



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

DECISION

Application Number: 2013/6585

Date of Decision: 18/9/2014

O.G. Date-Issue: 4/12/2014-29195

SECOND SECTION

DECISION

President	: Alparslan ALTAN
Members	: Recep KÖMÜRCÜ Engin YILDIRIM Celal Mümtaz AKINCI Muammer TOPAL
Rapporteur	: Elif KARAKAŞ
Applicants	: 1- Salih ÜLGEN 2- Mehmet Nuri ÜLGEN 3- Fatma ÜLGEN
Counsel	: Att. Murat Rohat ÖZBAY

I. SUBJECT OF APPLICATON

1. Indicating that the first applicant Salih Ülgen, on the date of 27/6/2006, was wounded as a result of a mine explosion in the area where he was grazing animals and the case that they had filed with the request of compensation for the material and spiritual damages that they have incurred as a result of the said incident was dismissed and not finalized within reasonable time, the applicants have asserted that their rights that are guaranteed by articles 17, 36 and 40 of the Constitution have been violated and requested that such violations be identified and that it be decided that the material and spiritual damage they have incurred be compensated.

II. APPLICATION PROCESS

2. The application was lodged on 19/8/2013 via the 13th Civil Court of First Instance of Istanbul. As a result of the preliminary administrative examination of the petition and its annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

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

4. In accordance with the interlocutory decision of the Second Section dated 4/12/2013, it was decided that the examination of admissibility and merits of the application be carried out together and a sample thereof be sent to the Ministry of Justice for its opinion.

5. The letter of opinion dated 4/2/2014 and No. 14755 of the Ministry of Justice was notified to the counsel of the applicants on the date of 26/2/2014 and no statements in response to the opinion of the Ministry of Justice have been made by the applicants.

III. FACTS AND CASES

A. Facts

6. As expressed in the application petition, the facts are summarized as follows:

7. On the date of 27/6/2006, near the minefield that was set up so as to ensure border security at a distance of 300 meters to the Ziyaret Infantry Border Company Command which is located on the Turkish-Iranian border in the district of Doğubeyazıt in the province of Ağrı, the first applicant, aged thirteen, Salih Ülgen who was grazing animals with two of his friends, aged eleven and twelve, entered the minefield in pursuit of the grazing sheep that have gone down along the wire fence on which there was the minefield warning sign.

8. Upon the explosion of the mine that they have found in the minefield all three persons were wounded, the first applicant Salih Ülgen's right arm was severed from below his elbow and his body was injured in various locations.

9. With the request that the material and spiritual damages that they have incurred due to the said incident be compensated, acting for and on behalf of Salih Ülgen and principally in their own name, Fatma Ülgen and Mehmet Ülgen have filed a case against the Ministry of National Defense requesting that a decision be given to the effect that a material compensation of TRY 100,000.00 for the loss of capability to do work, TRY 420,000.00 as the cost for a prosthetic arm and a spiritual compensation of TRY 50,000.00 be paid to the first applicant and a spiritual compensation of 10.000,00 TRY each for the second and the third applicants be paid separately.

10. The case was dismissed with the decision of the 2nd Administrative Court of Erzurum dated 23/5/2008 and numbered M.2007/167, D.2008/574. The justification section of the decision is as follows:

"It was understood that at the location where the incident took place, on the Turkish-Iranian borderline, mines were laid with the aim to protect the Ziyaret Border Company Post and that the terrain was a minefield where the vicinity of the place where the incident took place was surrounded by wire fence on which minefield warning signs hung, and that from the minutes of the judicial inspection at the place of incident dated 28/6/2006 it was understood that within the minefield were herds of sheep, that these sheep were brought by the wounded children, and from the statement that was taken from the person who is an Infantry Corporal at the Ziyaret Border Company Post, who is the witness of the incident, that he was on watch at the post on the day of the incident, that he warned the three children who followed the herd of sheep that walked down by the wire fence that was marked with a minefield warning sign not to enter the minefield by blowing a whistle four times, that however the children did not heed his warning and entered the zone, that he once again warned them with the whistle and when the children did not egress the minefield he reported to the command of the post and that the explosion took place while the kids were playing with something in their hands. In this respect, as it is understood that the children did not comply with the warning of the watch post and that with the acceptance of the counsel of the claimant it is established that they entered the military restricted zone and played with the mine that was located inside the minefield, and as it was understood from the decision of the Office of the Chief Prosecutor of Doğubayazıt no. 2006/799 dated 6/11/2006 that it was determined that on the jack-knife which belonged to the claimant explosive residue containing TNT was found and that similar incidents had taken place on this site before, the conclusion that it was not possible that the families did not know the site was a minefield and that the incident resulted from the claimants' own negligence was reached and there is neither a negligence attributable to the administration nor, considering the course of the incident, any damage that has to be compensated by the administration in line with the principle of social risk.

As such, it was understood that in the occurrence of the incident in question the child of the claimants who entered the area that was known to be mined and had warning signs and wire fence around it and who started meddling with the mine with a jack-knife, and the mother and the father of the child who have failed to duly perform their duty of caring for and watching over their child were in complete negligence, hence the conclusion that it was necessary to dismiss the request for compensation since it would not be in compliance with the

law to hold the defendant administration responsible for the damage and to sentence the latter to compensation."

11. The decision that was appealed by the claimants was approved by the decision of the 10th Civil Chamber of the Council of State dated 8/5/2013 and numbered M.2009/4372, D.2013/4251. The applicants did not opt for the legal remedy of correction of decision.

12. The decision was notified to the counsel of the applicants on 25/7/2013.

13. The Ministry in its opinion dated 4/2/2013 (§5) has included the additional information below regarding the incident which is the subject of the application:

The Process of Criminal Investigation

14. Upon the mine explosion which is the subject of the application, within the scope of the investigation that was carried out by the Office of the Chief Prosecutor of Doğubayazıt regarding the officials of the 1st Mechanized Brigade Command all of the witnesses who were knowledgeable about and who saw the incident were heard, the required investigation on the incident site was carried out by specialist teams and pictures of the scene of the incident was taken. It was established that the scene of the incident was surrounded by wire fence on which hung warning signs showing that the site is a minefield.

15. It was found out that the area where the incident took place was a Category 2 land military restricted zone and at the same time remained within the military security zone of the Ziyaret Border Company Post and at the end of the criminal examination that was conducted on the fragments of mine that were found at the scene of the incident as well as the knife belonging to the injured parties, explosive residue containing TNT have been found on the said knife.

16. The Office of the Chief Prosecutor of Doğubayazıt that has evaluated all the evidence obtained within the scope of the investigation concluded that the incident took place when the victims of the incident were playing with the mines (trying to open them) that they found there after their entry to the restricted minefield, and judged that there was no grounds for prosecution with the decision No. 2006/799 dated 6/11/2006.

17. The objection that was made by the applicants in relation to the aforementioned decision was dismissed with the decision of the Assize Court of Iğdır No. 2006/273 dated 20/12/2006.

B. Relevant Law

18. The last paragraph of article 125 of the Constitution is as follows:

"The administration is liable to compensate for damages arising from its own actions and acts."

19. Paragraph (2) of article 1 of the Code of Administrative Procedure dated 6/1/1982 and numbered 2577 with the side heading of "Scope and quality" is as follows:

"Written trial procedure shall be applied in the Council of State, regional administrative courts, administrative courts and tax courts and the examination shall be carried out over the documents."

20. Paragraphs (3) and (4) of article 14 of the Code numbered 2577 with the side heading of "The first examination on petitions" are as follows:

"(3) The petitions shall be examined by a rapporteur judge to be assigned by the head of the chamber in the Council of State, and by the chief judge or a member to be assigned by

him/her in the administrative and tax courts in terms of the following aspects in the following order:

a) Competence and venue,

b) Breach of administrative authority,

c) Capacity,

d) Whether there is a final act to be performed that will be the subject of the administrative proceeding or not,

e) Statute of limitations,

f) Hostility,

g) Whether they comply with Articles 3 and 5 or not,

(4) If the petitions are considered to be contrary to the law in terms of these aspects, this matter shall be notified to the competent chamber or court with a report. No report shall be arranged for the petitions of a case to be settled through a single judge and the provisions of Article 15 shall be imposed by the related judge. The examination to be performed according to paragraph 3 and the procedures to be carried out according to this paragraph and paragraph 5 shall be finalized within fifteen days at most following the date on which the petition is received.

21. Paragraphs (1) and (5) of article 20 of the Code numbered 2577 with the side heading of "Examination of the files" are as follows:

"(1) The Council of State and administrative and tax courts shall perform by themselves all types of examinations pertaining to the cases which they are trying. The courts may request from the parties and other related authorities the submission of the documents that they deem necessary and the provision of all types of information within the specified period. It shall be obligatory that the decisions on this matter be fulfilled by those concerned within due period. In the event that there are valid reasons, this period may be extended for once only.

"(5) In the Council of State, regional administrative, administrative and tax courts, the files shall be determined by their subjects by the Board of Presidents for the Council of State; and by the High Council of Judges and Prosecutors for other courts according to their status of priority or urgency specified in this Code and other codes, examined in terms of the date on which they are received, by considering the priority actions to be announced in the Official Gazette and be finalized in the order that they are completed. The files which are not covered by these shall be finalized in the order that they are completed and within six months at the latest following the date of completion.

22. Article 60 of the Code numbered 2577 with the side heading of "Notification work and fees" is as follows:

All types of the notification work in relation to the Council of State and the regional administrative, administrative and tax courts shall be performed according to the provisions of the Notification Code. The fees in relation to the notifications to be made in this way shall be paid by the concerned in advance.

IV. EXAMINATION AND JUSTIFICATION

23. The individual application of the applicants dated 19/8/2013 and numbered 2013/6585 was examined during the session held by the court on 18/9/2014 and the following were ordered and adjudged:

A. Claims of the Applicants

24. Indicating that the mine explosion took place as the administration has not carried out the necessary precaution and control activities, that Salih Ülgen was wounded as a result of the explosion and his physical integrity was permanently damaged, that the trial which continued for about seven years was not concluded within reasonable time and that there are no legal remedies that they can use against the violations of said rights, the applicants have claimed that their rights in articles 17, 36 and 40 of the Constitution have been violated and requested that compensation for material and spiritual damages be judged or a retrial be made.

B. Evaluation

1. In Terms of Admissibility

a. The Claim that Article 40 of the Constitution was Violated

25. The applicants, indicating that there is no national legal remedy whereby they can sound their complaints regarding the violations of rights that they claim, have propounded that the right to an effective application that is guaranteed by article 40 of the Constitution has been violated.

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

"The Court, can rule on the inadmissibility of applications which are clearly devoid of grounds." "

27. In sub-paragraph (d) of paragraph (2) of article 59 of the Internal Regulation of the Constitutional Court entitled "*The individual application form and the annexes thereof*", it has been indicated that in the individual application form, which of the rights within the scope of the individual application has been violated for which reason and the justifications in relation thereto and concise explanations concerning the evidence shall be present.

28. Although the liability to prove their claims regarding the matter and to prove their claims concerning which provision of the Constitution has been violated, respectively by submitting evidence concerning the allegation of violation which is the subject of the application and by making explanations, rests with the applicant, the applicants have abstractly stated that there is no legal remedy whereby they can sound their allegations yet since it was understood that they did not bring forward neither any substantive explanation nor proof regarding for which of their claims and in what way there was no legal remedy, it has to be decided that this portion of the application is inadmissible for being "*clearly devoid of grounds*" without being examined in terms of other conditions for admissibility.

b. The Claim that Article 17 of the Constitution was Violated

29. In the opinion of the Ministry concerning the claims of the applicants that article 17 of the Constitution was violated, no objections regarding the admissibility of the complaints have been made.

30. One of the conditions required in order for the application of principles concerning the right to life in an incident is that an unnatural death has taken place. However, in some cases, even if death does not take place, it is possible to examine the incident within the framework of right to life. The ECtHR can also examine incidents of injury that do not result in death within the scope of right to life by way of taking into consideration the degree of the force, the type thereof and the will and purpose underlying the use of force together with other factors. (see: *İlhan v. Turkey* [BD], 22277/93, 27/6/2000, §76; *Paşa and Erkan Erol v. Turkey*, 51358/99, 12/12/2006, §27; *Makaratzis v. Greece*[BD], 50385/99, 20/12/2004, §52).

31. In the incident which is the subject of the application, although the applicant Salih Ülgen has survived from the mine explosion that occurred with injuries, considering the lethal quality of anti-

personnel land mines that are laid for the purpose of border protection and the danger of the life threatening situation that the applicant has survived it was concluded that the incident which is the subject of the application be examined within the framework of the right to life.

32. It is seen that the section of the application concerning the violation of the dimension of the positive liability to the right to life that is arranged in article 17 of the Constitution is not expressly devoid of grounds pursuant to article 48 of the Code No. 6216. As no other reason for inadmissibility was observed, it should be decided that this part of the application is admissible.

c. The Claim as to the Effect that the Case was not Concluded within Reasonable Time

33. The complaint of the applicants regarding the lengthiness of the trial is neither clearly devoid of grounds, nor is there any other reason of inadmissibility for this complaint. Therefore, it must be decided that this section of the application is admissible.

2. Examination on Merits

a. The Claim as to the Fact that the Dimension of Positive Liability to the Right to Life has been Violated

34. The applicants have stated that the physical integrity of the first applicant has been permanently damaged as a result of his contact with the mine that has been laid with a consideration for public good and by way of exercise of public power, which was lying around in an uncontrolled and dangerous fashion as a result of failure to duly perform the activities of prevention and control, and claimed that the right to life which is regulated in article 17 of the Constitution has been violated.

35. In the opinion of the Ministry concerning the claims of the applicants regarding the violation of article 17 of the Constitution, it was indicated that according to the case law of the European Court of Human Rights the right to life charges the states with a positive liability so that they take the necessary precautions so as to protect the lives of the persons within the sovereign authority thereof, and yet such liability is not absolute and has to be interpreted within the scope of conditions and that the ECtHR has concluded in the Paşa and Erkan / Erol - Turkey application which is similar to the present application that the right to life was violated upon the failure of the state to perform its positive liability.

36. Moreover, the Ministry concerning the incident which is the subject of the application has stated that in the letter dated 7/2/2014 that was sent by the Chief of General Staff the information that *the minefield was not used as a pasture by the local people, that the animals were grazed in the area starting from a distance of one hundred meters from the border of the minefield, that the 'Instructions that have to be Observed by the Landowners During the Taming of their Lands and by Shepherds During the Grazing of Animals in Category 1 and Category 2 Land Military Restricted Zones' has been notified to the local people in the area, that in such instructions it was indicated that the wire fence barrier separating the minefield was not to be approached more than one hundred meters, that shepherds, herb pickers and workers shall not in any way tamper with and handle the exploded, unexploded ordnances, mines and military material that they see on the land, that they shall immediately inform the commander of the post and moreover, that the people coming to graze their animals have also been warned verbally about the minefields, that the periphery of the mine field was enclosed by one meter-high barbed and concertina wire whereupon minefield warning signs were displayed in a way to prevent the entrance of civilians to the zone and that the local people who came to graze their animals or to work in their fields have been informed about minefields and that such instructions have been notified to them and that the precautions that have been taken were sufficient* was included.

37. No statements in response to the opinion of the Ministry have been made by the applicants.

38. Article 17 of the Constitution with the heading of "*Inviolability and material and spiritual existence of the individual*" is as follows:

"Everyone has the right to life and the right to protect and improve their material and spiritual existence."

39. The right to life and the right to protect and improve his/her material and spiritual existence of an individual are among the rights which are closely tied, inalienable and indispensable and the state has positive and negative liabilities about this subject. The state, as a negative liability, has the liability not to terminate the life of any individual within its jurisdiction intentionally and in contrary to the law and, as a positive liability, has the liability to protect the right to life of all individuals within its jurisdiction against the risks arising out of the actions of public institutions, other individuals and the individual himself/herself (App. No: 2012/752, 17/9/2013, § 50-51).

40. According to the basic approach that the Constitutional Court has embraced in terms of the positive liabilities which the state has within the scope of the right to life, in the incidents of death which occur under the conditions which can require the responsibility of the state, article 17 of the Constitution imposes the state the duty of taking effective administrative and judicial measures which will ensure that the legal and administrative framework that is formed in this matter is duly applied in order to protect the individuals whose life is in danger and that the violations as regards this right are stopped and punished by making use of all available facilities. Such liability, whether it be public or not, shall be valid regarding all sorts of activities whereby the right to life can be endangered (App. No: 2012/752, 17/9/2013, § 52), and the field of dangerous activities that are carried out so as to ensure public security is also within the scope of this liability.

41. The positive liability to protect life charges the state with the duty to take general preventive security measures in order to protect the life of individuals who are within its area of sovereignty (For decisions of the ECtHR to a similar effect, see: *L.C.B v. United Kingdom*, 9/6/1998, §36; *Osman v. United Kingdom*, 28/10/1998, §115; *Paşa and Erkan Erol v. Turkey*, 51358/99, 12/12/2006, §31).

42. Within this context, it must be stated that, within the scope of performance of the positive liabilities prescribed in Article 17 of the Constitution, the determination of the measures to be taken is an issue which is under the discretion of administrative and judicial offices. Many methods can be embraced so as to secure constitutional rights and positive liabilities can be carried out through another measure even if one fails in the performance of any measure that has been regulated within the legislation (App. No: 2013/2075, 4/12/2013, § 59).

43. In the incident which is the subject of the application it is seen that no claims have been asserted by the applicants concerning any deliberate action of the state or regarding the lack of existing legal and administrative framework concerning the prevention of entry to the minefield in the accident that occurred as a result of the explosion of the mine. In this case, whether or not the existing mechanisms have been effectively employed in the incident that occurred, whether or not the necessary and sufficient security measures were taken by public authorities so as to prevent the entry of civilian citizens into the minefield has to be investigated within the conditions of the incident and a decision has to be made regarding the claims concerning the violation of the right to life regarding positive liabilities.

44. In the incident which is the subject of the application, Salih Ülgen, who is one of the applicants, on the date of 27/6/2006, entered the minefield that was set up so as to ensure border security at 300 meters to the Ziyaret Infantry Border Company Post which is on the Turkish-Iranian border in the district of Doğubeyazıt, in the Province of Ağrı that was in the proximity of where he was grazing animals with his two friends who were at the age of eleven and twelve and following the sheep that walked down along the wire fence on which was a minefield warning sign, he entered the minefield and when the mine that they found exploded, he lost the part of his right arm below the elbow and was injured at various places in his body. Due to the fact that the incident which is the subject of the application has taken place in a military zone the entry of civilians into which is prohibited, taking the necessary security measures so as to prevent their entry into the area

concerned in order to protect the lives of Salih Ülgen, the applicant, and his friends is within the scope of positive liabilities of the state in terms of article 17 of the Constitution.

45. In the present incident, anti-personnel mines that have caused the injury of the first applicant have been laid with the aim to protect the Ziyaret Border Company Post, which is located on the Turkish-Iranian border. Of the information and documents that are among the contents of the file, in the letter dated 7/2/2014 of the Presidency of General Staff that has been submitted as an attachment to the opinion of the Ministry, it has been stated that the minefield was not being used as a pasture by the local people, that the animals would be grazed starting from a distance of one hundred meters from the border of the mined territory, that the minefield was enclosed by a meter-high barbed and concertina wire where minefield warning signs have been placed, that the people of the area had been informed about minefields and instructions had been notified to them and the people coming to work their land or graze their animals were warned about mined territories.

46. That being said, it was concluded that the measures that are said to have been taken by the authorities and the warnings of the soldiers on watch could not prevent the applicant and his friends, who cannot be expected to act like responsible adults, from entering the mined zone, that it was even possible for the herd of sheep to jump over the wire fences and that the security measures that needed to be taken so as not to allow the occurrence of the mine explosion that has led to permanent injury of Salih Ülgen of the applicants were not available at an adequate level in the present incident.

47. Due to the reasons explained, it should be decided that the right to life guaranteed in Article 17 of the Constitution was violated regarding the positive liability.

b. Regarding the Claim that the Case was not Finalized within Reasonable Time

48. The applicants have claimed that the trial concerning the case that they have filed on the date of 1/2/2007 was not finalized within reasonable time and the right to a fair trial which is defined in article 36 of the Constitution was thus violated.

49. In its opinion, the Ministry of Justice, with reference to the resolutions of the Constitutional Court regarding the right to trial within reasonable time, has stated that the submission of an opinion regarding the claim of the applicant concerning the violation of the right to trial within reasonable time was not necessary.

50. 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 (the 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 that 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 is admissible (App. No: 2012/1049, 26/3/2013, § 18).

51. 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."

52. 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."*

53. The sub-principles and rights, which stem from the text of the Convention and the decisions 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).

54. The right to a trial in a reasonable time which constitutes the basis of the present application also falls within 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 a trial in a reasonable time as per the principle of holism of the Constitution (App. No: 2012/13, 2/7/2013, § 39).

55. As the aim of the right to trial within 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 since 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).

56. Matters such as the complexity of a case, how many instances 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 in the determination of whether the duration of a case is reasonable or not (App. No: 2012/13, 2/7/2013, §§ 41-45).

57. However, none of the specified criteria is conclusive by itself in the evaluation of the 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).

58. 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.

59. 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 within reasonable time. As it is seen that the case which is the subject of the application is a conflict concerning the applicants' request for compensation of the damage incurred upon the injury of the first applicant as a result of the mine explosion that has occurred in a military area, there is no doubt that the material act of trial that has been conducted as per the procedural provisions in the Code No. 2577 and which concerns the solution of such problem is a trial that concerns civil rights and liabilities.

60. In the evaluation of reasonable time 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 be executed, in other words, the date on which the case is filed; in some special cases a previous date on which the dispute occurs can be accepted as the date of beginning by taking into account the quality of attempt (App. No:2012/1198, 7/1/2013, § 45). A similar situation is present regarding the present application, and the date of commencement of the period of time that shall be taken into consideration in the evaluation of reasonable time shall be the date of 2/10/2006 on which the applicants have made an application to the Ministry of National

Defense for the compensation of the damages that they said to have incurred as a result of the damage incurred on the physical integrity as a result of the explosion of the mine.

61. In case the date on which the case was lodged is different from the date of commencement of the authority of the Constitutional Court regarding the examination of individual applications, the duration that shall be taken into consideration is not the time that has passed after the date of 23/9/2012 but the time that has elapsed since the commencement of the conflict (App. No: 2012/13, 2/7/2013, § 51).

62. The end of such duration, on the other hand, is the date of finalization of the trial in a way whereby, most of the time, the duration of enforcement is also covered and regarding the application at hand, such duration is the date of 8/5/2013, which is the date of the decision of approval of the 10th Chamber of the Council of State No. M.2009/4372, D.2013/4251 (App. No. 2012/13, 2/7/2013, § 52).

63. From the examination of the trial process which is the subject of the application it is understood that the applicants have made an application to the Ministry of National Defense with the request for the compensation of the damages that they have incurred after when the first applicant, Salih Ülgen, on the date of 27/6/2006, was grazing animals with his friends and followed the herd of sheep into the minefield where the mine that they found exploded and the portion of his arm below his elbow was severed and he was wounded in various locations on his body, and that upon receiving no response to the said application, they lodged a case against the Ministry of National Defense on the date of 1/2/2007 with the claim that material and compensation for spiritual damages be ruled. It is understood that the first examination of the file by the court took place on the date of 14/2/2007, that, with the interlocutory decision dated 20/2/2007, information concerning the economic, financial and social statuses of the applicants were requested from the Office of the District Governor of Doğubayazıt so as to make a decision regarding the request of the applicants concerning legal assistance, that as per the response received via the letter dated 29/3/2007 it was decided that request for legal assistance be accepted and notification procedures were started, that the file has been proceeded upon observance of the period of responses and second responses and that on the date of 23/5/2008, a ruling on the file had been made by the Court of first instance.

64. It is understood that upon the appeal of the decision an initial appeal examination minute was drawn up in due time by the Court of first instance on the date of 31/10/2008 regarding the file, and that the file was developed and sent to the Council of State for the appeals examination was registered on the date of 7/4/2009 at the office of appeals and that regarding such file the Office of the Chief Prosecutor of the Council of State has submitted its opinion about one year and six months after the registration date of the file, and about two years and six months after the letter of opinion, on the date of 8/5/2013 the decision of approval was taken by the 10th Chamber of the Council of State.

65. It is understood that the activity of trial that has been concluded with such decision lasted a total of six years, seven months and six days.

66. It is seen from the examination of the trial documents concerned that, regarding the case which was filed on the date of 1/2/2007, the initial examination minutes have been drawn up by the court of first instance in due time as envisaged in article 14 of the Code No. 2577, that the writing of the justified decision has been accomplished within reasonable time, that however, upon resorting to legal remedy some delays have occurred regarding the commencement of notification transactions and the transfer of the file to the Council of State and that the file which had to be finalized within six months at the latest starting from the date of development thereof as per article 20 of the Code No. 2577 was decided upon about ten months after the date of development thereof and with that being said, the trial was finalized in less than two years.

67. In the evaluation of the legal remedy examination process, it is understood that upon the appeal of the decision of the court of first instance, a decision of approval was made after about four years and one month when the date of registration at the appeals authority is taken into consideration. Accordingly, it is understood that the duration of trial that has passed at the authority of legal remedy

extended over a lengthy duration despite the provision prescribed in article 20 of the Code No. 2577 that the files at the Council of State, regional administrative, administrative and tax courts shall be determined by their subjects by the Board of Presidents for the Council of State; and by the High Council of Judges and Prosecutors for other courts, according to their status of priority or urgency specified in the Code No. 2577 and other codes, examined in terms of the date on which they are received by considering the priority actions to be announced in the Official Gazette and finalized in the order that they are completed, and that the files that are excluded from this shall be decided upon in the order of their development and finalized within six months at the latest from the date of development thereof.

68. As much as the delays which can be attributed to competent authorities in the prolongation of the trial process can result from the failure to show due diligence for the speedy conclusion of trial, they can also arise out of structural problems and lack of organization. Because, article 36 of the Constitution and article 6 of the Convention impose 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 within a reasonable time (App. No: 2012/13, 2/7/2013, § 44).

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

70. When the duration of the trial which is the subject of the application is evaluated, it is understood that a delay has occurred during the process of rendering a decision regarding the file by the Court of First Instance and during the process of the forwarding thereof to the Council of State, and that in the examination of the legal remedy the occurrence of similar drawbacks have been identified in the stage of rendering a decision, and under the light of the findings above the work load which especially results from the structure of the judicial system and the lack of organization have had an overwhelming effect regarding the elongation of the process of trial concerning the present application. However, in accordance with article 36 of the Constitution and article 6 of the Convention, since it is obligatory that the trial system to be regulated in a way to fulfill the conditions of fair trial including the liability of courts to conclude cases within reasonable time, it is clear that the structural and organizational deficiencies which are present in the legal system shall not be considered as an excuse for the non-conclusion of the trial activity in a reasonable time.

71. It was not determined that the attitude of the applicants had a special influence on the prolongation of the trial.

72. When the file is considered as a whole within the framework of such determinations it was concluded that, the dispute which is the subject of the application concerns the compensation of the material and spiritual damages that have been incurred as a result of the injury which resulted from the explosion of the mine in the military zone, and that there is unreasonable delay in the trial activity the importance for the applicants of which is express and which has lasted six years seven months and six days, which is the subject of the application and which does not include any complexities what so ever and where the courts of instance have not required any investigations or surveys or expert examinations other than the information and documents within the file.

73. Due to the aforementioned reasons, it should be decided that the applicants' rights to trial within reasonable time guaranteed by Article 36 of the Constitution was violated.

3. Regarding Article 50 of the Code No. 6216

74. In the event that the decisions regarding the full remedy action they have been filed by mentioning that they have incurred damages as a result of the incident which is the subject of the application being finalized to their detriment is determined by the court to have led to a violation of right, the applicants have requested for the first applicant a compensation of TRY 750,000.00 for material damages in return for the loss of occupational earning capacity and for the cost of prosthetic arm, and a compensation of TRY 100,000.00 for material damages; and a compensation of TRY 50,000.00 each for the second and third applicants for spiritual damages, and should such request be dismissed, they requested that a decision of retrial be made regarding such dispute.

75. In the opinion of the Ministry of Justice, no opinion was expressed as regards the applicants' requests for compensation.

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

"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for the holding of a retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding a 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."

77. As it has been determined in the current application that article 17 of the Constitution was violated, it should be decided that the file be sent to the relevant Court in order for the violation and the consequences thereof to be removed.

78. Even though a request for compensation for material and spiritual damages was made by the applicants, as it is understood that the fact that a decision was delivered to send the file to the relevant Court for holding a retrial constitutes a sufficient compensation with a view to the claim of violation of the applicant, it should be decided that the requests of material and moral compensation by the applicants be dismissed.

79. When the trial process which is longer than six years seven months concerning the dispute to which the applicants are parties is taken into account, it should be decided by discretion that a moral compensation of TRY 5,000.00 be paid to the applicants jointly in return for the moral damage which cannot be compensated only by the determination of the violation due to the lengthiness of the trial activity.

80. Although the applicants have made a request regarding compensation for material damages due to the lengthiness of the trial process, since it is understood that there is no link of causality between the violation that has been identified and the material damage claimed, it has to be decided that the requests of the applicants regarding material damages to be dismissed.

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

V. JUDGMENT

Due to the reasons explained: it was decided **UNANIMOUSLY** on the date of 18/9/2014 that;

A. The applicants'

1. Claim concerning the violation of the right to effective application which is guaranteed by article 40 of the Constitution is **INADMISSIBLE** for being '*clearly devoid of grounds*.'

2. Claim concerning the violation of the positive liability dimension of the right to life which is guaranteed by Article 17 of the Constitution is **ADMISSIBLE**,

3. Claim concerning the violation of the right to trial within reasonable time which is guaranteed by Article 36 of the Constitution is **ADMISSIBLE**,

B. That the applicants'

1. Right to life enshrined in Article 17 of the Constitution **WAS VIOLATED** in terms of positive liability,

2. Right to trial within a reasonable time enshrined in Article 36 of the Constitution **WAS VIOLATED**,

C. That the file be sent to the relevant Court for a retrial to be carried out in order to remedy the violation and the consequences thereof which have been identified in terms of article 17 of the Constitution,

D. that the applicants jointly **BE PAID A COMPENSATION FOR SPIRITUAL DAMAGES** of TRY 5,000.00 TRY for the establishment of the violation of their right to trial within reasonable time which is guaranteed in article 36 of the Constitution and that other requests of the applicants regarding compensation **BE DISMISSED**,

E. That the trial expenses of TRY 1,698.35 in total composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00, which were made by the applicants **BE PAID TO THE APPLICANTS**,

F. That the payments be made within four months as of the date of application by the applicants 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
Alparslan ALTAN

Member
Recep KÖMÜRCÜ

Member
Engin YILDIRIM

Member
Celal Mümtaz AKINCI

Member
Muammer TOPAL