



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

DECISION

Application No: 2013/533

Date of Decision: 9/1/2014

SECOND SECTION

DECISION

President	: Alparslan ALTAN
Members	: Osman Alifeyyaz PAKSÜT Recep KÖMÜRÇÜ Engin YILDIRIM Celal Mümtaz AKINCI
Rapporteur	: Muharrem İlhan KOÇ
Applicant	: Ercan KANAR
Counsel	: Att. Mustafa RÜZGAR

I. SUBJECT OF APPLICATON

1. The applicant asserted that the right to a fair trial and the right to respect for private life were violated due to the fact that a report in which information regarding private life was included, which had a quality of intelligence and was stated not to be used as evidence was used as evidence in an investigation conducted and a case filed and that a prosecution was not performed about the public officials related to this report.

II. APPLICATION PROCESS

2. The application was directly lodged by the counsel of the applicant on 9/1/2013. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the First Commission of the Second Section on 21/3/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

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

5. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on 30/7/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 30/9/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 21/10/2013.

7. The applicant submitted to the Court his statements against the opinion on 5/11/2013.

III. FACTS AND CASES

A. Facts

8. The relevant facts in the application petition are summarized as follows:

9. The applicant works as a freelance attorney registered in Istanbul Bar Association.

10. In relation to some persons also including the applicant, the Branch Directorate of Anti-Terrorism of Istanbul Police Department sent a letter to the file of the Chief Public Prosecutor's Office of Istanbul numbered 2009/1868 Investigation on 22/3/2011.

11. In the annex to this letter, a report with a quality of intelligence which was prepared by the National Intelligence Organization (NIO) with the name "*Etiüt*" (Research) on an organization named "*Devrimci Karargâh*" (Revolutionary Headquarters) (RH) aimed to realize an armed revolution and contained various determinations and evaluations on the organization was included. Under all pages of the research, the phrases "*Top Secret*" and "*This Information with a Quality of Intelligence Cannot be Used as Legal Evidence*" are included.

12. In the chapter titled "*Prison Activities*" on page 31 of the mentioned report, the following expressions were included with regard to the applicant: "... *it is considered that the persons who met the members of the organization such as ... in prison can act as intermediary / messenger between the DK organization and its senior management and the aforementioned ones. In this context, Ercan KANAR ... an attorney of Istanbul Bar Association who generally pursues the cases of the members of Devrimci Karargah (Revolutionary Headquarters) as well as families and the persons who are in the list of those who can visit are of importance.*"

13. At the end of the investigation conducted by the Chief Public Prosecutor's Office of Istanbul, a public case was filed on some persons not including the applicant before the 9th Assize Court of Istanbul with the indictment dated 16/12/2011 and numbered 2011/852 drawn up due to the offenses of being a member of an armed terrorist organization, slander, using the identity or identity information which belong to others.

14. In the file numbered M.2011/243 of the 9th Assize Court of Istanbul in which the applicant participated as a defense counsel, he requested that the report prepared by MIT be removed from the case file, the Court decided on the dismissal of this request at the hearing dated 8/5/2012.

15. The file of the 9th Assize Court of Istanbul numbered 2011/243 Merits was joined in the file of the same Court numbered 2009/213 Merits.

16. Five attorneys including the applicant whose names are stated in the report and who are registered in Istanbul Bar Association filed a criminal complaint on the Branch Director of Anti-Terrorism of Istanbul Police Department and MIT members who drew up the report before the Chief Public Prosecutor's Office of Istanbul on 29/3/2012 with the request that they be punished in accordance with the provisions of the Turkish Criminal Code with regard to the offenses of misuse of duty, insult, slander, the violation of the privacy of private life.

17. As the investigation on MIT members who were made the subject of complaint was subject to permission, the Chief Public Prosecutor's Office of Istanbul filed a request for permission from the Prime Ministry which was the institution authorized to grant permission.

18. In the letter sent by the Undersecretariat of MIT to the Chief Public Prosecutor's Office of Istanbul, it was notified that it was decided "*not to grant permission*" on the concerned persons through the Approval of the Prime Minister dated 16/8/2012 and numbered 1632.

19. The Chief Public Prosecutor's Office of Istanbul requested information from MIT on the determination of whether or not the mentioned decision became final and the sending of the note of finalization, in the response given thereto, it was stated that "*Due to the fact that our Undersecretariat does not fall within the scope of the Code on the Trial of Public Servants and Other Public Officials, as the mentioned decision was not notified to any other person except for your Chief Public Prosecutor's Office, it was not possible to meet the matters in relation to the reference letter*".

20. Thereupon, the Chief Public Prosecutor's Office of Istanbul decided in final fashion on 23/11/2012 that "*there is no ground for investigation*" on the ground that a permission for investigation was not granted by the Prime Ministry.

21. This decision was notified to the applicant on 10/12/2012.

B. Relevant Law

22. Subparagraph a) of paragraph one of article 4 of the Code on State Intelligence Services and the National Intelligence Organization dated 1/11/1983 and numbered 2937 with the heading of "*The duties of the National Intelligence Organization*" is as follows:

"The duties of the National Intelligence Organization are as follows;

a) To create national security intelligence of the Republic of Turkey on the current and possible activities which are directed from inside and outside against its country and nation and integrity, existence, independence, security, Constitutional order and all elements which constitute its national power throughout the State and to convey this intelligence to the President, the Prime Minister, the Chief of General Staff, the Secretary General of the National Security Council and the necessary institutions."

23. Paragraph one of article 125 of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 with the heading "*Insult*" is as follows:

" (1) A person who attributes a concrete act or phenomenon, of a quality which can hurt his/her honor and reputability, to an individual or who attacks the honor and reputability of an individual by way of cursing shall be penalized with a prison sentence of three months to two years or a judicial fine. In order for the defamation in absentia of the aggrieved to be able to be penalized, the act must be committed in the presence of at least three persons."

24. Articles 134 - 138 of the Turkish Criminal Code numbered 5237 are as follows:

"Violation of the confidentiality of private life

Article 134- *(1) A person who violates the privacy of others shall be penalized with a prison sentence of one to three years. In the event that privacy is violated by way of recording images or sounds, the penalty to be imposed shall be increased by one fold.*

A person who unlawfully exposes images or sounds related to an individual's private life shall be penalized with a prison sentence of two to five years. The same penalty shall be decreed also in the event that the said exposed data is published through the press and publications."

"Recording of personal data

Article 135- (1) *A prison sentence of six months to three years shall be imposed on a person who unlawfully records personal data.*

(2) *A person who records the information related to an individual's political, philosophical or religious views, racial origins, and who unlawfully records information related to their moral dispositions, sexual lives, health conditions or connections to trade unions as personal data shall be penalized as per the provisions of the above clause."*

"Unlawful delivery or acquisition of data

Article 136- (1) *A person who unlawfully gives personal data to another, publishes or acquires it shall be penalized with a prison sentence of one to four years."*

"Qualified forms

Article 137- (1) *In the event that the crimes defined above are committed;*

a) By a public official and through the abuse of the authority arising from his/her office,

b) By exploiting the advantage provided by a certain profession or art,

The penalty to be imposed shall be increased by half."

"Not deleting data

Article 138- (1) *When those who are obliged to delete data from the system do not fulfill their duty despite the fact that the period of time set forth by law has expired, a prison sentence of six months to one year shall be imposed.*

25. Paragraph one of article 257 of the Turkish Criminal Code numbered 5237 with the heading of "*Misconduct in office*" is as follows:

"A public official who, outside the circumstances otherwise set forth as a crime in the law, causes the grievance of individuals or loss to the public or who derive unjust benefit for persons by acting in contrary to the requirements of his/her duty shall be penalized with a prison sentence of six months to two years."

26. Paragraph one of article 267 of the Turkish Criminal Code numbered 5237 with the heading of "*Slander*" is as follows:

"A person who attributes an unlawful act to an individual in order for the initiation of an investigation and prosecution or the imposition of an administrative sanction on him/her despite knowing that s/he has not committed said act by denouncing or filing a complaint with the competent authorities or through the press and publication shall be penalized with a prison sentence of one to four years."

IV. EXAMINATION AND JUSTIFICATION

27. The individual application of the applicant dated 9/1/2013 and numbered 2013/533 was examined during the session held by the court on 9/1/2014 and the following were ordered and adjudged:

A. Claims of the Applicant

28. He asserted that articles 2, 10, 20, 36, 40 and 125 of the Constitution were violated by stating that his personal information was collected by the National Intelligence Organization contrary to law in a report with a quality of intelligence, that this report was included in the annex to the indictment prepared at the end of the conducted investigation, that information with regard to his personal, private and professional states was included in the report, that activities in relation to the profession of attorneyship were indicated as crime, that it was decided by the Chief Public Prosecutor's Office of Istanbul that there was no ground for prosecution due to the fact that a permission for investigation was not granted as regards the complaint on those who drew up the report.

B. Evaluation

29. In relation to the supply of information with regard to private life for the purpose of intelligence contrary to law and the use of a report containing this information in a process of investigation, the inclusion of this report in the file concerning the public case filed, the applicant filed a complaint on the public officials who drew up the report and used it in the investigation.

30. It is understood that, upon this complaint, it was decided by the Chief Public Prosecutor's Office of Istanbul that there was no ground for prosecution (*that there was no ground for conducting an investigation*) as a permission for investigation was not granted on MIT members who were claimed to have prepared the report.

31. Although the applicant asserts that articles 2, 10, 20, 36, 40 and 125 of the Constitution were violated, it is understood that the violation of the right to respect for private life and the failure to conduct and conclude, in an effective and fair manner, the process of investigation initiated with the request for the punishment of the public officials about whom a complaint was filed due to this violation constituted the essence of his claims. For this reason, it has been concluded that the claims within the scope of the application need to be examined within the scope of articles 20 and 36 of the Constitution.

1. Admissibility

a. In Terms of the Right to a Fair Trial

32. In its opinion, the Ministry of Justice stated that the applicant claimed that the right to a fair trial which fell within the scope of article 6 of the European Convention on Human Rights (ECHR) was violated, that when this article of the Convention was examined in terms of the persons who could be considered as victim, it would be seen that they were persons who were in the position of accused as for criminal proceedings and persons who were the party to a case as for proceedings other than criminal proceedings, that it was stipulated in article 6 of the Convention which regulated the right to a fair trial that rights and principles in relation to the right to a fair trial were valid during the conclusion of the merits of "*disputes related to civil rights and obligations*" and a "*basis of incrimination*" and that the scope of the right was limited to these issues.

33. Moreover, the Ministry of Justice stated that it was stipulated in article 6 of the ECHR which regulated the right to a fair trial that rights and principles in relation to a fair trial were valid during the conclusion of the merits of "*disputes related to civil rights and obligations*" and a "*basis of incrimination*" and that the scope of the right was limited to these issues.

34. Against this opinion, the applicant stated that a decision was issued on the public officials who drew up and used a document which was explicitly contrary to law without conducting an effective investigation and without a justification, that the freedom to claim rights was restricted in a way which did not accord with the principle of a fair trial.

35. Paragraph three of article 148 of the Constitution is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force. In order to make an application, ordinary legal remedies must be exhausted."

36. Paragraph (1) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/11/2011 and numbered 6216 with the side heading of "*Individual application right*" is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."

37. According to the mentioned provision of the Constitution and the Code, in order for the merits of an individual application lodged 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 ECHR and the additional protocols thereof 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 the violation of a right that is outside the common field of protection of the Constitution and the ECHR (App. No: 2012/1049, 26/3/2013, § 18).

38. Paragraph one of Article 36 of the Constitution with the side heading "*Freedom to claim rights*" is as follows:

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

39. The relevant section of article 6 of the ECHR 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 code." ..."

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

41. It is stipulated in article 6 of the Convention which regulated the right to a fair trial that rights and principles in relation to a fair trial are valid during the conclusion of the merits of "*disputes related to civil rights and obligations*" and a "*basis of incrimination*" and

the scope of the right is limited to these issues. From this expression, it is understood that, in order to lodge an individual application on the ground that the freedom to claim rights has been violated, it is necessary that the applicant be the party to a dispute in relation to his/her civil rights and obligations or that a decision has been issued on a basis of incrimination towards the applicant (App. No: 2012/917, 16/4/2013, § 21).

42. According to the case law of the European Court of Human Rights (ECtHR) , while paragraph (1) of article 6 of the Convention can be applied for the complaint of a party that intervenes in a criminal action (see *Perez v. France*, App. No: 47287/99, 12/2/2004, § 70-71), the case of filing a complaint only with the request for the punishment of the accused and with the motive of personal revenge remains outside the field of protection of article 6 of the Convention (see *Sigalas v. Greece*, App. No: 19754/02, 22/09/2005, § 29). In order for such a right to fall within the field of protection, it is necessary that a system which makes it possible to have a civil claim in a criminal case be embraced or that the decision issued as a result of the criminal case be effective or binding for the criminal case.

43. In terms of our legal system, with the entry into force of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 the opportunity of having a personal claim in criminal procedure was removed and an applicant does not have the opportunity of asserting his/her civil rights in the process of criminal procedure. Moreover, in the concrete incident, it is understood that the request of the applicant was limited to the punishment of the persons and that the effects of the decision issued on no ground for prosecution were limited to the process of criminal procedure and that, when the claims of the applicant are taken into consideration, it did not have any binding effect in terms of civil trial.

44. Due to the reasons explained, as it is understood that the subject of the claim of violation based on article 36 of the Constitution falls outside the scope of the field of protection of fundamental rights and freedoms enshrined in the Constitution and stipulated within the scope of the ECHR, it should be decided that this part of the application is inadmissible due to "*lack of venue in terms of subject*" without it being examined in terms of the other conditions of admissibility.

b. In Terms of the Right to Respect for Private Life

45. While it is seen that it was not possible to initiate a judicial prosecution as regards the complaint of the applicant, that it was possible to examine the complaint within the scope of the application through a case to be filed before general courts, to determine the violation, if any, and to provide a just compensation, it has been concluded that it would not be fair to expect from the applicant to exhaust all legal remedies which could be effective in relation to his claim of violation.

46. It is understood that the claims of the applicant are not devoid of basis and that there is no other reason for inadmissibility. Therefore, it should be decided that the application is admissible.

2. In Terms of Merits

47. In its opinion letter, the Ministry of Justice states that the concept of private life does not have a single definition and is a broad concept (*Peck v. the United Kingdom* par. 57, *Pretty v. the United Kingdom*, par. 61). Moreover, the Ministry states that while the ECtHR accepted that intelligence agencies could be present in a democratic society in a legitimate way, it clearly expressed that the authority in terms of the secret surveillance of citizens could

be accepted within the scope of the convention only in cases where it was absolutely necessary in order to protect democratic institutions, that democratic societies were threatened by very sophisticated methods of espionage and terrorism, that as a result of this, it accepted the fact that the state was obliged to perform secret surveillance activities against destructive elements which acted in its own jurisdiction in order to be able to challenge these kinds of threats in an effective manner.

48. By stating matters which were similar to his statements within the scope of the application, the applicant requested that a decision be issued as to the effect that the right to respect for private life was violated.

49. Article 13 of the Constitution is as follows:

“Fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant articles of the Constitution and by law without prejudice to their essence. These restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality.”

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

“Everyone has the right to ask for respect for their private life and family life. The privacy of private life and family life is inviolable.”

51. The right to respect for private life is enshrined in article 20 of the Constitution. The state is liable not to intervene in the private and family life of persons in an arbitrary way and to prevent the unfair attacks of third parties.

52. The ECtHR states that the concept of private life is too broad a concept to be defined with all its elements, that it also covers the name and identity, individual development, family life of a person as well as his/her connection with the outer world, his/her relation with others, his/her commercial and professional activities (See *Niemietz v. Germany*, App. No: 13710/88, 16/12/1992, § 29-33).

53. Within the scope of an investigation to be conducted due to a violation as regards the right to respect for private life, it is necessary to examine primarily whether or not the protected interest is covered by the right, secondly whether or not there is an intervention in the interest which has been found to be within the scope of the right, in case of an intervention, whether or not this complies with the conditions prescribed in articles 20 and 13 of the Constitution. Within this framework, it should be examined whether or not the intervention has a legal basis, whether or not it depends on one of the reasons for restriction stipulated in paragraph two of article 20, whether or not the principles of not infringing upon the essence, conformity with the requirements of the democratic society and proportionality are complied with.

54. It is necessary to accept that assessments which will create positive or negative associations in relation to the profession of attorneyship that the applicant professes and about his relations which have occurred due to his profession are related to private life. For this reason, there is no hesitation over the fact that the interest which is the subject of the application is covered by the right to respect for private life.

55. Nevertheless, given the fact that democratic societies face with complicated criminal methods, it is possible to need the existence of intelligence institutions in order for the democratic state of law and the rights and freedoms of individuals to be guaranteed and

secret surveillance activities in order to fight against these kinds of crimes in an effective manner. However, the collection of information concerning the private lives of individuals through intelligence activities can only be considered legitimate to the extent that it is obligatory in order to protect democratic institutions (For the decision of the ECtHR in the same vein, see *Rotaru v. Romania*, App. No: 28341/95, 4/5/2000, § 47).

56. In this context, in article 4 of the Code numbered 2937, the National Intelligence Organization has a duty assigned by law in order to create national security intelligence of the Republic of Turkey on the current and possible activities which are directed from inside and outside against its integrity, existence, independence, security, Constitutional order and to convey this intelligence to the necessary institutions. It is necessary to accept that the intelligence in relation to an illegal organization which aims to realize an armed revolution and the conveyance of this intelligence to the relevant institutions were realized within the scope of the mentioned duty.

57. In this context, it is understood that the intelligence report in which information related to the applicant is also included was prepared based on the aforementioned legal provision, that it was directed towards the purposes of national security, public order and the prevention of the committal of crime.

58. The expressions as regards the applicant in the report which is the subject of the application in which an illegal organization is evaluated with its various aspects (§12) do not contain a judgment and certainty that the applicant has an association with this organization or the activities of the organization which constitute a crime and point to some phenomena towards the aim of monitoring the communication of the organization.

59. Nevertheless, given the fact that hearings are, as a rule, held in public, the consideration that the persons who met the members of the illegal organization in prison could act as intermediary/messenger between the senior management of the organization and those who were in the prison and that the applicant was among the persons who were of importance as an attorney who generally pursued the cases of the members of this organization cannot be accepted only as the determination of a phenomenon and situation. This consideration has the quality of giving rise to the constitution of a conviction in relation to the personality of the applicant. The consideration which could result in the constitution of this conviction became public with the inclusion of the report in the case file.

60. Although this consideration about the applicant which is related to his profession and can be considered as negative does not have legal certainty and does not constitute any basis for attribution about the applicant, it is necessary to accept that a severe intervention occurred as regards the private life of the applicant by making it public through the inclusion thereof in the case file. In a democratic society, the publicization of the information with the quality of intelligence whose accuracy cannot be investigated and subjected to inspection in any way through its inclusion in the case file cannot be accepted. As the inclusion of the information related to the applicant on whom no public case was filed cannot be accepted as necessary in a democratic society, nor can it be said that it is proportionate.

61. In the face of these determinations, it should be decided that the right to respect for private life was violated due to the practice which bore the consequence of the publicization of the report which contained an assessment which could be considered negative within the framework of the relations of the applicant that occurred as a result of the profession of attorneyship that he professes.

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

62. In paragraph (1) of article 50 of the Code numbered 6216, it is stated that 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; however, it is provided that legitimacy review cannot be done, decisions having the quality of administrative acts and actions cannot be made.

63. In the application, it has been concluded that article 20 of the Constitution was violated. The applicant filed a request for a moral compensation of 100.000 TL and a material compensation of 100.000 TL. However, no document was submitted as a basis for material compensation.

64. In relation to the request of the applicant for moral compensation, it has been considered that the issued decision of violation is sufficient in terms of fair compensation. Neither did the applicant submit any document concerning the material loss that he asserted to have incurred, nor did he put forth that the loss arose out of the violation in question. For this reason, it should be decided that request for material compensation be dismissed.

65. It has been decided that the trial expenses of 1,698.35 TL in total composed of the application fee of 198.35 and the counsel's fee of 1,500.00 TL, which were made by the applicant be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 9/1/2014 that;

A. The applicant's

1. Complaints as to the effect that the right to a fair trial was violated are **INADMISSIBLE** due to "*lack of venue in terms of subject*",

2. Complaints as to the effect that the right to respect for private life was violated are **ADMISSIBLE**,

B. That paragraph one of article 20 of the Constitution *in relation to the right to respect for private life* was **VIOLATED**,

C. That there is **NO GROUND** for adjudging a separate moral compensation as the decision of violation provides a fair compensation,

D. That the request for material compensation be **DISMISSED**,

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

F. That the payment 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,

G. That a copy of the decision be sent to the relevant court.

President
Alparslan ALTAN

Member
Osman Alifeyyaz PAKSÜT

Member
Recep KÖMÜRCÜ

Member
Engin YILDIRIM

Member
Celal Mümtaz AKINCI