on this qualification. Because the aim of detention is to execute the judicial process in a more sound manner by proving the accuracy or removing the doubts which constitute the basis of the detention of a person during the executed investigation and/or prosecution. According to this, it is necessary not to evaluate the cases which will constitute the basis of the doubts that will form the basis of incrimination and the cases which will be discussed in the subsequent stages of criminal trial and constitute the justification of criminal sentence at the same level (App. No: 2012/1272, 4/12/2013, § 73).

48. Detention is regulated in article 100 and the subsequent articles of the Code numbered 5271. According to article 100, a person can only be detained in the event that there are cases which indicate the existence of strong doubts about him/her as to the effect that s/he has committed a crime and a ground for detention. The grounds for detention are also specified in the article. According to this, a decision on detention can be delivered (a) if the suspect or accused escapes, hides or there are concrete cases which arouse the suspicion that s/he will escape, (b) if the behaviors of the suspect or accused constitute strong doubt in the cases of 1) destruction, concealment or alteration of evidence, 2) attempting to put pressure on witnesses, victims or others. In the regulation, the crimes in which a ground for detention will be assumed in the event that there is a strong suspicion that they have been committed have been specified as a list (App. No: 2012/239, 2/7/2013, § 46).

49. On the other hand, as long as the rights and freedoms stipulated in the Constitution are not violated, the issues as regards the interpretation of the provisions of law or material or legal mistakes in the decisions of the courts of instance cannot be handled in the examination of an individual application. The interpretation of the provisions of law on detention and their application to concrete cases are also covered by the discretionary power of the courts of instance. However, in case of a clear arbitrariness in the discretion of the evidence through comments which are clearly contrary to law or the Constitution, such decisions which result in the violation of a right and freedom should be examined in an individual application. The acceptance of the contrary does not accord with the aim of introducing the individual application (App. No. 2012/239, 2/7/2013, § 49).

50. Within the scope of the investigation of the Chief Public Prosecutor's Office of Istanbul numbered 2009/1868, the applicant was detained with the decision of the 14th Assize Court of Istanbul dated 28/09/2010 and numbered investigation 2010/53 with the claim that he committed the crimes of knowingly and willingly aiding a terrorist organization and its members, violating the confidentiality of the investigation file, influencing those who fulfill their judicial duties, pointing the persons involved in anti-terrorism as targets. "*Article 100 and the subsequent articles of the Code of Criminal Procedure"* were shown as the justification of detention *"by considering the quality of the crimes charged on the suspect, the situation of existing evidence against him, the presence of facts attesting to strong suspicion of crime as to the effect that he committed the attributed crimes, the fact that some of the attributed crimes were among the crimes stipulated in article 100/3-a of the Code of Criminal Procedure, the fact that the evidence was not completely collected, the possibility of the destruction, concealment or alteration of some of the evidence by the suspect due to his position*".

51. When the indictment prepared by the prosecutor's office is examined, in brief, it is seen that a public case was filed on the ground that the applicant knowingly and willingly aided the members of the alleged "*DevrimciKarargah (Revolutionary Headquarters) Organization*", that he gave information to the suspect N.K. who was claimed to be the member of the organized group within the scope of the investigation and helped him get around police follow-up, that this situation was understood from the documents as regards the telephone calls explained in the book "*HaliçteYaşayanSimonlar, DünDevletBugünCemaat*" authored by the suspect and the content of the telephone calls he made with the suspect N.Ç., that the actions which violated the confidentiality of the investigation were detected, that fake identity cards, driving licenses and passports were seized in his residence situated in the province of Eskişehir, that military documents specified as confidential were present among the other seized documents, that voice recordings which were obtained as a result of illegal wiretapping in the searches conducted in his office in the Police Department of the province of Eskişehir were

seized and he hid information with the quality of personal data, that the guns whose period of license expired and aim of issue disappeared were seized in his residence.

52. From the examination of the case file, it is understood that there was sufficient suspicion for the detention of the applicant and there were grounds for detention. There is no issue indicating the contrary thereto in the application file either. In this case, it has been concluded that the claim of the applicant as to the effect that he was detained and his detention was sustained although there was no concrete case and information for suspecting that he committed a crime is not appropriate. The issue of whether the decisions on the continuation of detention were relevant and sufficient or not should be handled during the examination of his claims as to the effect that his requests for release were dismissed through stereotype justifications and that he was detained for a long time.

53. Due to the reasons explained, the claim of the applicant as to the effect that "*he was deprived of freedom although there were no strong suspicion of crime and grounds for detention*" should be decided to be inadmissible as it is "*clearly devoid of basis*".

d. In Terms of the Claim As to the Effect that the Presumption of Innocence was Violated

54. The applicant asserted that the fact that his state of detention was continuingalthough no evidence was put forth as to the effect that he was guilty between the date on which he was taken into custody and the date of application by him to the Constitutional Courtviolated "*the presumption of innocence*".

55. The Ministry of Justice stated that it was necessary to evaluate this claim of the applicant within the framework of paragraph seven of article 19 of the Constitution.

56. The applicant repeated his claims in the application form and did not make a new declaration on this issue.

57. The essence of the claim of the applicant is related to the fact that he was deprived of his freedom and kept under detention for a long time although there was no strong suspicion of crime and ground for detention on him. The claim of the applicant as to the effect that he was deprived of freedom although there were no strong suspicion of crime and ground for detention has been examined above and it has been decided that this claim is clearly devoid of basis (§§ 41-53). It is necessary to evaluate the claim of the applicant as to the effect that the presumption of innocence was violated due to the fact that he was kept under detention for a long time within the framework of paragraph seven of Article 19 of the Constitution.

e. In Terms of the Claim As to the Effect that the Period of Detention is not Reasonable

58. The complaint of the applicant as to the effect that the detention exceeded the reasonable period is not clearly devoid of basis. Besides, as there is no other reason for inadmissibility, it should be decided that the part of the application as regards this complaint is admissible.

2. In Terms of Merits

59. The applicant asserted that his requests for release and the objections he filed upon the dismissal of his requests for release were dismissed through stereotype justifications without being based on any case and that he was detained for a long time.

60. The Ministry of Justice stated that, according to the decisions of the ECHR, the starting point for the calculation of the period of detention was the date on which an applicant was first arrested and taken into custody, that this period came to an end through the release of the person or the decisions of the court of instance, that the detention turned into a state of "*detention after conviction*" together with the decision of the court of instance, that the presence of suspicion of escape, the danger of influencing the judiciary, the risk of committing a crime again or the danger of the disruption of public order was sufficient in order for the ongoing detention to be accepted as legitimate, that while evaluating whether a period of detention that exceeded a certain period of time was reasonable or not, it was necessary to examine whether the reasonable doubt continued to be present or not, whether the court which conducted the trial showed necessary attention in terms of the quick conclusion of the trial or not, whether the national judicial authorities discussed the issue of resorting to judicial control or not, that it was also necessary to handle the complexity of the case and the quality of the allegations, whether the alleged crime was within the scope of fight against organized crime or not in line with the specific characteristics of each application and that the case-law of the Constitutional Court was also in this direction.

61. Moreover, the Ministry of Justice stated that it was necessary not to detain and extend the detention of a person who was suspected of having committed a crime through a court judgment which was completely devoid of justification, that however the detention of a suspect or accused by showing some justifications that legitimized the detention could not be considered as arbitrary detention, that the delivery of a decision of detention or the continuation of detention through extremely short justifications and without showing any legal provision could not be considered within this scope and that a similar approach was also embraced by the Constitutional Court.

62. The applicant disagreed with the opinion of the Ministry by stating that the provisions of judicial control prescribed by the Code numbered 6352 on the Amendment of Some Codes So As to Render Judicial Services Effective and the Postponement of Cases and Penalties as Regards the Crimes Committed Through the Press were not applied on him, that he was not released although some people who were tried in the same case were released, that the detention was intentionally sustained, that while the accused named N.K. who was claimed to be a member of the organized group was released, he who was tried with the claim that he helped this person was kept under detention, that the posts of two policemen who were unlawfully wiretapping him were changed and that an investigation was filed on them, that he was kept under detention for a long time and that his detention was unlawfully extended.

63. Paragraph seven of article 19 of the Constitution is as follows:

> *"Detained individuals have the right to request being tried within a reasonable time and being released during investigation or prosecution. Release can be linked to a guarantee in order to ensure that the relevant individual is present at the court during trial or that the sentence is executed."*

64. In paragraph seven of article 19 of the Constitution, it is enshrined that the individuals who are detained within the scope of a criminal investigation have the right to request the conclusion of the trial within a reasonable period and being released during investigation or prosecution.

65. It is not possible to evaluate the issue of whether the period of detention is reasonable or not within the framework of a general principle. Whether the period during which an accused is kept under detention is reasonable or not should be evaluated depending on

the characteristics of each case. The presumption of innocence that is stipulated as "*No one can be deemed guilty until they are found guilty by a court order*" in article 38 of the Constitution requires that the freedom of an individual is essential and detention is exceptional during the trial. The continuation of detention can be considered to be justified in spite of the presumption of innocence only if there is a public interest which has more precedence over the right to personal liberty and security enshrined in article 19 of the Constitution (App. No: 2012/1137, 2/7/2013, § 61).

66. Ensuring that detention does not exceed a certain period of time in a case is primarily the duty of the courts of instance. To this end, all incidents which affect the aforementioned requirement of public interest should be examined by the courts of instance and these facts and cases should be put forth in the decisions as regards the requests for release (App. No: 2012/1137, 2/7/2013, § 62).

67. The measure of detention can be resorted to in the presence of a strong indication on the delinquency of individuals and in order to prevent these individuals from escaping, the destruction or alteration of the evidence. Even if these grounds for detention can be initially considered sufficient for the continuation of detention up to a certain period, after the expiry of this period, it is necessary to show that the grounds for detention still continue to exist together with their justifications in the decisions as regards extension. In the event that these justifications are considered as "*relevant*" and "*sufficient*", whether the trial process has been diligently executed or not should also be examined. Factors such as the complexity of a case, whether it is related to organized crimes or not or the number of the accused are taken into account for the evaluation of diligence shown in the functioning of the process. A conclusion can be reached on whether the period is reasonable or not when all these elements are evaluated together (App. No: 2012/1137, 2/7/2013, § 63). A conclusion can be reached on whether the period is reasonable or not when all these elements including the measures that the relevant authorities took in order to keep the period of detention at a reasonable level are evaluated together (App. No: 2014/85, 3/1/2014, § 43).

68. Therefore, in the evaluation of whether paragraph seven of article 19 of the Constitution is violated or not, basically, the justifications of the decisions as regards the requests for release should be considered and whether the decisions are sufficiently justified or not within the framework of the documents submitted in the applications of objection to detention filed by the individuals who are kept under detention should be taken into account. On the other hand, as long as a strong indication that a person who is detained in accordance with the law has committed a crime and one or more of the grounds for detention continue to exist, it is necessary, as a principle, to accept the state of detention up to a certain period as reasonable (App. No: 2012/1137, 2/7/2013, §§ 63-64).

69. On the other hand, the right to liberty should not be interpreted in a way that may result in rendering extremely difficult the effective fight of judicial authorities and security officers against organized crimes in particular. As a matter of fact, the ECHR emphasizes that subparagraph (c) of paragraph (1) of article 5 of the Convention should not be interpreted in a way that may result in rendering extremely difficult the effective fight of security officers of the States that are Party to the Convention against crimes, in particular those which are organized (*Dinç and Çakır v. Turkey*, App. No: 66066/09, 9/7/2013, § 46).

70. The detention and the extension of the detention of a person through a court judgment which is completely devoid of justification is inadmissible (for the judgments of the ECHR in the same vein see *Nakhmanovic v. Russia*, App. No: 55669/00, 2/3/2006, § 70;

Belevitskiy v. Russia, App. No: 72967/01, 1/3/2007, § 91). Nevertheless, it is not possible to say that the detention of a suspect or accused by showing justifications which legitimize detention is arbitrary. However, the delivery of a decision of detention or the continuation of detention through extremely short justifications and without showing any legal provision should not be considered within this scope (for a judgment of the ECHR in the same vein, see ***Mooren v. Germany***[BD], App. No: 11364/03, 9/7/2009, § 79).

71. The failure of an objection or appeal authority to justify its relevant decision in a detailed way in cases where it agrees with the court decision which is the subject of the objection or appeal examination and the justifications in this decision does not, as a rule, constitute contrariety to the right to a reasoned decision (for a judgment of the ECHR in the same vein see *Garcia Ruiz v. Spain*, App. No: 30544/96, 21/1/1999, § 26).

72. The beginning of the period in the calculation of the reasonable period is the date of being arrested and taken into custody in cases where an applicant was previously arrested and taken into custody or the date of detention in cases where s/he has been directly detained. The end of the period is, as a rule, the date on which the person is released. However, if conviction of a person is decided in a case in which s/he is tried under detention, the state of detention comes to an end as of the date of conviction (App. No: 2012/237, 2/7/2013, §§ 66-67).

73. On the other hand, as long as a strong indication that a person who is detained in accordance with the law has committed a crime and one or more of the grounds for detention continue to exist, it is necessary, as a principle, to accept the state of detention up to a certain period as reasonable (App. No: 2012/1137, 2/7/2013, §§ 63-64).

74. The applicant primarily asserted that he was under detention for a long time. In the concrete case, the applicant was detained on 28/09/2010 and sentenced to an imprisonment and judicial fine through the decision of the 9th Assize Court of Istanbul dated 19/7/2013. According to this, the applicant was deprived of his freedom depending on a basis of incrimination for approximately 2 years and 10 months.

75. In the concrete case, the applicant also asserted that the justifications of the decisions on objection to detention and on the dismissal of objection were insufficient.

76. At the first hearing of the 12th Assize Court of Istanbul dated 13/4/2011, it was decided "*that the case file be joined with the case file of the 9th Assize Court of Istanbul numbered Merits 2009/213, that the trial be proceeded in the case file of the 9th Assize Court of Istanbul numbered Merits 2009/213 and* that the state of detention of the applicant continue on the ground that*"the alleged act is one of the crimes stipulated in article 100/3 of the Code of Criminal Procedure as it is understood that there are cases which show the presence of strong suspicion of crime as to the effect that the accused are the members of the illegal armed terrorist organization "DevrimciKarargah" (Revolutionary Headquarters)*".

77. On 19/4/2011, the applicant requested "*that the decision on the continuation of the state of detention be lifted upon objection by considering his defense petition by stating that he was detained on 28/09/2010 and that he was taken before the court for the first time on 13/04/2011 after approximately 7 months, that Constitutional and statutory requests as regards defense were not fulfilled in any way during the stages of investigation and trial, that this right to liberty and security and right to a fair trial were violated"* against the decision that the 12th Assize Court of Istanbul delivered on the continuation of the state of detention at the hearing dated 13/4/2011.

78. The objection of the applicant was dismissed through the decision of the 13th Assize Court of Istanbul dated 12/5/2011 and numbered Miscellaneous Action 2011/308 on the ground of "*... the sanction of the crime alleged to the suspect, the findings attesting to strong suspicion of crime and that the alleged crime is one of the crimes stipulated in article 100/3 of the Code of Criminal Procedure*".

79. The applicant applied to the court with the request for the termination of the state of detention on the dates of 17/11/2011, 6/2/2012, 30/4/2012, 6/7/2012, 7/8/2012, 5/10/2012, 26/11/2012, 4/1/2013 in the subsequent stages of his trial. In summary, the requests of the applicant for release were dismissed with the justifications of the nature of the crimes alleged to the applicant, that there were facts attesting to strong suspicions of crime as regards the alleged crimes, that the alleged crimes were among catalogue crimes, that the current evidence showed the existence of strong suspicion of crime given all evidence within the file, that there was no situation as exceeding the reasonable period in detention, that there was a suspicion of escape for the applicant if released, that the application of the measure of judicial control which was a lighter protective measure would be insufficient as regards the subject matter of case. The objections filed by the applicant to the decisions of dismissal delivered by the courts were also dismissed.

80. Lastly, the applicant applied to the 9th Assize Court of Istanbul on 4/2/2013 with the request for the termination of his state of detention and his release. The 9th Assize Court of Istanbul, at the 17th trial dated 4/2/2013, decided on the continuation of the state of detention of the applicant by repeating its previous justifications.

81. The applicant opposed against this decision, his objection was dismissed through the decision of the 10th Assize Court of Istanbul dated 7/3/2013 and numbered Miscellaneous Action 2013/78 on the ground that "*the decision delivered by the 9th Assize Court of Istanbul on the continuation of the state of detention on 4/2/2013 complies with the procedure and law*". The decision of dismissal was notified to the applicant on 1/4/2013.

82. The state of detention of the applicant was also assessed by the 9th Assize Court of Istanbul *ex officio* on the dates of 22/6/2011, 21/07/2011, 10/1/2012, 21/6/2013, 19/7/2012, 6/09/2012, 20/11/2012, 18/12/2012, 22/01/2013, 26/2/2013 in accordance with article 108 of the Code numbered 5271 and a decision was delivered on the continuation of the state of detention.

83. In the evaluation of whether paragraph seven of article 19 of the Constitution is violated or not, basically, the justifications of the decisions as regards the requests for release should be considered and whether the decisions are sufficiently justified or not within the framework of the documents submitted in the applications of objection to detention filed by the individuals who are kept under detention should be taken into account.

84. Although it is necessary, as a principle, to accept the state of detention up to a certain period as reasonable as long as a strong indication that a person has committed a crime and one or more of the grounds for detention continue to exist, while deciding on the continuation of detention especially after a certain period of time expires, it is an obligation to take into account the special case of the person who files a request for his/her release and to personalize the justifications of detention in this sense in addition to the general status of the case. For this reason, assuming that others could also act in the same way by making a generalization in the evidence of the circumstances of some accused who are tried in the same case prevents personalization while it also does not accord with the understanding as to the effect that freedom is essential and detention is exceptional.

85. In the concrete case, when the justifications of the decisions delivered by the Courts of Instance on objection to detention and the dismissal of objection are examined, it is seen that these justifications did not have diligence and content that would justify the lawfulness of the continuation of detention and the legitimacy of detention and had the quality of being a repetition of the same matters. It cannot be said that these justifications are relevant and sufficient as regards the continuation of the state of detention in the concrete case. Given the fact that the applicant was deprived of his freedom based on irrelevant and insufficient justifications, the period of detention in question cannot be evaluated as reasonable.

86. Due to the reasons explained, it should be decided that paragraph seven of article 19 of the Constitution was violated in terms of the complaint of the applicant as to the effect "*that the period of detention is not reasonable and that the requests for release were dismissed through stereotype justifications*" .

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

87. Paragraphs (1) and (2) of article 50 of the Code numbered 6216 is as follows:

> *"(1) At the end of the examination on merits, it shall be decided that the right of the applicant has been violated or has not been violated. In the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged ...*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court which is responsible for holding the retrial shall render 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."*

88. In the application, it has been concluded that paragraph seven of article 19 of the Constitution was violated.

89. One copy of the decision should be sent to each of its court and the Supreme Court of Appeals.

90. It should be decided that the trial expenses of 1,698.35 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL which were made by the applicant and determined in accordance with the documents in the file be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is UNANIMOUSLY decided on 18/6/2014 that;

A.

1. The claims of the applicant as to the effect that "*the decisions delivered as a result of the examinations of detention carried out by the Court of Instance ex officio were not notified to him and that therefore he could not find an opportunity of objecting to these decisions*" are INADMISSIBLE due to "*lack of venue in terms of subject*",

2. His claim as to the effect that "*he was deprived of freedom although there were no strong suspicion of crime and grounds for detention*" is INADMISSIBLE as it is "*clearly devoid of basis*"

3. His claim as to the effect that "*the period of detention is not reasonable and that the requests for release were dismissed through stereotype justifications*" is ADMISSIBLE,

B. Paragraph seven of article 19 of the Constitution was VIOLATED in terms of his complaint as to the effect "*that the period of detention is not reasonable and that the requests for release were dismissed through stereotype justifications*",

C. The trial expenses of 1,698.35 TL in total composed of the fee of 198.35 TL and the counsel's fee of 1,500.00 TL which were made by the applicant and determined in accordance with the documents in the file be PAID TO THE APPLICANT,

D. One copy of the decision be sent to each of its court and the Supreme Court of Appeals,

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

President	Member	Member
Alparslan ALTAN	SerdarÖZGÜLDÜR	Osman Alifeyyaz PAKSÜT

Member	Member
Recep KÖMÜRCÜ	Engin YILDIRIM