



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

**FIRST SECTION**

**DECISION**

Application Number: 2013/711

Date of Decision: 3/4/2014

## **FIRST SECTION**

### **DECISION**

**President** : Serruh KALELİ  
**Members** : Nuri NECİPOĞLU  
Hicabi DURSUN  
Erdal TERCAN  
Zühtü ARSLAN  
**Rapporteur** : Murat AZAKLI  
**Applicants** : 1. Kenan YILDIRIM  
2. Turan YILDIRIM  
**Counsel** : Att. Yusuf İzzettin DOĞAN

#### **I. SUBJECT OF APPLICATION**

1. The applicants alleged that their rights to property and to a fair trial were violated by indicating that the price ruled upon by the Court at the end of the case for the payment of the price of immovable property confiscated without expropriation, which they had filed against the Mayor's Office of Esenyurt Municipality, was not paid, that the enforcement proceedings they undertook against the Municipality remained inconclusive and requested compensation.

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

2. The application was lodged on 11/1/2013 via the 3rd Civil Court of First Instance of Küçükçekmece. 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 Second Commission of the First Section on 31/10/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In accordance with the interim decision of the First Section dated 14/11/2013, it was decided that the examination of admissibility and merits of the application be carried out together.

5. The opinion letter of the Ministry of Justice dated 27/12/2013 was notified to the applicants on 13/1/2014, the counsel of the applicants alleged in his petition with the referral date of 15/1/2014 that the rights to property and to a fair trial were violated.

### III. FACTS AND CASES

#### A. Facts

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

7. The immovable property with the plot number 190 and parcel number 15 in Esenyurt village, Büyükçekmekce district, Istanbul province was registered at the title deed office in the names of the applicants with 1/2 share ratio each on 21/8/1991 upon the sale made by Esenyurt Municipality to the applicants.

8. In the case they filed on 14/5/2008 against the Mayor's Office of Esenyurt Municipality at the 3rd Civil Court of First Instance of Büyükçekmece, the applicants alleged that the defendant had converted the entirety of the immovable property with the plot number 190 and parcel number 15 into a park area with a modified zoning plan, that it had actually confiscated the immovable property, that it charged a second Layout Arrangement Partnership Share (LAPS) through the zoning amendment that was undertaken and requested the payment of 7.000 TL as the price for the immovable property, which was confiscated without expropriation.

9. It was decided by the Court with the decision dated 26/11/2008 and numbered M.2008/519, D.2008/1438 that 7.000 TL, *non ultra petita*, out of the total value of the immovable property of 158.012 TL be collected from the defendant and paid to the applicants in equal proportion along with its legal interest starting from the date of the case, that the title deed registry of the immovable property in the names of the plaintiffs be annulled and that it be registered at the title deed office in the name of the defendant Municipality with the justification that the immovable property had been set aside as a park area through a change in the zoning plan and that an annotation was affixed to the title deed registry of the immovable property by the defendant by means of making an expropriation decision, that the applicants were inhibited from utilizing the immovable property, that the immovable property was confiscated without expropriation.

10. Upon appeal, the judgment was approved with the decision of the 5th Civil Chamber of the Supreme Court of Appeals dated 14/12/2009 and numbered M.2009/10244, D. 2009/17487.

11. The request for correction was rejected with the writ of the 5th Civil Chamber of the Supreme Court of Appeals dated 8/4/2010 and numbered M.2010/5515, D. 2010/6076.

12. Based on the aforementioned Court decision, the applicants initiated, on 4/2/2010, an enforcement proceeding based on a writ against Esenyurt Municipality with the purpose of the collection of 10.058,77 TL, composed of the main receivable of 7.000 TL, accumulated interest, counsel fee, interest and trial expenses, with 9 % interest to be applied to the main receivable in the file of the 1st Enforcement Office of Küçükçekmece numbered M.2011/3809 and an enforcement order was sent to Esenyurt Municipality.

13. In the case they filed on 11/5/2010 against Esenyurt Municipality at the 3rd Civil Court of First Instance of Büyükçekmece, with the claim that the defendant had confiscated without expropriation the immovable property with the plot number 190 and parcel number

15, the defendants requested the set-off of the confiscation without expropriation price of 7.000 TL, which was ruled upon by the Court with the decision dated 26/11/2008 and numbered M.2008/519, D.2008/1438, from 158.012 TL that was calculated in the first decision and the collection of the balance 151.012 TL.

14. With the decision dated 15/9/2010 and numbered M.2010/687, D.2010/959, the Court decided on accepting the case, the collection of the balance immovable property price of 151.012 TL from the defendant along with its legal interest starting from 14/5/2008 and its payment to the applicants in equal parts with the justification that the defendant had confiscated the immovable property without expropriation, that the value of the immovable property was 158.012 TL and that it had been decided in the first decision to collect 7.000 TL from the defendant and to register the immovable property at the title deed office in the name of the Municipality.

15. Upon appeal, the judgment was approved with the decision of the 5th Civil Chamber of the Supreme Court of Appeals dated 29/9/2011 and numbered M.2011/5379, D. 2011/15196.

16. The request for correction was rejected with the writ of the same Chamber dated 26/3/2012 and numbered M.2011/21571, D. 2012/5735.

17. Based on the aforementioned Court decision, the applicants initiated, on 19/10/2010, before the appeal, an execution proceeding based on a writ against Esenyurt Municipality with the purpose of the collection of 198.949,30 TL, composed of the main receivable of 151.012 TL, interest accrued, counsel fee, interest and trial expenses, with 9% interest to be applied to the main receivable in the file of 2nd Enforcement Office of Küçükçekmece numbered M.2010/10753 and an enforcement order was sent to the Mayor's Office of Esenyurt Municipality.

18. The applicants applied to the Mayor's Office of Esenyurt Municipality on 4/12/2012 and requested the notification of when and in what order the payment of their receivables relying on finalized Court decisions would be made.

19. It was notified by the Mayor's Office of Esenyurt Municipality with the letter dated 11/12/2012 and numbered 5056 that the claims in both of the enforcement proceeding files were queued pending payment as per article 34 of the Public Financial Management and Control Code dated 10/12/2003 and numbered 5018, and it was indicated that the receivables of the applicants had not been paid and that they were in the 30th and 31st places among those to whom payments would be made in the enforcement payment list.

20. The mentioned letter was notified to the applicants on 18/12/2012.

## **B. Relevant Law**

21. The Decision of the Grand General Assembly on Unification of Case Law of the Supreme Court of Appeals dated 16/5/1956 and numbered 1956/1-6 is as follows:

*“As the owner whose immovable property has been confiscated without expropriation can file a case for the prevention of confiscation, so shall s/he have the right to request the price of the immovable property in the event that s/he consents to the situation with this action. In the event that the owner of the immovable property files a case by requesting the price of the confiscated immovable property, a decision shall be delivered to determine and collect the*

*price of the immovable property on the date of the case, which is the date on which s/he consents to the transfer of the right of ownership, not its price on the date of confiscation.”*

22. Paragraphs one and two of article 34 of the Code numbered 5018 with the side heading of "*Expenses which cannot be paid and budgeted debts*" are as follows:

*“The amounts that are not paid despite having been attached to a payment order document shall be registered to the budget as expense, taken into escrow accounts and paid from here. However, the amounts in escrow accounts, which are not claimed until the end of the fifth year following the financial year during which the good is purchased or the service is delivered, shall be registered to the budget as revenue. The amounts that have been registered as revenue shall be paid upon court decision.*

*In the event that public administrations' cash on hand cannot cover all payments, the expenses shall be paid according to the order in which they have been included in the accounting records. However; taxes, duties, charges, premiums, fund charges, shares and other similar amounts that need to be paid to other public administrations as per their codes, tariff-bound payments, debts relying on a writ, debts that would bring additional burden such as past due fee or interest in the event that they are not paid and amounts in the escrow accounts that are requested to be paid shall be respectively prioritized.”*

23. Paragraph one of article 45 of the Code numbered 5018 with the side heading "*Acquiring movables and immovables*" is as follows:

*“In circumstances made compulsory by public services, public administrations within the scope of general administration can acquire movables and immovables of required quantity and quality, within the country or outside the country, by paying their prices in advance or in installments or through financial leasing. Public administrations can carry out actions of purchasing or expropriating immovables via another public administration by means of the delegation of authority. The immovables acquired by public administrations within the scope of general administration shall be registered in the name of the Treasury, the immovables belonging to other public administrations shall be registered in the name of their legal entities to the title deed registry. The immovables that are registered in the name of the Treasury shall be managed by the Ministry of Finance. These registration actions shall be notified to the relevant units of the administration, in whose name the registration has been done, that are located in the place where the immovable is found.”*

24. Paragraph 1 of article 82 of the Code of Enforcement and Bankruptcy dated 9/6/1932 and numbered 2004 with the side heading "*Assets and Rights the Seizure of Which is Not Permissible*" is as follows:

*“The following things cannot be seized:*

*1. State property and the assets the seizure of which is shown to be not permissible in their private laws,  
...”*

25. The last paragraph of provisional article 6 with the side heading "*Compensation due to confiscation without expropriation*" added to the Code of Expropriation dated 4/11/1983 and numbered 2942 with the Code Concerning the Amendment of the Code of Expropriation dated 18/6/2010 and numbered 5999 is as follows:

*“The assets, rights and receivables of administrations cannot be seized due to the collection of the compensation to be paid as per this article.”*

26. Paragraphs eight and eleven of provisional article 6 with the side heading "*Determination of price of immovables set aside for public service without being expropriated*" of the Code numbered 2942 amended with the Code Concerning the Amendment of Certain Codes and the Decree in the Force of Code numbered 375, dated 24/5/2013 and numbered 4687 are as follows:

*“A share of two percent of the allowances foreseen for capital expenditures in the budgets of administrations that are included in the central administration budget (of the allowances set aside for the acquisition of goods and services geared towards security and defense and construction expenses in the budgets of the Ministry of National Defense, the Gendarmerie General Command and the Coast Guard Command), at least two percent of the sum of latest finalized budget revenues for municipalities, special provincial administrations and their subordinate administrations, of latest finalized budget expenditures for other administrations shall be set aside, in the event that there is a need, to be used in payments as per this article based on finalized court decisions. In the event that the total sum of finalized receivables exceeds the total sum of the allowance that has been set aside, payments shall be made pro rata and in installments over following years. Budgetary capabilities and the receivable amounts shall be taken into consideration in installments. The legal interest as per the Code numbered 3095 shall also be paid during the payment in installments. Other reconciliation methods indicated in paragraph three can also be proposed by the administration instead of cash payment as per court order and a conduct can be carried out according to the provisions of this paragraph that concern reconciliation.*

....

*“The assets, rights and receivables of administrations cannot be seized due to the collection of the price to be paid as per this article.”*

27. The last paragraph of article 15 of the Municipality Code dated 3/7/2005 and numbered 5393 with the side heading "*Authorities and privileges of municipalities*" is as follows:

*“Revenues obtained by a municipality through project-based borrowing, conditional donations and assets that are actually used in public services as well as tax, duty and charge revenues collected by the municipality cannot be seized.”*

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

28. The individual application of the applicants dated 11/1/2013 and numbered 2013/711 was examined during the session held by the court on 3/4/2014 and the following are ordered and adjudged:

##### **A. Claims of the Applicants**

29. The applicants alleged that their right to property and right to a fair trial were violated by indicating that their immovable property, which they had purchased from the Mayor's Office of Esenyurt Municipality and which is registered in their name in the title deed registry, was confiscated without expropriation, that a decision was delivered to collect the price of the immovable property from the Municipality as a result of the cases they filed against the Municipality at the 3rd Civil Court of First Instance of Büyükçekmece, that the ruled upon amounts were not paid despite the enforcement proceeding based on a writ carried out at the 1st and 2nd Enforcement Offices of Küçükçekmece for the purpose of enforcement of the Court decisions, that the Municipality avoided payment by relying on legal provisions

to the effect that the public assets of the Municipality cannot be seized, that the right of ownership of the immovable property had been transferred to the Municipality and that the price was not paid despite this and requested the determination of violation and that 395.000 TL in material compensation and 100.000 TL in moral compensation be ruled upon as the current value of the 158.012 TL in compensation ruled upon by the Court, which had not been paid, due to the increase in the value of the immovable property.

## **B. Evaluation**

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

30. The complaint of the applicants regarding the non-payment of the price of the immovable property ruled upon by the Court is not clearly devoid of basis, nor are there any other reasons of inadmissibility for this complaint. Therefore, it should be decided that the application is admissible.

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

31. The applicants alleged that their rights to property and to a fair trial were violated by indicating that the amounts ruled upon at the end of the cases pertaining to the payment of the price of the immovable property that had been confiscated without expropriation were not paid.

32. In its opinion letter, the Ministry of Justice indicated that the allegations of the applicants pertaining to the point that the enforcement of finalized and enforceable court decisions had not been ensured needed to be evaluated within the framework of the allegations that their rights to a fair trial and to property were violated.

33. The applicants indicated, against the opinion of the Ministry of Justice, that their rights to property and to a fair trial were violated and that they repeated the matters in their application petition.

34. According to the provisions of paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 numbered 6216, 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 force, must fall within the scope of 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 on the admissibility of an application, which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18).

35. The last paragraph of article 138 of the Constitution is as follows:

*“Legislative and executive organs and the administration are obliged to abide by court judgments; such organs and the administration can in no way change court judgments and delay their execution.”*

36. The claims of violation of the applicant have been evaluated under two separate headings.

#### **a. Claim as Regards the Violation of the Right to a Fair Trial**

37. 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."*

38. The relevant part of article 6 of the Convention with the side heading "*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."*

39. The sub-principles and rights, which stem from the text of the Convention and the judgments of the ECHR and are concrete manifestations of the right to a fair trial, are also 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).

40. In addition to being one of the most effective assurances that ensure the proper enjoyment of other fundamental rights and freedoms and the protection thereof, the freedom to claim rights, which is stipulated under article 36 of the Constitution, is a tool of the individual for finding justice, obtaining what is his/her right and preventing unjustness, which also strengthens societal peace. The freedom to claim rights and the right to a fair trial are a right that covers not just the right to make claims and defenses as plaintiff and defendant before judicial instances but also obtaining what is one's right at the end of the trial (CC, M.2009/27, D.2010/9, D.D. 14/1/2010).

41. One of the elements of the right to a fair trial is the right to access to court. The right to access to court also covers the right to take a dispute before a court and the right to request the implementation of the decision delivered by the court as well. The implementation of court decisions is an element that complements the trial process and ensures that the trial bears consequence. If the decision is not implemented, the trial will not have any meaning (see *Hornsby v. Greece*, App. No: 18357/91, 19/3/1997, § 40).

42. The implementation of decisions of the judiciary is evaluated within the framework of "*the right to access to court*". As a result, it is not sufficient for a court to have delivered a decision at the end of the trial; this decision must also be implemented in an effective fashion. In the event that the legal system contains regulations that render final court decisions unimplementable in such a way as to create consequences to the detriment of one of the parties or the enforcement of court decisions is prevented in any way, "*the right to access to court*" also loses its meaning (App. No: 2012/144, 2/10/2013, § 28).

43. The ECHR underlines that in the event that a finalized and binding court decision cannot be executed despite the fact that the party in whose favor the decision has been delivered is damaged, the right to access to court guaranteed by article 6 of the Convention will not carry any meaning. Regardless of the issuing judicial instance, the execution of a



judicial decision or judgment is considered as a complementary element of “*the case*” as per article 6 (see *Burdov v. Russia*, App. No:59498/00, 7/5/2002, § 34).

44. The effective protection of the individual, who is a party to the case, and ensuring lawfulness require the compliance of the administration with final judicial decisions that can be delivered regarding it. If the administration refuses or neglects to implement judicial decisions or delays the implementation thereof, in this case, the assurances envisaged under article 6 of the Convention, from which the individual who is a party in the case has benefited during the phases of the case, lose all of their reason of existence (see *Süzer and Eksen Holding Inc. v. Turkey*, App. No: 6334/05, 23/10/2012, § 115).

45. The ECHR has acknowledged that the right to access to a judicial instance within the framework of article 6 of the Convention protects not just the theoretical granting of this right but also a legitimate expectation as to the enforcement of the final decision obtained from that judicial instance (see *Apostol v. Georgia*, App. No:40765/02, 28/2/2007, § 54).

46. The State cannot assert the lack of economic resources as an excuse not to perform its debt as laid out by a final and binding court decision delivered against one of its institutions (see *Burdov v. Russia*, App. No:59498/00, 7/5/2002, § 35).

47. In circumstances pertaining to a final decision delivered to the detriment of the State, in favor of the individual, the individual cannot be forced to carry out a separate enforcement proceeding (see *Manushaqe Puto and Others v. Albania*, App. No: 604/07, 34770/09, 43628/07, 31/7/2012, § 71).

48. In the incident that is the subject of the application, a decision was delivered to collect the price of the immovable property from the Municipality as a result of the case filed against the Municipality with the claim that the immovable property had been confiscated without being expropriated and without paying its price, and there is no doubt that the concrete trial activity, which was conducted with a view to the solution of this problem, is a trial that takes civil rights and liabilities as its subject.

49. The applicants alleged that their right to a fair trial was violated by stating that a decision had been delivered to collect compensation from the Municipality as a result of the cases they had filed against the Mayor's Office of Esenyurt Municipality at the 3rd Civil Court of First Instance of Büyükçekmece, that the ruled upon amounts were not paid despite the enforcement proceedings based on a writ carried out at the 1st and 2nd Enforcement Offices of Küçükçekmece for the purpose of the enforcement of the Court decisions, that the Municipality avoided payment by relying on legal provisions to the effect that the public assets of the Municipality cannot be attached despite the fact that the right of ownership of the immovable property had been transferred to the Municipality.

50. Despite the fact that the decision delivered by the 3rd Civil Court of First Instance of Büyükçekmece in favor of the applicants is enforceable and that the applicants used all of the application remedies regulated within the legal system, the price of the immovable property, which was ruled upon by the Court, was not paid by the Administration without providing any reason and in this manner, the Court decision was not implemented in such a way as to bear consequence to the detriment of the applicants.

51. When monetary depreciation is taken into consideration, the abnormal delays in the payment of the price of the immovable property ruled upon by the Court can lead to material losses by leaving the individuals, whose immovable property was confiscated, in

uncertainty. So much so that, even if the court rules on interest, this interest amount may not suffice to cover all of the material damages (see *Akkuş v. Turkey*, App.No:19263/92, 9/7/1997, § 29).

52. Paragraph eleven of provisional article 6 added to the Code numbered 2942 contains the provision that the assets, rights and receivables of administrations cannot be seized with the purpose of collecting compensations ruled upon by courts due to confiscations without expropriation between the dates of 9/10/1956 and 4/11/1983. The Code envisages setting aside a certain share from the budgets of administrations to this end and making payments out of these shares, and in the event that the set aside share does not cover the amount of ruled upon compensation, making payments in installments and pro rata by spreading them over years to come. The payment of legal interest in the event of payment in installments has also been rendered conditional on a rule (CC, M.2010/83, D.2012/169, D.D. 1/11/2012). However, the right to access to court within the framework of the right to a fair trial is violated in the event that the administration, which has unlawfully intervened in the individual's right to property, insists on not paying the receivables or compensations ruled upon via finalized court decisions. The mentioned arrangement cannot be a reason not to pay receivables or compensations ruled upon via finalized court decisions.

53. The failure to implement or execute finalized court decisions amounts to the violation of the right to a fair trial. The Court decisions delivered in favor of the applicants in the concrete incident were not fulfilled by the Municipality for a period in excess of four years without providing justification despite the fact that the applicants took all kinds of initiatives for the execution of these decisions. When the nature of the decisions in question is taken into account, it is clear that this period is not reasonable.

54. It has been understood that the Municipality violated the applicants' right to access to court by failing to take the necessary measures to ensure the execution of finalized and executable judicial decisions delivered to its detriment and that therefore, it rendered article 36 of the Constitution devoid of substance with a view to its effective consequences, and it should be decided that the applicants' right to a fair trial was violated.

**b. Claim as Regards the Violation of the Right to Property**

55. Article 35 of the Constitution with the side heading of "*Right of Ownership*" is as follows:

*"Everyone has the right to property and inheritance.*

*These rights may be restricted by law only for the purposes of public interest.*

*The exercise of the right to property cannot be contrary to public interest."*

56. Paragraph one of article 1 of the Additional Protocol 1 to the Convention with the side heading "*Protection of property*" is as follows:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

57. Article 35 of the Constitution and article 1 of the Additional Protocol 1 relate to the right to property with parallel arrangements.

58. Article 1 of the Additional Protocol 1 to the Convention consists of three fundamental rules. The first rule is the principle of peaceful enjoyment of property in general or respect to property. This matter is regulated in the first sentence of paragraph one. The second rule regulates the deprivation of property and renders this dependent on certain conditions. This is regulated in the second sentence of the same paragraph. The third rule grants the states' right to control the use of property in accordance with public interest and through the use of codes to the extent that is required by this purpose, this is included in paragraph two (see *Sporrong and Lönnroth v. Sweden*, App. No: 7151/75, 7152/75, 23/9/1982, § 61).

59. In parallel to the regulation in article 1 of the Additional Protocol 1 to the Convention, article 35 of the Constitution grants the right to property in paragraph one, and it stipulates the restriction of the right to property and the criteria for this restriction in paragraphs two and three

60. The ECHR considers delays in the execution of judicial decisions as an intervention to the right to “*peaceful enjoyment of property*” (see *Burdov v. Russia*, App. No:59498/00, 7/5/2002, § 40).

61. As is the case with the concrete incident, the failure of the administration, which confiscated without expropriation the immovable property belonging to the individuals, to pay the receivable or compensation ruled upon as a result of the case filed against it due to this action, amounts to the violation of the principle of peaceful enjoyment of property or respect to property.

62. If an intervention has been made by the State to the right of an individual to property or if his/her rights over his/her assets have been rendered unusable in compliance with article 35 of the Constitution, the rights of that individual need to be protected. This can only take place through the payment of the value of the asset that is the subject of ownership. As a rule, the value of the asset, which is confiscated by the state, is expected to be automatically paid by the state(see *Carbonara and Ventura v. Italy*, App. No: 24638/94, 30/5/2000, § 67)

63. The asset values, which can be included within the scope of the right to property, need to be determined. As an existing property can fall within the scope of the benefits covered by the field of protection of article 35 of the Constitution and article 1 of the Additional Protocol 1, so can receivable rights that are defined in a definitive way (CC, M.2000/42, D.2001/361, D.D. 10/12/2001; CC, M.2006/142, D.2008/148, D.D. 24/9/2008).

64. A receivable that stems from a court judgment can be considered as asset and property in the event that it is proven to be executable (see *Burdov v. Russia*, App. No:59498/00, 7/5/2002, § 40). There is no doubt that the court decision, which concerns the payment of the price of the immovable property that was confiscated without expropriation, is executable.

65. Referring to the principle of the rule of law in a democratic society, the ECHR acknowledges that the right to property is also violated due to the failure to implement judicial decisions that demonstrate the existence of a receivable right (see *Süzer and Eksen Holding Inc. v. Turkey*, App. No:6334/05, 23/10/2012, § 155).

66. On the other hand, article 6 of the Convention and article 1 of the Protocol attribute to the state the liability of establishing a system that is effective with the intent of the implementation of judicial decisions (see *Fuklev v. Ukraine*, App. No: 71186/01, 30/11/2005, § 84). If the public instances that are tasked to implement a court decision prevent the implementation of this decision or do not display the necessary care for the implementation of the decision, this situation amounts to the violation of articles 35 and 36 of the Constitution.

67. It was decided, through the Court decisions that are the subject of the application, that the price of the immovable property that had been confiscated by the Municipality without expropriation be collected from the Municipality, and the price of the immovable property, which was adjudicated, demonstrate that the applicants have receivable rights. Therefore, these rights, which are based on a court decision, are evaluated within the framework of the right to "property".

68. The principle of "good governance" requires public authorities to act in a timely manner, with an appropriate method and, first and foremost, consistently when it comes to a subject that falls within the scope of public benefit (see *Krstic v. Serbia*, App. No: 45394/06, 10/12/2013, § 78).

69. As explained above (see §§ 26-27), the assets, rights and receivables of administrations cannot be seized for the purpose of collecting compensations ruled upon by courts due to confiscations without expropriation. The purpose of this rule is the protection of resources that are necessary for the conduct of public services, which the administrations are tasked to fulfill. The uninterrupted fulfillment of public services, which are compulsory for the continuation of societal life in a constant, orderly and systematic manner, depends on the possession of certain assets in cash and in kind by the administrations. It is clear that these services will be interrupted or will not be fulfilled at all in the event that the assets required by the administrations to fulfill public services are seized. Even though individuals will be able to collect their compensation receivables later due to the inability of seizing the assets, rights and receivables of administrations, a reasonable balance is tried to be achieved between public benefit and the rights of individuals through the payment of legal interest for this delay. As a result, it cannot be claimed that this restriction imposed upon the rights of the individual with the intent of ensuring the uninterrupted fulfillment of public services is disproportionate (CC, M.2010/83, D.2012/169, D.D. 1/11/2012).

70. However, the avoidance of administrations from paying the price of immovable property confiscated without expropriation, which has been ruled upon by the court and finalized, by using the rule that the assets, rights and receivables of administrations cannot be seized as a pretext can disrupt the balance between public benefit and the rights of the individual to the detriment of individuals. This situation is considered to have the quality of the violation of the right to property from the standpoint of the individual, the price of whose immovable property ruled upon by the Court was not paid despite the fact that his immovable property had been confiscated.

71. In the incident that is the subject of the application, the decision dated 26/11/2008 issued as a result of the case filed by the applicants against the Mayor's Office of Esenyurt Municipality on 14/5/2008 at the 3rd Civil Court of First Instance of Büyükçekmece was finalized on 8/4/2010, which is the date on which the request for correction was dismissed by the 5th Civil Chamber of the Supreme Court of Appeals. Based on the mentioned decision, the applicants initiated an enforcement proceeding based on a writ on 4/2/2010 at the 1st Enforcement Office of Küçükçekmece against the Municipality.

72. The decision dated 15/9/2010, which was issued as a result of the case that was also filed by the applicants against the Mayor's Office of Esenyurt Municipality on 11/5/2010 at the 3rd Civil Court of First Instance of Büyükçekmece, was finalized on 26/3/2012, which is the date on which the request for correction was dismissed by the 5th Civil Chamber of the Supreme Court of Appeals. Based on the mentioned decision, the applicants initiated an enforcement proceeding based on a writ on 19/10/2010 at the 2nd Enforcement Office of Küçükçekmece against the Municipality.

73. Despite the enforcement proceedings, which the applicants initiated based on both decisions, no payment was made by the Municipality to the applicants, it was merely indicated that the payment was queued.

74. That the enforcement proceeding, which the applicants undertook against the Administration with the intent of the collection of their receivables based on Court decision and acknowledged within the framework of the right to property, lasted long and the existence of ambiguity in terms of accessing the receivable rendered the decision issued by the Court devoid of substance in terms of its effective consequences.

75. For the explained justifications; it should be decided that the applicants' right to property guaranteed under article 35 of the Constitution was violated due to the lack of payment by the Municipality of the price of the immovable property ruled upon by the Court.

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

76. The applicants requested the determination that their right to property and to a fair trial was violated due to the lack of payment of their receivables based on Court decision, and the payment of 395.000 TL in material compensation, 100.000 TL in moral compensation.

77. In the opinion of the Ministry of Justice, no assessment was made as regards the request of compensation of the applicants.

78. 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 holding the retrial in order for the violation and the consequences thereof to be removed, In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."*

79. The applicants requested material and moral compensation with a view to remedying the right violation. It has been understood that the rights of the applicants to property and to a fair trial were violated as a result of the lack of payment of their receivables based on court decision. The damage incurred by the applicants relates to the lack of payment of the compensation, which they were supposed to receive on the date on which the courts of instance issued final decisions. When it is taken into consideration that the enforcement phase, which lasted 4 years 1 month and 29 days from the date of 4/2/2010 on which the applicants initiated the enforcement of the Court decisions until the date on which a decision was issued by the Constitutional Court, is not reasonable and that the applicants' right to property and to a fair trial have been violated, it should be decided that a discretionary moral

compensation of 6.650,00 TL be paid to each of the applicants in exchange for their moral damages that cannot be rectified with a mere determination of violation.

80. The applicants also made a request for material compensation by indicating that the current value of the immovable property increased, that it appreciated to a point that is higher than its current value at the time of the case, and that it was not possible to cover the difference in value through interest. Ruling on compensation with a view to covering material damage is conditional on the applicants' proving that there is a causal link between the violation and the material loss. In the decisions that are the subject of the application, it was decided by the Court to collect the price of the immovable property that was confiscated without expropriation along with its legal interest, and a request was also made by the applicants for collection with legal interest in their enforcement proceedings. The applicants alleged that the real current value of the immovable property was determined as of the date of the case and that the determined value was appropriate as of that date, that however, the current value of the immovable property increased substantially during the period that elapsed in the meantime, that the difference in current value could not be covered with interest, but they did not bring forward an allegation of material loss due to another reason. Even though it has been determined that articles 35 and 36 of the Constitution were violated in the incident that is the subject of the application, when it is taken into consideration that the applicants did not bring forward a claim of damage resulting from the difference between the interest and the rate of inflation, that the value of the immovable property was determined with a Court decision and that the ownership changed hands, it should be decided that their request for material compensation, which they requested due to the increase in the current value of the immovable property, be rejected.

81. 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 applicants and determined in accordance with the documents in the file, be paid to the applicants.

82. Taking into consideration the fact that the decisions issued at the end of the trial that is the subject of the application were not executed and that this matter violated the applicants' right to property and to a fair trial, with a view to preventing the continuation of the damage incurred by the principle of confidence in the law, justice and court, it should be decided that a copy of the decision be sent to the relevant Municipality to ensure the fulfillment of the Court decisions in the shortest period possible.

## V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 3/4/2014 that;

**A.** That the application *IS ADMISSIBLE* with a view to the complaint pertaining to the lack of payment of the receivable right as a result of the non-fulfillment of the court decisions,

**B.** That the rights to property and to a fair trial guaranteed under articles 35 and 36 of the Constitution *WERE VIOLATED*,

**C.** That 6.650,00 TL in moral compensation *BE PAID* separately to the applicants, that the other requests of the applicants *BE DISMISSED*,

**D.** 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 applicants *BE PAID TO THE APPLICANTS*,

**E.** That the payments be made within four months from the date of application of the applicants to the State Treasury following the notification of the judgment; if there happens to be a delay in payment, legal interest be accrued for the period elapsing from the date when this duration ends until the date of payment,

**F.** That a copy of the decision be sent to the Mayor's Office of Esenyurt Municipality,

President  
Serruh KALELİ

Member  
Nuri NECİPOĞLU

Member  
Hicabi DURSUN

Member  
Erdal TERCAN

Member  
Zühtü ARSLAN