REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2013/849

Date of Decision: 15/4/2014

FIRST SECTION

DECISION

President	: Serruh KALELİ
Members	: Nuri NECİPOĞLU
	Hicabi DURSUN
	Erdal TERCAN
	Zühtü ARSLAN
Rapporteur	: Recep ÜNAL
Applicant	**:** Karlis A.Ş.
Representative	**:** Abdulhalim KARAVİL
Counsel	**:** Att. Devrim BİÇEN

I. SUBJECT OF APPLICATON

1. The applicant asserted that the right to a fair trial was violated due to the dismissal of its application against an administrative fine imposed on it based on the circular on tachograph application issued in contrary to the regulation.

II. APPLICATION PROCESS

2. The application was lodged on 10/1/2013 via the 2nd Assize Court of Diyarbakır. 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 First Commission of the First Section on 29/3/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the First Section on 29/7/2013, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application were notified to the Ministry on 30/7/2013. The Ministry presented its written opinion to the Constitutional Court on 16/9/2013.

6. The opinion letter of the Ministry was notified to the applicant on 24/9/2013. The applicant submitted its petition including its statements against the opinion of the Ministry on 7/10/2013.

III. FACTS AND CASES

A. Facts

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

8. The applicant was sentenced to an administrative fine of 319,00 TL by the officials of the Traffic Control Branch Directorate of Diyarbakır on 12/7/2012 on the ground that it did not comply with the liability to use a tachograph in accordance with subparagraph (b) of paragraph one of article 31 of the Highways Traffic Code dated 13/10/1983 and numbered 2918.

9. The applicant filed an opposition against the administrative fine before the 2nd Criminal Court of Peace of Diyarbakır (Court) on 26/7/2012.

10. A hearing was held by the court in order for the opposition to be ruled. The attorney of the applicant attended at the second hearing dated 11/12/2012 and requested that a decision be delivered on the acceptance of the opposition by stating that it was not possible to impose a limitation which was not regulated by law through a circular, that his client did not have the obligation of knowing the circular.

11. Through the decision of the court dated 11/12/2012 and numbered 2012/748, a decision was delivered to the face of the attorney of the applicant as regards the dismissal of the opposition in a final fashion.

B. Relevant Law

12. Article 31 of the Code numbered 2918 is as follows:

"In vehicles;

…

b) ***It shall be obligatory to also have a tachograph in trucks****, wreckers and buses, a taximeter in taxi automobiles*

and to keep them available. However*, **the obligation to have and use tachograph shall not be sought for** vehicles which were manufactured in years prior to the date on which the Code numbered 2918 entered into force and those which were registered and will be registered as official vehicles and* ***those which transport passengers and freight within a city and municipal urban area****. …*

Drivers who fail to have, use or keep available a taximeter, tachograph in their vehicles according to subparagraph (b) ... of paragraph one shall be sentenced to a fine of 34.800.00 liras. If the driver is not the owner of the car as well, a fine report shall be issued also for the registry plate for the same amount. …"

13. Subparagraph (a) of paragraph one of article 99 of the Highways Traffic Regulation (Regulation) dated 18/7/1997 and numbered Official Gazette 23053 is as follows:

"The principles as regards in what kind of vehicles the device of tachograph and driver employment certificates will be kept and used are shown below.

a) The devices of tachograph

…

2) It shall be obligatory to keep available and use the devices of tachograph in buses, trucks and wreckers which transport freight or passengers between cities.

3) The operator and driver of each vehicle in which a device of tachograph is equipped shall be obliged to keep these devices available as of the date on which they are installed.

4) ***The obligation of keeping a device of tachograph shall not be sought for vehicles in the type of bus, truck and wrecker which transport passengers and freight within a city and municipal urban area****.*

…"

14. The relevant parts of the Consolidated Circular of the Traffic Implementation and Control Department Presidency of Turkish National Police (Circular) are as follows:

"…

According to article 31 of the Highways Traffic Code, it shall be obligatory to have and keep available a tachograph in trucks, wreckers and buses, a taximeter in taxi automobiles.

According to this;

…

The obligation of having and using a tachograph shall not be sought for those which transport passengers and freight within a city and municipal urban area as well, a letter of undertaking to be received from a notary public shall be requested during the procedures of registration to be performed in the name of natural and legal persons that are the owners of a vehicle and declare that they will transport freight and passengers within a city and municipal urban area during the procedures of registration.

In the procedures of registration to be performed based on these submitted documents, this circumstance shall be recorded in the relevant part of the certificate of registration.

Civilian vehicles which are exempted from the obligation of using and having a device of tachograph shall have a driver employment certificate in the event that they perform land transportation between cities. This matter shall be checked during traffic controls.

In the event that vehicles which declare that they work within a city and municipal urban areas and make this matter recorded into their documents use highways outside a city and municipal urban areas, the criminal provisions of article 31 of the Code shall apply."

IV. EXAMINATION AND JUSTIFICATION

15. The individual application of the applicant dated 10/1/2013 and numbered 2013/849 was examined during the session held by the court on 15/4/2014 and the following were ordered and adjudged:

A. Claims of the Applicant

16. The applicant asserted that an administrative fine was imposed on it based on the Circular although the regulation in article 99 of the Regulation did not impose any liability or restriction on the owners of vehicles, that its application against the administrative fine imposed as a result of the implementation, through the Circular, of the restrictions which were not present in the Regulation and the imposition of responsibilities on it within the framework of article 124 of the Constitution and the hierarchy of norms was dismissed by the Court, that therefore the right to a fair trial (defense) was violated and requested for a decision to be delivered on the holding of a retrial.

B. Evaluation

1. In Terms of Admissibility

17. In the opinion letter of the Ministry, it was stated that the main complaint of the applicant is related to the principle of lawfulness, that no concrete reason was put forth by the applicant as regards the complaint of the right to a fair trial (defense) and an opinion was presented as to the effect that the complaints of the applicant should be examined within the framework of article 38 of the Constitution.

18. In its declaratory petition against the opinion letter of the Ministry, the Applicant expressed that the dismissal of the complaints of the applicant in a final fashion without the examination and evaluation thereof by the local court in a sufficient manner was a violation of the right to a fair trial.

19. Although the applicant asserted that the right to a fair trial (defense) was violated due to the facts and cases which it explained in the application petition as the subject matter of the violation, it is understood that the complaints of the applicant are, in essence, related to the violation of the principle of lawfulness in crime and in punishment regulated in article 38 of the Constitution. For this reason, the concrete application has been examined within the framework of the principle of lawfulness in crime and in punishment, it has not been considered necessary to carry out a separate examination in terms of the right to a fair trial.

20. In the opinion letter of the Ministry, as regards admissibility, it was stated that the European Court of Human Rights (ECtHR) interpreted the concept of crime in an autonomous manner without being bound by the characterization of the action in national law, that an evaluation for the merits, not the procedure was performed in order for an effective protection to be provided against arbitrary actions, that the characterization in national law was initially taken into account as the criteria of interpretation in the ECtHR case-law in which a general differentiation was not performed, that however in addition to this, the quality, aim and severity of a crime and the punishment prescribed therefor were also taken into account, that while the quality of a crime was evaluated, the issues as regards how the relevant crime was characterized by the great majority of the states which are party to the European Convention on Human Rights (Convention), the similarity of this crime with other crimes in the criminal law, the characteristics of the procedures applied, whether the crime is binding for a group or everyone based on public interest were taken into account, that if it could be considered as a crime in terms of one of the criteria, then this would be considered as sufficient.

21. 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 and numbered 6216, in order for the merits of an individual application lodged to the Constitutional Court to be examined, it is necessary that the right which is claimed to be intervened by the public force be enshrined in the Constitution and that it also be covered by the Convention and the additional protocols to which Turkey is a party. In this context, it is necessary to identify the scope of the fundamental right and freedom which is the subject matter of an individual application within the framework of the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18; App. No: 2012/13, 2/7/2013, § 34).

22. The principle of lawfulness in crime and in punishment is regulated in paragraph one of article 38 of the Constitution with the side heading "*Principles relevant to offences and penalties*" and in paragraph (1) of article 7 of the Convention with the side heading "*No*

punishment without law". The fact that a dispute is relevant to crimes and penalties is the prerequisite for the evaluation of a claim of violation within the scope of the common field of protection of the aforementioned articles.

23. In a similar application, it was accepted that disputes as regards the administrative sanctions imposed due to the acts of misdemeanor as "*allegation directed ... in criminal jurisdiction ...*" were also included within the scope of the field of protection of article 6 of the Convention (App. No: 2013/1718, 2/10/2013, § 26). It is necessary to accept that the claim as to effect that the principle of lawfulness in crime and punishment was violated due to the administrative fine and the dismissal of the application against this fine by the Court is also included within the scope of the common field of protection of the Constitution and the Convention.

24. Due to the reasons explained, it should be decided that the application, which is not clearly devoid of basis and where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible.

2. In Terms of Merits

25. In the opinion letter of the Ministry, the lawfulness of crimes and penalties was one of the main elements of the principle of the state of law, that the aim of this guarantee was to ensure an effective protection against arbitrary investigations, prosecutions and punishments, that the concept of "*law*" in the article had an autonomous meaning just as other concepts, that the ECtHR understood "*act*" not as a disposition of the legislative branch in form exclusively, but as "*an objective legal norm*" independently from the procedure and form of introduction of the provision, that it was necessary that the norms in question comply with international liabilities of human rights and the requirements of a democratic society and that they be ratified with an authority stemming from the Convention, that it was also necessary that regulations as regards a crime and the penalty against it be accessible and foreseeable, that when individuals examined the wording of the relevant provision which was accessible, it was necessary that they know which executive or negligent actions would make them encounter with which penalty through the help of a lawyer when necessary, that it was important that the conclusion reached in terms of merits be foreseeable in a way which was consistent and reasonable for the essence of the action, that the obligation of installing a tachograph whose contravention constituted a traffic crime was clearly regulated in the Code numbered 2918 by also stating the exceptions thereof and the penalty against it, that the letter of undertaking stipulated in the Circular was related to the determination of vehicles which would benefit from the exception as regards the obligation of installing a tachograph in the relevant Code, that this determination resulted from a practical need and was not contrary to the legal regulation, that individuals who made vehicle registration procedure performed in the relevant units of Turkish National Police were averagely informed of the aforementioned Circular and its implementation.

26. In its declaratory petition against the opinion of the Ministry, the applicant stated that the decisions of the ECtHR included in the opinion of the Ministry did not set a precedent for the concrete incident in which the obligation of having a tachograph that was not prescribed in the Code and the Regulation was prescribed with the Circular and turned into a sanction under an administrative fine, that moreover no basis was shown in the opinion letter as to the effect that those concerned were informed of the implementation of the aforementioned Circular during vehicle registration procedures in the units of Turkish National Police.

27. The claim that the conditions of implementation for the exemption as regards the obligation of tachograph which constituted the exception for the act of misdemeanor were determined through the Circular, that in this way a crime was created with the Circular and that therefore the principle of "*lawfulness in crime and in punishment*" was violated constitutes the essence of the examination of merits.

28. Lawfulness in crime and in punishment is a fundamental principle which is enshrined in the Constitution and the Convention as regards the rules of criminal law and the implementation of these rules.

29. Paragraph one of Article 38 of the Constitution with the side heading *"Principles relevant to offences and penalties"* is as follows*:*

> *"No one can be punished for an act which is not considered to be an offence by the law that was in force when the offence was committed; no one can be given a penalty heavier than the penalty stipulated by the law for that offence when the offence was committed."*

30. Paragraph (1) of article 7 of the Convention with the side heading *"No punishment without law"* is as follows:

> "*1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when itwas committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*

31. While the principle of regulation by law is separately included in many articles in the sections of the Constitution as regards fundamental rights and freedoms, it is also provided in general principles in relation to the restriction of fundamental rights and freedoms as stipulated in article 13 that restriction can "*only*" be imposed "*by law*". The principle of "*lawfulness in crime and in punishment*" is also specially enshrined in article 38 of the Constitution which regulates crimes and penalties.

32. The principle of lawfulness in crime and in punishment is one of the constituent elements of a state of law. In addition to constituting a fundamental guarantee in the regulation of all rights and freedoms in general, the principle of lawfulness also has a special meaning and importance in terms of the determination of crimes and penalties and, in this context, prevents individuals from being alleged and punished in an arbitrary way due to acts which are not prohibited or sanctioned by law and, in addition, ensures the retrospective implementation of regulations which are in favor of the alleged person in an effective manner.

33. The fact that the exercise of public authority and the consequent authority to impose a penalty for arbitrary and illegal purposes can be possible through the implementation of the principle of lawfulness in a strict way. Accordingly, it is necessary that legislative, executive and judiciary powers which represent public authority act in respect for this principle; that the boundaries of legal regulations as regards crimes and penalties be drawn by the legislative branch in a clear way, that the executive branch not create a crime and penalty through its regulatory actions without being based on an authority whose boundaries are determined by law, that the judiciary branch which is tasked with implementing criminal law not extend the scope of crimes and penalties determined in codes by way of interpretation.

34. One of the fundamental principles of a state of law stipulated in article 2 of the Constitution is "*certainty*". According to this principle, it is necessary that legal regulations be clear, net, understandable and implementable in a way that will not give rise to any interruption and doubt in terms of both individuals and the administration, that moreover they include some protective guarantees against the arbitrary practices of public authorities. The principle of certainty is associated with legal security; an individual should have an opportunity of learning from the law in a certain accuracy which legal sanction or consequence is attributed to which concrete action and case, which authority of intervention they grant to the administration. Only in this case can an individual foresee the liabilities which are incumbent upon him/her and regulate his/her behaviors accordingly. Legal security requires that rules be foreseeable, that individuals can have confidence in the state in all its actions and procedures, that the state abstains from methods that may damage this feeling of confidence in its legal regulations (The CC, M.2009/51, D.2010/73, D.D. 20/5/2010; The CC, M.2009/21, D.2011/16, D.D. 13/1/2011; The CC, M.2010/69, D.2011/116, D.D. 7/7/2011; The CC, M.2011/18, D.2012/53, D.D. 11/4/2012).

35. The principle of "*lawfulness in crime*" is enshrined in paragraph one of article 38 of the Constitution by stating "*No one can be punished for an act which is not considered to be an offence by the law ...*"and the principle of "*lawfulness in penalty*" is enshrined in paragraph three by stating "*Penalties and security measures deemed to be penalties can only be imposed by law*." The principle of "*lawfulness in crime and in punishment*" prescribed in the Constitution also constitutes one of the fundamental principles of criminal law in our current day when an understanding which is based on human rights and freedoms comes to the forefront. The principle which is also regulated in article 2 of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 in parallel with article 38 of the Constitution requires that which actions are prohibited and the penalties which will be imposed for these prohibited actions be shown in the law in a way which will not give rise to any doubt, that the rule be clear, understandable and its boundaries be specified. This principle which is based on the thought that individuals know prohibited actions beforehand is aimed at guaranteeing fundamental rights and freedoms (The CC, M.2010/69, D.2011/116, D.D. 7/7/2011).

36. According to paragraph one of article 31 of the Code numbered 2918, it is obligatory to have and keep available a tachograph in trucks, wreckers and buses. Through the regulation in the second sentence of the same paragraph, those which transport passengers and freight within a city and municipal urban area are exempted from this obligation. A regulation which is parallel with this is also included in article 99 of the Highways Traffic Regulation published in the Official Gazette dated 18/7/1997 and numbered repeated 23053.

37. Tachograph is an electronic device which is installed in certain vehicles in particular buses and trucks in order to record information such as speed or completed distance, which allows for controlling in an effective way whether especially drivers who drive the vehicles of transport comply with daily period of driving and intervals and speed limits which are determined by codes within the framework of traffic safety or not.

38. In the Consolidated Circular of the Traffic Implementation and Control Department Presidency of Turkish National Police, it is stated that in the event that real and legal persons that are the owners of vehicles undertake in writing to transport freight and passengers within a city and municipal urban area during registration procedures, the statement as regards this undertaking will be annotated in the documents and computer records of the vehicle and due action will be undertaken in accordance with article 31 of the

Code numbered 2918 (§ 12) on those who are found to transport freight and passengers outside a city and municipal urban area in spite of this annotation.

39. The applicant asserts that although it was covered by the specified exemption and the relevant regulations did not impose any other liability, it was sentenced to an administrative fine through the Circular published by the administration on the ground that it did not fulfill the liability of the letter of undertaking prescribed for the owners of vehicles covered by the exemption and that accordingly it did not comply with the liability to use a tachograph in accordance with subparagraph (b) of paragraph one of article 31 of the Code numbered 2918.

40. In a state of law, individuals must know and foresee which actions are defined as crime and which criminal sanctions they are attributed to in a certain period of time and, in other words, the rules of criminal law must be foreseeable and accessible. Otherwise, it will not be possible to materialize the principle of criminal law expressed as "*Ignorance of the criminal codes shall not be considered as an excuse*". Because, criminal responsibility is based on the assumption that an individual is aware of his/her action and that s/he has committed this action which constitutes a crime on his/her free will. For this reason, in order for an individual to be held responsible for the action that s/he has committed, it is necessary that which actions constitute crimes be clearly shown in codes. (The CC, M.1991/18, D.1992/20, D.D. 31/3/1992).

41. The condition of regulating an action which is subjected to a criminal sanction in the code in a clear way states that the enactment of regulations as crimes and penalties in the form of a code is not sufficient and that they need to be suitable for achieving a certain aim also in terms of content. In this respect, the text of a code should be drawn up at a level that will allow individuals to foresee in a certain clarity and accuracy which legal sanction or consequence is attributed to which concrete action and case by way of receiving legal aid when necessary. Therefore, prior to implementation, a code should be sufficiently foreseeable as regards its possible effects and consequences. Nevertheless, as it will not always be expected that the text of a code shows all consequences and effects, the degree of desired clarity can be determined by considering factors such as the content of the text in question, the area which it aims to regulate and the status and size of the group that it addresses. It is necessary that a code with these characteristics be easily accessible as well (The CC, M.2011/62, D.2012/2, D.D. 12/1/2012).

42. In the Code numbered 2918, no clear regulation is present on how persons "*that transport passengers and freight within a city and municipal urban area*" exempted from the obligation of using a tachograph will be included into this different status. In order for such a provision to have the capability of implementation and to prevent misuses, it is a logical requirement that an exemption be attributed to an action or undertaking. However, no condition of form is prescribed for the exemption stipulated in the Code numbered 2918 and it is considered necessary that the concerned only be a person "*that transports passengers and freight within a city and municipal urban area*". It is not possible to foresee that any undertaking, notification or making an annotation in traffic registration records is required from this expression in the Code. On the other hand, for example, if "*those who notify that they will transport passengers and freight*" and a similar expression had been used in the Code, it could have been mentioned that the liabilities prescribed by the Circular and attributed to an administrative sanction had a legal basis. However, the Circular regulation indirectly creates a new misdemeanor by imposing a liability which is not stipulated in the Code on those concerned in an unforeseeable way. Because, the real action of misdemeanor is

"*the failure to keep available a tachograph"* and its exception according to the provision of the Code is transporting freight and passengers within a city and municipal urban area. The Circular, as the exception of this exception although not stipulated in the Code, prescribes that in the event of "*the failure to declare working within a city and municipal urban areas and to make the circumstance recorded in the registration documents*", the relevant person will not be able to benefit from the exemption and will be sentenced to an administrative fine due to the fact that s/he fails to undertake due action in accordance with the provision of the Circular even if s/he is actually covered by the exception in the Code.

43. The Circular restricted the field of application of the exceptional regulation without any legal basis by attributing the exemption of tachograph which is recognized by the Code and is not attributed to any form to the form of notification and making an annotation in the registration document. The restriction through an administrative action of the field of application of the exceptional regulation as regards an action which requires an administrative fine resulted in the consequence of creation of a misdemeanor in the concrete incident. This emerging consequence does not accord with the principle of "*lawfulness in crime and in punishment*" regulated in paragraph one of Article 38 of the Constitution.

44. Due to the reasons explained, it has been concluded that the sentencing of the applicant to an administrative fine on the ground that it did not fulfill its liability of notification which is imposed by the Circular and is not prescribed in the Code violated the principle of lawfulness in crime and in punishment.

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

45. The applicant requested that the file be sent to the relevant Court for retrial in order for the consequences of the violation to be removed.

46. 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."*

47. The violation determined in the incident which is the subject of the application stems from the decision of the Court. As it is possible to remove the violation and its consequences in the event that a retrial is held, it should be decided that the file be sent to the relevant Court for holding a retrial.

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

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 15/4/2014 that;

A. The application as to the effect that the the principle of "*lawfulness in crime and in punishment*" guaranteed by Article 38 of the Constitution was violated is ADMISSIBLE,

B. The principle of "*lawfulness in crime and in punishment*" guaranteed by Article 38 of the Constitution was VIOLATED,

C. The decision be SENT to the relevant Court for retrial in order for the violation and the consequences thereof to be removed,

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

E. 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.

President	Member	Member
Serruh KALELİ	Nuri NECİPOĞLU	Hicabi DURSUN

Member	Member
Erdal TERCAN	Zühtü ARSLAN