REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

RIDA BOUDRAA APPLICATION

(Application Number: 2013/9673)

Date of Judgment: 21/1/2015

Official Gazette Date – Issue: 16/6/2015-29388

FIRST SECTION

JUDGMENT

President	: Serruh KALELİ
Members	: Burhan ÜSTÜN
	Hicabi DURSUN
	Erdal TERCAN
	Zühtü ARSLAN
Rapporteur	: Esat Caner YILMAZOĞLU
Applicant	: Rıda BOUDRAA
Representative	: Att. Abdulhalim YILMAZ

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicant maintained that he faced with the risk of infringement of his right to life and of being subject to torture and ill-treatment in his country to which he would be extradited due to the deportation order given in respect of him for having no passport without awaiting for the conclusion of his application before the United Nations High Commissioner for Refugees ("the UNHCR") for being given the status of asylum-seeker; that he was held in custody in the Yalova Foreigners' Department and therefore deprived of his liberty for a period of 68 days; and that the conditions of his administrative custody were poor. He accordingly alleged that there was a breach of Articles 17, 19, 20, 40 and 41 of the Constitution.

II. APPLICATION PROCESS

2. The application was lodged with the Constitutional Court on 27 December 2013 through the 6th Chamber of the Bakırköy Criminal Court of General Jurisdiction. Upon the preliminary examination of the petitions and annexes thereto under administrative aspect, it has been found established that there was no deficiency which would prevent its referral to the Commission.

3. On 27 December 2013, the First Commission of the First Section decided that the examination on the admissibility be made by the Section, and therefore the case-file be referred to the Section.

4. As the applicant's allegation that there was a risk towards his life or his material or spiritual integrity was taken serious by the First Section, on 30 December 2013 the Section held by a majority vote that the applicant's request for an interim measure be accepted pursuant to Article 49 § 5 of the Law on the Establishment and Rules of Procedures of the Constitutional Court dated 30 March 2011 and no. 6216 and Article 73 of the Internal Regulations of the Court; that the administrative act ordering the applicant's deportation to Algeria be suspended until a further decision to be rendered by the Constitutional Court; and that this interim decision be notified to the Ministry of Internal Affairs for necessary action to be taken immediately.

5. On 20 January 2014, the Section decided that the examination on the admissibility and merits be made concurrently.

6. The facts of the application were notified to the Ministry of Justice on 21 June 2014. The written observations of the Ministry were submitted to the Constitutional Court on 18 July 2014. The Ministry's observations were served on the applicant on 29 July 2014. The applicant submitted his counter-statements to the Constitutional Court within the prescribed period of time.

III. THE FACTS

A. The Circumstances of the Case

7. The facts may be summarized as follows as explained in the application form and annexes thereto and in the observations of the Ministry of Justice:

8. The applicant is an Algerian citizen who was residing illegally in Turkey between the years of 2001 and 2003. In 2003, he was arrested for travelling without a passport and deported to his homeland, namely Algeria.

9. The applicant joined a political formation *"Rachad Movement"* established in Algeria in the course of the incidents emerging in Tunisia in 2010 and called as the Arab Spring by the public. He was then taken into custody by the police as he had been the leader

of a peaceful protest and, according to his own statement, his foot was broken as he had been tortured in the police custody.

10. The applicant against whom criminal investigations were initiated frequently after these protests had been over left his country and went to Syria with the worry of being incarcerated once again due to political reasons. He subsequently entered Turkey without a passport through the Cilvegöz border gate located in the province of Hatay. He had failed to obtain his passport and the official documents due to the inner turmoil taking place in Syria at the relevant period.

11. The applicant went to the province of Yalova where his wife and children previously entering Turkey through legal means were residing and started residing in that province with his family. On 3 November 2013, he was taken into custody, during the check carried out in their residence upon their neighbour's complaint that they had been making noise, for having no passport and subsequently placed in administrative custody at the Foreigners' Department of the Yalova Security Directorate.

12. In his questioning by the police, the applicant maintained that he had firstly arrived in Syria due to political reasons and then arrived in Turkey without a passport for having no opportunity to bring his passport and the other official documents with him. He accordingly requested to be granted status of asylum-seeker. The relevant administration filled in the asylum-seeker request form in respect of the applicant and submitted this form and the enclosed documents to the Ministry of Internal Affairs to take a decision.

13. Making the necessary assessment over the file, the Ministry of Internal Affairs served its decision in which his application for asylum was dismissed on the applicant on 6 December 2013. The applicant was thereby notified that he could object to this decision within 72 hours.

14. The applicant objected to this decision dismissing his above-mentioned request for procedural and substantive grounds by maintaining that the period allocated for raising objection was very short and that he wished to submit an additional objection petition after consulting with his lawyer.

15. On 17 December 2013, the applicant's lawyer lodged an application for asylum with the UNHCR.

16. On 23 December 2013, the applicant's lawyer submitted a new objection petition enclosed with one copy of the application for asylum lodged with the UNHCR to the administration and requested the administration to await for the outcome of this application and to release the applicant.

17. By the reply letter drawn up on 25 December 2013 and at 05:30 p.m., it was indicated that the application for asylum was dismissed; that this decision was final; and that the applicant would be deported to Algeria. The applicant refrained from signing the notification letter in respect thereof.

18. The applicant noted that he was taken into custody on 3 November 2013 for having no passport and held in the Foreigners' Department of the Yalova Security Directorate; that on 18 November 2013 he filled in an interview form for refugee / asylum and requested asylum. He also indicated that the decision on the dismissal of his request was served on him on 5 December 2013; that upon being informed that he may object to this decision within 72 hours, he raised an objection to this decision on 6 December 2013; and that his lawyer being notified of this situation lodged an application for asylum with the UNHCR on 17 December 2013. He further stated that although he objected to the decision on dismissal of his request for asylum before the Ministry of Internal Affairs and the Yalova Security Directorate and mentioned of his application for asylum before the UNHCR, his application was dismissed finally on 25 December 2013 without awaiting for the outcome of the decision to be rendered by the UNHCR, and it was decided that his file concerning his asylum be closed and he be deported.

19. In his letter of application dated 27 December 2013, the applicant's lawyer stated *"... as a result of the negotiations held with the Foreigners' Department of the Yalova Security Directorate, he was informed that the applicant would be taken to the Algerian Consulate in Istanbul on Friday, 23 December 2013 and be sent to his country by plane after issuance of a travel document on his behalf for his travel to Algeria; that they could not await for a court's decision in case of an action to be brought or the decision of the UNHCR; that they have to send the person concerned to his country as soon as possible unless an instruction is received from the Ministry of Internal Affairs (they could not send the person to a safe third country requested by him as he has no passport)"*.

20. With respect to the application lodged by the applicant with the Constitutional Court for an interim measure while he was held in the Foreigners' Department of the Yalova Security Directorate for being deported, the Court held by a majority vote on 30 December 2013 that execution of the administrative act ordering the applicant's deportation to Algeria be suspended until a further decision to be rendered by the Court.

21. In the petition submitted on 20 February 2014 by the applicant's lawyer to the Constitutional Court through the Bakırköy Assize Court on duty, it was indicated *"Pursuant to the interim decision of the Constitutional Court dated 30 December 2013, the Security General Directorate's decision dismissing the applicant's request for asylum and ordering his deportation was suspended; that the applicant was released on 7 January 2014 and granted the residence permit issued for the foreigners; and that as the applicant was notified, during his release, to regularly append signature at the Yalova Foreginers' Department on each Friday, he has been appending signature at the Security Directorate on a regular basis".*

22. The deportation order given in respect of the applicant was suspended, and residence permit for the foreigners were issued and given to him. Within this period, the relevant articles of the Law no. 6458 on Foreigners and International Protection dated 4 April 2013, which were specified to enter into force one year after the promulgation of this Law in the Official Gazette pursuant to Article 125 § 1 (b) thereof, and accordingly Article 53 § 3 thereof entered into force on 11 April 2014. Article 53 § 3 of this Law reads as follows: *"Foreigner, legal representative or lawyer may object to the deportation decision to the administrative court within fifteen days as of the date of notification. The person who has appealed against the decision to the court shall also inform the authority that has ordered the deportation regarding the objection. Such objections shall be concluded within fifteen days. The decision of the court on the objection shall be final. Without prejudice to the foreigner's consent, the foreigner shall not be deported during term of litigation or, in case of recourse to a judicial remedy, until the conclusion of proceedings.*

B. Relevant Law

23. Article 53 of the Law dated 4 April 2013 and no. 6458 and entering into force upon being promulgated in the Official Gazette dated 11 April 2013 and no. 28615 reads as

follows (Article 53 of the Law entered into force on 11 April 2014 pursuant to Article 125 thereof):

"(1) A deportation decision shall be issued either upon the instruction of the Directorate General or ex officio by the governorships.

(2) The [deportation] decision together with the grounds thereof shall be notified to the foreigner, in respect of whom a deportation decision has been issued or, to his/her legal representative or lawyer. If the foreigner, in respect of whom the deportation decision has been issued, is not represented by a lawyer, the foreigner or his/her legal representative shall be informed about the consequence of the decision, procedures and time limits for objection.

(3) "Foreigner, legal representative or lawyer may object to the deportation decision to the administrative court within fifteen days as of the date of notification. The person who has appealed against the decision to the court shall also inform the authority that has ordered the deportation regarding the objection. Such objections shall be concluded within fifteen days. The decision of the court on the objection shall be final. Without prejudice to the foreigner's consent, the foreigner shall not be deported during term of litigation or, in case of recourse to a judicial remedy, until the conclusion of proceedings."

24. Article 58 § 1 of the Law no. 6458 entitled *"Removal centres"* and entering into force on 11 April 2014 pursuant to Article 125 of the same Law reads as follows:

"Foreigners subject to administrative detention shall be held in removal centres."

25. Articles 17 and 23 of the Law on Residence and Travel of Foreigners in Turkey no. 5683 which was abolished by Article 124 § 1 of the Law no. 6458 are as follows:

"Article 17 – Foreigners taking refuge in Turkey due to political reasons may reside only in places allowed by the Ministry of Internal Affairs."

"Article 23 – Those in respect of whom a decision for deportation has been taken but who cannot leave Turkey for not being able to obtain passport or for any other reasons are to reside in the place to be designated by the Ministry of Internal Affairs."

26. Article 3 of the *"European Convention on Establishment"* signed on 13 December 1955 and found appropriate to be ratified by the Law dated 12 April 1989 and no. 3527 reads as follows:

" 1. Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against ordre public or morality.

2 Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.

3 Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this article are of a particularly serious nature."

27. Article 13 of the International Covenant on Civil and Political Rights of the United Nations reads as follows:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

28. Relevant parts of the Standards on the Foreign nationals detained under aliens legislation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment read as follows:

"... In the view of the CPT, in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel.

Such centres should provide accommodation which is adequately-furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. Further, care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment. As regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games,

table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them.

…

79. Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants should have … and should be restricted in their freedom of movement within the detention facility as little as possible."

29. Principles 1 and 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly of the United Nations by its resolution dated 9 December 1988 and no. 43/173 are as follows:

*"**Principle 1- Obligation of treatment in a humane manner***

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person."

*"**Principle 4- Judicial review of detention or the other measures***

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority."

30. Paragraphs 1, 2 and 4 (f) of the Resolution no. 44 on the *"Detention of Refugees and Asylum-Seekers"* issued by the Executive Committee of the UNHCR read as follows:

"The Executive Committee,

Recalling Article 31 of the 1951 Convention relating to the Status of Refugees.

…

(f) Stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered;"

31. Article 33 of the Convention relating to the Status of Refugees reads as follows:

"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on

account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

IV. ASSESSMENT AND GROUNDS

32. At the meeting held on 21 January 2015, the applicant's individual application which was dated 27 December 2013 and numbered 2013/9673 was examined, and the Constitutional Court accordingly concluded the followings.

A. The Applicant's Allegations

33. The applicant alleged that there was a breach of the following articles and accordingly claimed compensation.

i. He maintained that as he did not have a passport, an order for his deportation was given without awaiting for the outcome of the application he had lodged with the UNHCR for granting a status for asylum-seeker; that according to this order, he would be deported to his country, namely Algeria, where he had been previously taken into custody by police for acting as a leader of the protest organized by the formation called *"Rachad Movement"* and subject to torture and ill-treatment, he had been incarcerated, he was under prosecution and sought for currently being one of the founders of the opposing political movement and where criminal proceedings were conducted in his absentia. He was accordingly alleged that in case of his deportation, he would be probably sentenced to death penalty and he would face with the risk of being subject to torture and ill-treatment. He further indicated that in case of being forcibly sent by the Turkish Government to Algeria, this would lead to a breach of the non-refoulment principle set forth in Article 33 of the Geneva Convention and of Article 3 of the United Nations Convention against Torture to which Turkey was also a party. He also asserted that there was no effective remedy in the domestic law in respect of the act of deportation; and that as his wife and children were residing in Yalova, their family unity would come to an end. He accordingly alleged that Article 13 of the European Convention on Human Rights ("the Convention") and Articles 17, 40 and 41 of the Constitution were violated.

ii. He indicated that he was taken into custody on 3 November and placed in administrative custody at the Foreigners' Department of the Yalova Security Directorate as he had no passport without existence of a custody order or arrest warrant issued by a judicial authority in his possession and held at this Department until 7 January 2014; that although he was not exposed to any ill-treatment or physical violence by the public officers during that period, he was held in an unventilated, noisy and smoking place which was not directly getting daylight; that he was not provided with treatment services in a healthy manner and he was not allowed to get fresh air; and that he was not provided with opportunity for physical exercise and was subject to poor physical conditions. He accordingly maintained that he was deprived of his liberty for 68 days during which he was placed in the custody room at the Foreigners' Department of the Yalova Security Directorate where he had been taken only for being a foreigner and having no passport; that under the Turkish law, it was not possible to claim compensation as a foreigner's deprivation of liberty for administrative grounds was not deemed as a custody or detention by the judicial authorities; that there was no statutory review in respect of *"administrative custody"*; that he was not immediately or subsequently informed of the ground(s) for his custody; and that he was held in custody in an indefinite manner and there was no remedy through which an objection may be raised to this order. He accordingly claimed that Articles 3, 5 and 13 of the Convention and Articles 17, 19 and 20 of the Constitution were violated.

B. Assessment

34. Although the applicant maintained that there was a breach of Articles 17, 19, 20, 40 and 41 of the Constitution, the Constitutional Court which is not bound by the legal qualification of the applicant made its assessment within the scope of Articles 17 and 19 of the Constitution.

1. Admissibility

a. Alleged Violation of Article 17 of the Constitution for lack of effective remedy in respect of the act of deportation; the risk of being subject to torture and ill-treatment in the event that the applicant would be deported; and poor physical conditions of the place where he was placed in administrative custody

35. The applicant maintained that an action to be brought for the stay of execution of the deportation order did not automatically suspend the act of deportation unless a decision for

the stay of execution was rendered; that besides, the act of deportation may be executed until a decision for the stay of execution would be rendered. He accordingly alleged that there was no effective remedy in respect thereof.

36. The Ministry of Justice has indicated that the applicant's complaint in respect of the allegations asserted in the letter of application is examined by the European Court of Human Rights ("the ECtHR") within the scope of Articles 3 and 5 § 4 of the Convention.

37. The applicant reiterated his allegations in the application form and did not submit a new argument in respect thereof.

38. In the examination of individual applications, the joint protection sphere of the Constitution and the Convention is taken as a basis in determining whether an alleged violation falls within the Constitutional Court's jurisdiction *ratione materiae* (see the individual application no. 2012/1049, 26 March 2013, § 18). The right to an effective remedy is enshrined in Articles 40 and 13 of the Constitution and Convention, respectively.

39. Having regard to the expressions included in the above-mentioned articles, it is not possible to assess the applicant's allegations that his right to an effective remedy had been violated in an abstract manner, and such allegations must be certainly dealt with in conjunction with the other fundamental rights and freedoms set forth in the Constitution and the Convention. In other words, the question as to in respect of which fundamental right and freedom the right to an effective remedy was violated must be answered with a view to discussing whether there was a breach of the right to an effective remedy (see the individual application no. 2012/1049, cited-above, § 33).

40. In the present incident, the essence of the applicant's allegations concerns the inability of an action which would be brought for the stay of execution of the deportation order to automatically suspend the deportation order unless a decision for the stay of execution is rendered; the poor physical conditions of the place where the applicant was placed in administrative custody for being deported; and the fact that he would be subject to torture and ill-treatment in case of being deported to his country. These allegations of the applicant must be examined under Article 17 of the Constitution.

41. Both Article 148 of the Constitution and Article 45 § 1 of the Code no. 6216 set forth that everyone may apply to the Constitutional Court on the ground that one of the

fundamental rights and freedoms guaranteed by the Constitution and falling within the scope of the European Convention on Human Rights and additional protocols thereto of which Turkey is a party has been violated by public authorities.

42. Last sentence of Article 148 § 3 of the Convention is as follows:

"In order to make an application, ordinary legal remedies must be exhausted."

43. In Article 48 § 2 of the Law no. 6216, it is set out that the applications which are manifestly ill-founded may be declared inadmissible by the Constitutional Court.

44. Pursuant to the above-mentioned provisions of the Constitution and the Law, the ordinary legal remedies must be exhausted for having recourse to the Constitutional Court through individual application. Respect for the fundamental rights and freedoms is a constitutional duty of all organs of the State, and it is the duty of the administrative and judicial authorities to redress the right violations occurring due to neglect of this duty. Therefore, an alleged violation of the fundamental rights and freedoms must be raised primarily before the inferior courts and examined and resolved by these tribunals (see individual application no. 2012/403, 26 March 2013, § 16).

45. Having recourse to the remedy of individual application before the Constitutional Court does not have a bearing on the implementation of the impugned acts and decisions. However, if implementation of an act or decision would lead to a serious risk of constituting a violation of the individual's constitutional rights, the Constitutional Court is vested, by the Law no. 6216, with the authority to render an interim decision for the prevention of this risk. In this respect, the authority to rule on an interim measure is an exceptional power, and an interim measure may be indicated only when implementation of the act or the decision would result in a real and serious risk for the individual's right to life or his/her material and spiritual integrity.

46. On the other hand, due to the subsidiary nature of the individual application mechanism, the ordinary legal remedies must be primarily exhausted for lodging an individual application with the Constitutional Court. Pursuant to this provision, the applicant must duly raise his complaint, which would be brought before the Constitutional Court, primarily before the competent administrative and judicial authorities on time; must timely adduce his evidence and information on this matter before these authorities; and must also show due diligence in order to pursue his case or application during this period. In principle, it is not possible for the

Constitutional Court to accept and examine an individual application before the available remedies are exhausted. However, if the exhaustion of available remedies do not have a bearing on the elimination of the violation of the applicant's right; in other words, the remedy to be resorted is ineffective, or in case of awaiting for the exhaustion of available remedies, there would occur serious and irreparable risk for the applicant's rights, the principle of the respect for the constitutional rights may require the Constitutional Court to examine such applications (individual app. no. 2013/1243, 16 April 2013, § 24).

47. In the impugned incident, maintaining that in case of being deported, his right to life guaranteed by Article 17 of the Constitution may be endangered and he may face with the risk of being subject to torture and ill-treatment, the applicant requested the Constitutional Court to indicate an interim measure. Accordingly, an assessment was made by the Section concerning the applicant's request. On 31 December 2013, the Section decided, by a majority vote, to accept the applicant's request for an interim measure by having regard to the fact that there was currently no mechanism which would automatically suspend the deportation order as the Law no. 6458 would enter into force on 11 April 2014 and as the applicant's allegations that in case of his deportation to Algeria, he would face with a serious risk in respect of his life and his material and spiritual entity in his country were taken serious.

48. Following the acceptance of the request for an interim measure by the Section, Article 53 of the Law no. 6458 entered into force on 11 April 2014, and through paragraph 3 of this article in which it is set forth *"...without prejudice to the foreigner's consent, the foreigner shall not be deported during term of litigation or, in case of recourse to a judicial remedy, until the conclusion of proceedings...",* the mechanism enabling automatic suspension has been introduced.

49. By the Law no. 6458, the legislator put into force a protection mechanism by which it is envisaged that, in case of an deportation order that is, beyond any doubt, an administrative act, foreigners could not be deported within the term of litigation or, in case of recourse to a judicial remedy, until the conclusion of proceedings and which is compatible with international law texts and also guaranteed by Article 33 of the Convention relating to the Status of Refugees.

50. Although it could be said it was possible, before 11 April 2014 when the Law was put into effect, to request the stay of execution of a deportation order before the administrative

courts and in case of acceptance of this request, the deportation order may be suspended at least until the acceptance of an objection to be raised against the decision for the stay of execution or, in case of dismissal of the objection, until a decision as to the merits would be taken, there was no mechanism automatically coming into play for the protection of the fundamental rights and freedoms. In this respect, the procedure which was put into use by 11 April 2014 and through which foreigners cannot be deported within the term of litigation and, in case of having recourse to a judicial remedy, until the conclusion of the proceedings has automatically introduced a safer mechanism for the protection of the fundamental rights and freedoms.

51. In principle, the establishment of a new legal remedy for the elimination of the impugned violation after an individual application is lodged does not require the applicant to exhaust this new remedy under normal conditions. However, the Constitutional Court may request the applicant to exhaust the available remedies if the applicant has been provided with the opportunity to resolve his complaints forming a basis for the alleged violation through a more effective mechanism.

52. It has been observed that by the legal arrangement in Article 53 of the Law no. 6458 entering into force on 11 April 2014 subsequent to the interim decision and envisaging that foreigners could not be deported within the term of litigation or, in case of recourse to a judicial remedy, until the conclusion of proceedings, the legislator has introduced in the domestic law a new remedy which is more effective, rapid and does not require any prerequisite and which could serve for the protection of the applicant's fundamental rights and freedoms in a more effective manner and may offer a solution for a structural problem.

53. It has been comprehended that in principle, an effective mechanism was established, in respect of the deportation orders, by the legal arrangement specified in Article 53 of the Law no. 6458 and setting out that a foreigner cannot be deported within the term of litigation or, in case of recourse to a judicial remedy, until the conclusion of proceedings.

54. Moreover, on the basis of the interim decision taken by the Constitutional Court on 30 December 2013 upon the individual application lodged by the applicant requesting imposition of an interim measure, the applicant was released on 7 January 2014 and granted a residence permit for foreigners which would be valid between 6 January 2014 and 6 July 2017. On page 7 of this permit, it is stated *"the holder of this permit and those whose names are written in the section of accompanying persons may reside in Turkey within the limits of law*

and order". Pursuant to this residence permit, there has been no obstacle for the applicant's residence in Turkey. In case of failure to extend the term of this residence permit or in the event that it is considered invalid for any reason, the applicant has the opportunity to bring an action in respect thereof in the administrative jurisdiction. Furthermore, in the event that a new order is given by the administration for deportation of the applicant, the applicant may avail himself of a protection mechanism of automatic suspension by following the process which is explained in detail above (§ 34,35).

55. Accordingly, it has been observed that even if being established subsequent to lodging of the individual application, a new remedy which is more effective, practicable for the protection of the applicant's fundamental rights and freedoms and which is accessible and offers rapid and effective solutions in a manner which would enable the elimination of the applicant's complaints was introduced by the legislator. On the other hand, it cannot be mentioned that there is an administrative / judicial practice which would demonstrate that this remedy is ineffective for the protection of the fundamental rights and freedoms. As a new act of deportation has not been performed or *de facto* deportation of the applicant is not in question, this part of the application must be declared inadmissible for *"being manifestly ill-founded"*.

56. The applicant maintained that after he had been arrested in 2003 when he entered Turkey for the first time and deported to his country Algeria, his foot was broken during the period he was held in the Serkadj, El-Heraş, El-Belide and Berhaviye prisons located in this country and he was thereby subject to torture and ill-treatment; and that if he was deported to his country, he would be once again subject to torture and ill-treatment.

57. The applicant made an application to the Istanbul Representation Office of the Human Rights Foundation of Turkey for proving the torture he had been exposed to in the past in his country. Upon the request of this Foundation, a report was issued by the Forensic Medicine Department of the Istanbul Medical Faculty. In the report dated 20 June 2014 and protocol no. 2014.045 R, it is stated *"... the applicant was subject to trauma caused by human, which must be considered to fall within the scope of torture and the other inhuman or degrading treatment classified, by the International Classification of Diseases of the World Health Organization, with code Y07.3 within the scope of ICD 10"*.

58. Although the applicant claimed by relying on this report that he would be tortured and ill-treated in case of being deported, the Constitutional Court has held that the applicant's

complaint must be declared inadmissible for being *"manifestly ill-founded*" on the ground that there is currently no act for his deportation and that in case of performance of such an act by the administration in future, the above-mentioned protection mechanism may be put into operation.

59. On the other hand, the applicant maintained that his health deteriorated and his mental state adversely affected as the custody room of the Foreigners' Department of the Yalova Security Directorate, where he was placed in administrative custody for being deported, was an unventilated, noisy and smoking place which was not directly getting daylight and where he was not provided with treatment services in a healthy manner, he was not allowed to get fresh air, he was not provided with opportunity for physical exercise and where he was subject to poor physical conditions. He accordingly alleged that his asthma and bronchitis from which he had been suffering had deteriorated. He therefore maintained that there was a breach of Article 17 of the Constitution.

60. As in the present incident, it is possible for the applicant to be arrested and detained in accordance with the procedure manner and conditions of which are specified in the law as the act of deportation is still being executed. Ill-treatment must attain a minimum level of severity if the physical conditions under which a foreigner is placed under administrative custody are to fall within the scope of Article 3 of the Convention and Article 17 of the Constitution. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (for a similar judgment of the ECtHR, see *Kafkaris v. Cyprus*, no. 21906/04, 12 February 2008, § 95).

61. If a treatment is to be "inhuman", it must be premeditated and has caused either actual bodily injury or intense physical or mental suffering whereas if a treatment is to be "degrading", it must cause the victims to feel fear, anguish and inferiority capable of humiliating and debasing them. On the other hand, the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (for a similar judgment of the ECtHR, see *Kudła v. Poland*, no. 30210/96, 26 October2000, § 92).

62. In determining whether a punishment or treatment is *"degrading"* within the meaning of Article 3 of the Convention, it must be assessed whether the aim of this punishment

or treatment is to offend and degrade the person concerned and, given their effects, whether the measure in question has had a bearing on the personality of the concerned, which is in breach of Article 17 of the Constitution and Article 3 of the Convention. However, non-existence of such an aim does not certainly set aside the probable violation of this provision, and in order for a punishment or treatment associated with it to be "*inhuman*" or "*degrading*", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (for a similar judgment of the ECtHR, see *Ramirez Sanchez v. France,* no. 59450/00, 4 July 2006, § 157).

63. Although the applicant maintained that his placement in administrative custody deteriorated his pre-existing health problems, it has been observed that the applicant was referred to a hospital upon falling sick and ensured to get necessary medical care; and that thereby the requirement that physical and mental health of the person held in administrative custody must be protected has been complied with (for similar judgments of the ECtHR, see *Mouise v. France*, no. 67263/01, 14 November 2002, §40; *Keenan v. the United Kingdom,* no. 27229/95, 3 April 2001, § 111).

64. Consequently, as a result of the assessment made under the particular circumstances of the present incident, it has been concluded that the situation to which the applicant was exposed for being held in administrative custody did not attain a minimum level of severity for being qualified as inhuman or degrading treatment. It has been therefore held that such allegations of the applicant are found to be manifestly ill-founded.

b. Alleged violation of Articles 19 and 40 of the Constitution for his being held in administrative custody and non-existence of an effective domestic remedy whereby he could object thereto

65. In the present incident, the applicant asserted that his placement in administrative custody in the custody room of the Yalova Foreigners' Department did not have a legal basis; and that there was no effective remedy by which he could raise an objection thereto. These allegations must be examined within the framework of Article 19 §§ 2 and 8 of the Constitution.

66. The applicant's complaint that there was a breach of Article 19 §§ 2 and 8 of the Constitution is not manifestly ill-founded; nor are any of the other admissibility grounds

applicable to these complaints. Therefore, the Constitutional Court has declared this part of the application admissible.

2. Merits

67. The applicant maintained that he had been placed in administrative custody by the administration to be deported; however, there was no legal arrangement concerning the issues such as the grounds, duration and review of the administrative custody and etc.

68. In its observations, the Ministry of Justice has "referred to judgments rendered by the ECtHR on various dates concerning the measure of administrative custody (detention) and has indicated that these applications were dealt with under Article 5 §§ 1, 2 and 4 of the Convention.

69. The applicant reiterated his previous statements in reply to the observations submitted by the Ministry of Justice and did not make any new statement.

70. Article 19 §§ 1, 2 and 8 of the Constitution reads as follows:

"Everyone has the right to liberty and security of person.

No one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law:

Execution of sentences restricting liberty and the implementation of security measures decided by courts; arrest or detention of an individual in line with a court ruling or an obligation upon him designated by law; execution of an order for the purpose of the educational supervision of a minor, or for bringing him/her before the competent authority; execution of measures taken in conformity with the relevant provisions of law for the treatment, education or rehabilitation of a person of unsound mind, an alcoholic, drug addict, vagrant, or a person spreading contagious diseases to be carried out in institutions when such persons constitute a danger to the public; arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued.

(...).

Persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful."

71. Article 5 §§ 1 (f) and 4 of the Convention reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...)

F)the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(...)

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

72. In Article 19 § 1 of the Constitution, it is set forth that everyone has the right to liberty and security of person, and the second paragraph of the same article sets out that individuals may be deprived of their liberty provided that the procedure and conditions thereof are prescribed by law. The eighth paragraph therein sets out that "*persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful"*. Thereby the right to have recourse to a competent judicial authority against the deprivation of liberty has been envisaged in the law. Moreover, Article 5 § 1 and 4 sets forth that everyone has the right to liberty and security and that in case of deprivation of liberty, those concerned are entitled to apply to a tribunal which would assess the lawfulness of his/her detention and, if his detention is not lawful, which could order his/her release.

73. The authority to place someone in administrative custody is an exceptional power acknowledged by Articles 5 and 19 of the Convention and the Constitution, respectively. Accordingly, a foreigner may be arrested and held in custody in accordance with the procedure manner and conditions of which are prescribed by law as the act of his deportation is being conducted.

74. The administrative custody must be lawful and must not constitute an arbitrary treatment as it is an exceptional process and results in deprivation of liberty. Moreover, this measure must be reviewed to the extent considered necessary and reasonable by a democratic

state of law, its conditions must be in compliance with generally accepted standards and must not constitute a humiliating, degrading and inhuman treatment. Furthermore, those placed in administrative custody must be provided with fundamental procedural rights and safeguards. By the above-mentioned provisions of the Constitution and the Convention, the legislator has intended to create a more secure legal status for personal liberty by envisaging that, in certain cases which would lead to deprivation of liberty, the manner and conditions of this deprivation must be prescribed by law.

75. As regards the impugned dispute, it has been revealed that there was no clear legal arrangement in the legislation concerning the applicant's placement in administrative custody resulting in his deprivation of liberty for an indefinite period of time; and that the applicant was deprived of liberty although there was no conviction decision rendered in his respect.

76. According to Article 16 of the Constitution, the foreigners' fundamental rights and freedoms may be restricted by law in compliance with international law. That being said, the administrative custody resulting in deprivation of liberty must be prescribed by law, and the principles and procedures set out by law must comply with international law. Although the legal basis for the administrative custody is shown to be Article 23 of the Law on Residence and Travel of Foreigners which was in force at the relevant time, this article does not include any provision with respect to the administrative custody, and the conditions of administrative custody, its duration, extension thereof, notification of this process to the concerned, the remedies through which an objection may be raised to administrative custody, access of the person held in administrative custody to a lawyer and the right to get assistance of an interpreter are not prescribed therein. On the other hand, although the administrative custody has led to the individual's deprivation liberty, it is not considered to correspond to *"detention on remand"* within the meaning of the Code of Criminal Procedure no. 5271. Therefore, there is no effective remedy for raising an objection to the decision ordering administrative custody.

77. In this respect, it has been revealed that the act of administrative custody has no legal basis; and that this act relied on Article 4 of the Passport Law no. 5682 and Article 23 of the Law on Residence and Travel of Foreigners, which were in force within the period during which he was held in custody, set forth that foreigners having no identity document and entering Turkey through illegal means would reside in places to be designated by the administration. It has been also observed that these articles do not vest the administration with the authority to place the foreigner in administrative custody (for similar judgments of the

ECtHR, see *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, 22 September2009; *ZNS v. Turkey*, no. 21896/08, 28 June 2010; *Charahili v. Turkey*, no. 46605/07, 13 April 2010; *Keshmiri v. Turkey*, no. 22426/10, 17 April 2012; *Dbouba v. Turkey*, no. 15916/09, 13 October 2010; *Ahmadpour v. Turkey*, no. 12717/08, 22 November 2010; and *Ranjbar and others v. Turkey*, no. 37040/07, 13 July 2010).

78. In the first subparagraph of Article 19 § 2 of the Constitution, it is envisaged that no one may be deprived of his liberty except in the case of arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued. It is accordingly possible to duly arrest or detain a person in case of existence of legal conditions. However, it is beyond any doubt that in order to prevent this form of deprivation of liberty from resulting in a violation of one of the fundamental rights and freedoms, manner and conditions of such deprivation must be in accordance with the procedure set out and defined in the law. Given the fact that there is no clear legal arrangement concerning the placement of the applicant, who was decided to be deported for having no passport, in administrative custody, it cannot be concluded that the administrative custody in the present case is *"lawful"*.

79. For these reasons, it must be held that there was a breach of Article 19 §§ 2 and 8 of the Constitution in respect of the applicant's complaint that *"there is no clear legal arrangement concerning the conditions and duration of administrative custody, extension thereof, notification of this process to the concerned, the remedies through which an objection may be raised in respect of administrative custody, access of the person held in administrative custody to a lawyer and having assistance of an interpreter"*.

3. Article 50 of the Law no. 6216

80. Maintaining that his right to liberty and security was violated, the applicant requested the Court to award 30,000 Turkish Liras ("TRY") as non-pecuniary compensation for the redress of non-pecuniary damage suffered by him.

81. In its observations, the Ministry of Justice has not submitted any observation concerning the applicant's compensation claim.

82. Article 50 §§ 1 and 2 of the Law no. 6216 entitled *"Decisions"* reads as follows:

"1) At the end of the examination of the merits it is decided either the right of the applicant has been violated or not. In cases where a decision of violation has been made

what is required for the resolution of the violation and the consequences thereof shall be ruled (...)

2) If the violation found established 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 eliminated. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour 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 case-file, if possible, in a way that will eliminate the violation and the consequences thereof as indicated by the Constitutional Court in its judgment."

83. The applicant claimed non-pecuniary compensation. Accordingly, it has been concluded a net amount of TRY 5,000.00 be awarded, in the Constitutional Court's discretion, for redress of the non-pecuniary damages which have been suffered by the applicant and which could not be redressed by only finding a violation of the applicant's right to liberty and security.

84. It has been concluded that a total amount of TRY 1,698.35 which consists of an application fee of TRY 198.35 and a counsel's fee of TRY 1,500.00 and which was paid by the applicant and determined according to the documents in the file be paid to the applicant as the court expense.

85. It has been held that a copy of this judgment be sent to the Directorate General of Immigration Authority of the Ministry of Internal Affairs and to the Yalova Security Directorate.

V. JUDGMENT

For the above-mentioned reasons, the Constitutional Court has **UNANIMOUSLY** held on 21 January 2015 that

A. The applicant's

1. Allegations that *"there is no effective remedy in respect of the act of deportation; the physical conditions of the place where he was held in administrative custody for being deported were poor; and that in case of his deportation, his right to protect his material and spiritual entity was / would be violated"* be **DECLARED INADMISSIBLE** for *"being manifestly ill-founded"*;

2. Allegation that *"there is no clear legal arrangement concerning the conditions and duration of administrative custody, extension thereof, notification of this process to the concerned, the remedies through which an objection may be raised in respect of administrative custody, access of the person held in administrative custody to a lawyer and having assistance of an interpreter"* be **DECLARED ADMISSIBLE**;

B. Article 19 §§ 2 and 8 of the Constitution was **VIOLATED** in respect of the applicant's complaints that *"there is no clear legal arrangement concerning the conditions and duration of administrative custody, extension thereof, notification of this process to the concerned, the remedies through which an objection may be raised in respect of administrative custody, access of the person held in administrative custody to a lawyer and having assistance of an interpreter".*

C. A net amount of TRY 5,000.00 be paid to the applicant as **NON-PECUNIARY COMPENSATION**, and his compensation claims for surplus be dismissed.

D. A total amount of TRY 1,698.35 which consists of an application fee of TRY 198.35 and a counsel's fee of TRY 1,500.00 and which was paid by the applicant and determined according to the documents in the file be **REIMBURSED TO THE APPLICANT** as the court expense.

E. A copy of this judgment be sent to the Directorate General of Immigration Authority of the Ministry of Internal Affairs and to the Yalova Security Directorate.

F. The payment would be made within four months following the date of application to be made to the Ministry of Finance upon the service of this judgment; and in case of any delay in payment, a statutory interest would be charged for the period from the expiration date of the prescribed period to the payment date.