REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

DECISION

Application No: 2014/912

Date of Decision: 6/3/2014

SECOND SECTION

DECISION

President	:	Alparslan ALTAN
Members	:	Engin YILDIRIM
		Celal Mümtaz AKINCI
		Muammer TOPAL
		M. Emin KUZ
Rapporteur	:	Muharrem İlhan KOÇ
Applicant	:	Mehmet İlker BAŞBUĞ
Counsels	:	Att. Prof. Dr. Fatih Selami MAHMUTOĞLU
		Att. İlkay SEZER

I. SUBJECT OF APPLICATON

1. The applicant asserts that his personal liberty and security, which are guaranteed by article 19 of the Constitution, were breached in the process of investigation and prosecution against himself due to his being under detention starting from the date of 6/1/2012.

II. APPLICATION PROCESS

2. The application was directly lodged by the attorney of the applicant to the Constitutional Court on 22/1/2014. As a result of the preliminary examination that was carried out on administrative grounds, it was determined that there was no situation to prevent the submission of the application to the Commission.

3. It was decided by the Third Commission of the Second Section on 22/1/2014 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. The facts and cases, which are the subject matter of the application, were notified to the Ministry of Justice on 24/1/2013. The Ministry of Justice presented its opinion in relation to the application to the Constitutional Court on 24/2/2014.

5. The opinion of the Ministry of Justice was notified to the applicant on 25/2/2014. The applicant submitted his statements against the opinion of the Ministry of Justice to the Constitutional Court on 26/2/2014.

III. CASES AND FACTS

A. Facts

6. After serving the duty of the Chief of General Staff of the Turkish Armed Forces between 2008-2010, the applicant retired with the rank of General.

7. Within the scope of the court case that was tried in the file numbered Merits 2010/106 of the 13th Assize Court of Istanbul and is publicly known as *"the case of Internet memorandum"*, the Court decided in the hearing dated 30/12/2011 that a letter be written to the Chief Public Prosecutor's Office of Istanbul for the evaluation and performance of due action about the former Chief of General Staff, the name of whom is mentioned in the statements of the accused in relation to defense and the documents.

8. Within the scope of the investigation that is initiated by the Chief Public Prosecutor's Office of Istanbul, upon the notification made to the counsel of the applicant, the statement of the applicant was taken on 5/1/2012 for the crimes of *"attempting to extirpate the Government of the Republic of Turkey or preventing it from doing its duties through the use of force and violence"* and *"founding and leading an armed terrorist organization"* that are regulated in articles 312 and 314 of the Turkish Criminal Code. Due to the said crimes, the public prosecutor referred the applicant to the court with a request that the applicant be detained.

9. The applicant was detained for the crimes of *"attempting to extirpate the Government of the Republic of Turkey or preventing it from doing its duties through the use of force and violence"* and *"founding and leading an armed terrorist organization"* with the decision of the 12th Assize Court of Istanbul dated 6/1/2012 and numbered Inquiry 2012/10.

10. The indictment dated 2/2/2012 that was issued by the Chief Public Prosecutor's Office of Istanbul in relation to the crimes that were attributed to the applicant was accepted by the 13th Assize Court of Istanbul and a public action was filed in the file numbered Merits 2012/14. Since the joinder of the case in the file of the Court numbered Merits 2010/106 was requested in the indictment, the case was joined in the file of the same Court numbered Merits 2010/106.

11. The applicant who was tried in the file of the 13th Assize Court of Istanbul numbered Merits 2010/106 attended hearing for the first time on 26/3/2012. The applicant objected to the competence of the court within the scope of trial, this objection was rejected by the Court.

12. The 13th Assize Court of Istanbul joined the case in which the applicant was also being tried (file numbered Merits 2010/106) in the file numbered Merits 2009/191 which is publicly known as the *"Ergenekon case"*. The applicant requested that the decisions of joinder be reneged on and the files be separated, this request was rejected by the 13th Assize Court of Istanbul.

13. In the file numbered Merits 2009/191, the 13th Assize Court of Istanbul pronounced the judgment in the hearing on 5/8/2013 and, stating that the actions of the applicant as a whole constituted the crime of *"attempting to extirpate the Government of the Republic of Turkey or preventing it from doing its duties through the use of force and violence"*, decided only in terms of this crime that the applicant be penalized with lifelong imprisonment and his state of detention be continued. The applicant was not separately penalized for the crime of *"founding and leading an armed terrorist organization"*.

14. On 12/8/2013, the applicant objected to the decision of de jure detention that is made together with the decision of conviction, the objection was rejected with the decision

dated 22/8/2013 and numbered Miscellaneous Action 2013/553 of the 14th Assize Court of Istanbul.

15. The reasoned decision in relation to the judgment that was pronounced has not been included in the case file yet.

16. The applicant placed a request for release in the period when he was detained de jure following the decision of conviction, the 13th Assize Court of Istanbul decided through its decision dated 31/12/2013 and numbered Miscellaneous Action 2013/872 that there were no grounds to make a decision on the request on the grounds that *"the prosecution phase was completed and a decision was made to reject the objection against the decision of de jure detention"*.

17. The objection made against this decision was rejected with the decision dated 20/1/2014 and numbered Miscellaneous Action 2014/99 of the 14th Assize Court of Istanbul.

B. Relevant Law

18. The last sentence of paragraph one of article 145 of the Constitution is as follows:

"*Cases regarding offenses against the security of the State, the constitutional order and the functioning of this order are heard by courts of justice in any case."*

19. Paragraph seven of article 148 of the Constitution is as follows:

"The Chief of General Staff, the Commanders of the Army, Navy and Air Force and the General Commander of the Gendarmerie are also tried at the Supreme Criminal Tribunal due to offenses in relation to their duties."

20. Article 3 of the Code on the Fight Against Terrorism dated 12/4/1991 and numbered 3713 is as follows:

"The crimes that are written in articles 302, 307, 309, 311, 312, 313, 314, 315 and 320 and in paragraph one of article 310 of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 are crimes of terrorism."

21. Paragraphs one and two of article 10 of the Code numbered 3713 is as follows:

"The court cases that are filed due to crimes that fall within the scope of this Code shall be heard in assize courts that are to be given competence in the provinces to be determined by the High Council of Judges and Prosecutors upon the proposal of the Ministry of Justice in a way that the jurisdiction may cover more than one province. The presidents and members of these courts cannot be assigned by the justice commission of judicial court to courts or work other than these courts.

Provisions in relation to persons whom the Constitutional Court and the Supreme Court of Appeals will try and provisions in relation to the duties of military courts shall be reserved."

22. Article 105 of the Code dated 2/7/2012 and numbered 6352 is as follows:

"The following provisions shall be abolished:

...

6) Articles 250, 251 and 252 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271,"

23. Paragraphs (4) and (7) of Provisional article 2 of the Code numbered 6352 is as follows:

"(4) The cases that are filed in the courts which are given competence in accordance with paragraph one of the repealed article 250 of the Code of Criminal Procedure shall continue to be heard by these courts until they are finalized with a final judgment. No decision of lack of venue or lack of competence can be made in these cases. The provisions in relation to prosecution of article 10 of the Code on the Fight Against Terrorism dated 12/4/1991 and numbered 3713 shall also be applied in these cases.

(7) References in the legislation that are made to the assize courts which are established in accordance with the first paragraph of article 250 of the Code of Criminal Procedure shall be considered to have been made to the assize courts that are stated in paragraph one of article 10 of the Code on the Fight Against Terrorism.

24. Article 100 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 is as follows:

"(1) A decision of detention can be made about the suspect or the accused in the presence of facts indicating the existence of strong suspicion of a crime and the presence of a ground for detention. A decision of detention cannot be made in the event that the importance of the case is not proportionate to the anticipated penalty to be given or the security measure.

(2) Grounds for detention may be considered to exist in the following circumstances:

a) The fact that the suspect or the accused escapes, hides or if there are concrete facts giving rise to the suspicion that the suspect or the accused will escape.

b) If the behaviors of the suspect or the accused give rise to strong suspicion on the matters of;

1. Destruction, concealment or alteration of evidence,

2. Making an attempt to exert pressure on the witness, the aggrieved or others.

(3) Grounds for arrest may be considered to exist in the presence of grounds for strong suspicions that the crimes below have been committed:

a) As stipulated in the Turkish Criminal Code dated 26.9.2004 and numbered 5237;

...

11. Crimes Against the Constitutional Order and the Operation of the Said Order (Articles 309, 310, 311, 312, 313, 314, 315),

25. Article 104 of the Code numbered 5271 is as follows:

"(1) The suspect or the accused can request to be released at every phase of the investigation and prosecution stages.

(2) The continuation of detention of the suspect or the accused or the release thereof shall be decided by the judge or the court. The decision of rejection can be opposed to.

(3) When the file comes before the regional court of justice or the Supreme Court of Appeals, the decision pertaining to the request of release shall be made following the examination on the file by the regional court of justice or the relevant chamber of the Supreme Court of Appeals or the General Penal Assembly of the Supreme Court of Appeals; the said decision can also be made ex officio."

26. Paragraph three of article 232 of the Code numbered 5271 is as follows:

"The justification of the judgment shall be put into the case file within fifteen days at the latest following its pronouncement if it has not been put into minutes completely."

27. Paragraphs (1) and (3) of (the repealed) article 250 of the Code numbered 5271 is as follows:

"(1) As stipulated in Turkish Criminal Code;

...

c) The cases that are filed due to the crimes that are defined in Chapters Four, Five, Six and Seven of Section Four of Book Two (excluding articles 305, 318, 319, 323, 324, 325 and 332),

shall be heard in assize courts that are to be given competence in the provinces to be determined by the High Council of Judges and Prosecutors upon the proposal of the Ministry of Justice in a way that the jurisdiction may cover more than one province.

(3) Regardless of their titles and positions, those who commit the crimes that are mentioned in paragraph one shall be tried in the assize courts which are given competence with this Code. Provisions in relation to persons whom the Constitutional Court and the Supreme Court of Appeals will try and provisions in relation to the duties of military courts shall be reserved"

IV. EXAMINATION AND JUSTIFICATION

28. The individual application of the applicant dated 22/1/2014 and numbered 2014/912 was examined during the session held by the court on 6/3/2014 and the following were ordered and adjudged:

A. Claims of the Applicant

29. In relation to personal liberty, the applicant claims that,

i. Paragraphs two and three of article 19 of the Constitution were violated due to the facts that the court which decided for detention and for the continuation of detention was not the court *"having competence"*, that the court having competence was the Constitutional Court with the title of Supreme Criminal Tribunal as per paragraph seven of article 148 of the Constitution, due to the fact that depriving from liberty *"was not in accordance with the procedure that was set forth by law"* within the scope of the legal guarantee of judge,

ii. As a person is an accused until the judgment is finalized and is thus legally *"detained"*, the facts that the requests for being released on the justification that the reasonable time period was exceeded were rejected by the judicial authority that did not have competence without indicating *"relevant"* and *"sufficient"* justification and by means of repeating legal terms and that the opportunity to be released by being

subject to judicial control was not taken into consideration violated paragraph seven of article 19 of the Constitution,

iii. Paragraph eight of article 19 of the Constitution was violated due to the fact that a decision was not made about the request for release after the judgment was rendered since the stage of prosecution continued until the final judgment was made.

B. Opinion of the Ministry of Justice and Statement of the Applicant

30. The relevant sections of the opinion of the Ministry of Justice within the scope of the definition of complaints are as follows:

"The applicant firstly claims that 'he was not tried by the court of venue and competence' (Application Form, pp. 4-6). When this claim is evaluated in terms of human rights adjudication, it is understood that the claim of the applicant is in relation to the right 'to be tried by a tribunal that is established by law' which is guaranteed in paragraph 1 of article 6 of the European Convention on Human Rights (ECHR). Therefore, it is evaluated that it would be appropriate to review this claim within the scope of 'the right to a fair trial' and within the framework of the provision of the ECHR mentioned above and paragraph 1 of article 37 of the Constitution which corresponds to this provision.

The applicant claims that he was deprived of his liberty by a court not having competence and asserts that paragraphs 2 and 3 of article 19 of the Constitution were violated. As a justification for this claim of his, he claims that the allegations about him are within the scope of duty crime and he needs to be tried before the Constitutional Court with the title of the Supreme Criminal Tribunal due to these crimes (Application Form, pp. 18-22). Our Ministry evaluates that these claims are strictly relevant to the claims in relation to the right "to be tried by a tribunal that is established by law" which is stated above (paragraph 3, above) and thus it is appropriate to review them together.

The applicant claims that the fact that he has been detained for months (post-sentence detention) on the basis of an unjustified decision despite the fact that the short decision (judgment) is pronounced by the court of first instance is contrary to paragraph 2 of article 19 of the Constitution (Application Form, pp. 22-23). On the basis of the regulation that the reasoned decision needs to be written within 15 days following the announcement of the short decision as per the provision of paragraph 3 of article 232 of the Code of Criminal Procedure, the applicant asserts that the principle that 'No one shall be deprived of his liberty save in accordance with a procedure prescribed by law' set forth in paragraph 1 of article 5 of the ECHR is violated due to the said reason.

The applicant requests that the case law of the Constitutional Court that is established so far be changed in the light of paragraphs 2 and 3 of article 19 of the Constitution and the provisions 1 a) and 1 c) of article 5 of the ECHR and his existing legal status be considered as

"detainee" in terms of also the Constitutional Court and claims that "the reasonable time period under detention was exceeded" within the meaning of paragraph 7 of article 19 of the Constitution. According to the applicant, until the judgment of conviction is finalized, a person who is tried should be considered as a "detainee" within the meaning of paragraph 3 of article 19 of the Constitution and his legal status should be considered as a "detainee" even if a decision of conviction about him was made by the court of first instance. The applicant also asserts the following justification as an alternative to this argument of his: [Added within the meaning of (ECHR a. 5 § 1 a)] The starting point for "detention based on judgment" "should not be the date of pronouncement of the judgment in relation to conviction with a short decision but the date of learning the reason of the judgment of conviction". As a result, the applicant asserts that the period of detention that he was subject to was not reasonable.

Our Ministry considers that it would be consistent with the case law of the ECtHR to qualify the complaints of the applicant that are summarized above within the framework of provisions of the ECHR a. 5 § 1 a), 5 § 1 c) and 5 § 3 and paragraphs 2, 3 and 7 of article 19 of the Constitution that corresponds to these provisions. However, it should be stated that the main complaint is that "the detention period is not reasonable" (ECHR a. 5 § 3 and Constitution a. 19 § 7) and the legal issue in relation to provisions 5 § 1 a) and 5 § 1 c) of the Convention and 19 §§ 2 and 3 of the Constitution emerges as the admissibility condition in relation to the examination of the said complaint when the date the application was filed is taken into consideration. In summary, the applicant asserts that the reasonable time period under detention was exceeded and the reasons of the decisions in relation to detention did not fulfill the requirement of being "relevant" and "sufficient", included non-personalized and cliche justifications, that the reason why the judicial control measure was insufficient was not described and that the trial process was not carried out prudently (Application Form, pp. 23-29).

Lastly, on the basis of paragraph 8 of article 19 of the Constitution, the applicant asserts that the decision dated December 31, 2013 of the 13th Assize Court of Istanbul did not fulfill the requirements of "habeas corpus" guarantee (ECHR a. 5 § 4) and thus the stated provision was violated.

It is considered that the claims of the applicant on the fact that his personal liberty was violated is within the framework of article 19 of the Constitution within the scope that the decisions on detention and the continuation of detention that are made at each stage, namely the investigation, trial and post-conviction decision, were made by courts that were not "competent", that the requests for release were turned down without indicating "relevant" and "sufficient" justification and that no decision was made on the request for release after the judgment was issued.

31. The statement of the applicant within this scope is as follows:

It is asserted that, unlike the opinion of the Ministry of Justice, with the claim that "he was not tried by a court having venue and competence", what was violated was not the right to fair trial but the provisions of article 19 of the Constitution that guarantee personal liberty and security.

Since deprivation from freedom still continues and within the framework of the matters that are indicated in the application, the objections in relation to lack of venue in terms of time and exceeding time periods need to be turned down."

32. The relevant sections of the opinion of the Ministry of Justice within the scope of general admissibility are as follows:

"It is submitted to the attention of the Constitutional Court that some parts of the complaints of the applicant in relation to the said right occurred before the date of September 23, 2012 (the date when its venue in terms of time started) which was the date for the Constitutional Court to accept individual applications and that such kind of complaints were met by an objection of "lack of venue in terms of time".

In relation to the complaint of the applicant on long detention, when the decisions of the ECtHR (ECtHR, Rahman v. Turkey, no.9572/05, February 15, 2011, par. 22; Zeki Şahin v. Turkey, no.28807/05, February 22, 2011, par. 26; Tokmak v. Turkey, no.16185/06, February 16, 2010, par. 27; Yiğitdoğan v. Turkey, no. 20827/08, March 16, 2010, par. 22) and the previous decisions of the Constitutional Court on this subject and the decision of the court of first instance dated August 5, 2013 in relation to merits are considered together, it is seen that the detention of the applicant [within the meaning of human rights trial] ended on August 5, 2013. When the date of application is taken into account, it is thought that the consideration on whether the complaint on long detention and the other complaints that were relevant to this were submitted to the Constitutional Court within the application period of 30 days is at the discretion of the Constitutional Court."

33. The relevant sections of the opinion of the Ministry of Justice within the scope of the complaint on court of competence are as follows:

"According to the provisions of 148/3 of the Constitution and of 45/2 of the Code numbered 6216, in order to be able to apply to the Constitutional Court via individual application, the usual legal remedies must be exhausted. For this reason, it is essential that the claims to the effect that fundamental rights and freedoms have been violated be brought forward first before courts of instance, that they be evaluated and resolved by these instances.

The applicant expressed his said claim before both the prosecutor's office and the assize court. This claim of the applicant was evaluated both in the indictment of the prosecutor's office (Indictment dated February 2, 2012, pp. 3-8) and by the court in the hearing dated March 26, 2012 and was rejected.

On the other hand, it is considered that the legal remedies have not been exhausted yet in terms of this complaint hereby which also has dimensions in relation to the right to fair trial (trial by a court that is established by law). As mentioned above, the solution to these two legal problems which are closely related to each other has a quality of being settled finally by the Supreme Court of Appeals at the stage of appeal only. Since the appeal stage for the file has not been finalized yet, it is thought that whether the legal remedies have been exhausted yet in terms of this complaint needs to be considered by the Constitutional Court.

Furthermore, it should be stated that the implementation and interpretation of laws are within the venue of courts and it is important in terms of exhausting legal remedies to wait for the decisions of courts of instance as long as they are not openly arbitrary. A similar request was previously examined by the Supreme Court of Appeals and it is observed that the said request was turned down by the Supreme Court of Appeals (Decision of the 9th Criminal Chamber of the Supreme Court of Appeals dated October 9, 2013, No. Merits 2013/9110 - Decision No. 2013/12351). Also taking into account this decision of the Supreme Court of Appeals, it is thought that it is at the discretion of the Constitutional Court whether the implementation and interpretation of laws by the court of first instance in the concrete case has any open arbitrariness in terms of the result achieved regarding competence.

As is known, according to the case law of the ECtHR, the implementation and interpretation of laws are within the jurisdiction of judiciary bodies as long as they are not arbitrary, and the complaints on this matter in terms of Article 6 of the Convention are of the 4th degree. Indeed, the case law of the Constitutional Court has developed in this direction

(Individual application decision of the Constitutional Court dated 16.4.2013 and numbered 2012/869, paragraph 20).

As a result, it is considered that it is useful to pay attention to the information above while examining the claim of the applicant, in terms of admissibility and merits, that he was deprived of his liberty by a court that is not competent."

34. The statement of the applicant within this scope is as follows:

"It is stated that no objection was asserted regarding the fact that the court was not abstractly competent as indicated in the application, that the criminal acts which were attributed in the indictment could not be considered within the scope of the crimes that were charged, that it would be a misuse of power in office had the criminal acts been really committed and that the competence for trial belonged to the Supreme Criminal Tribunal. A conclusion that is based on an arbitrary interpretation was drawn without the court making a sufficient evaluation on this matter."

35. The relevant sections of the opinion of the Ministry of Justice within the scope of the complaint that the reasonable period under detention was exceeded are as follows:

"It is evaluated that the requests for release and objection evaluations that were decided upon before the date of 23 September 2012 were submitted with an objection of lack of venue in terms of time and this situation also included the complaints in relation to the justification of the said decisions.

Regarding the situation after the specified date, it is seen that the applicant was deprived of his liberty on the date of 5 January 2012 and that his detention ended on the date of 5 August 2013 with the decision of the court of first instance in relation to merits. Therefore, the total detention period of the applicant was one year seven months.

According to ECtHR decisions, in order for a person to be deprived of his/her liberty on the suspicion that s/he committed a crime, it is necessary to have reasonable suspicion or plausible reasons (raisons plausibles) for the fact that the person concerned committed the attributed crime and this necessity is a sine qua non condition in relation to detention. This condition should sustain its existence at any stage during which the detention of the person is continued and the person concerned should be released the moment the reasonable suspicion is removed.

When the evidence obtained and the peculiar conditions of the concrete incident are taken into consideration, the existence of reasonable suspicion should be sufficient to convince a completely objective observer who looks at incidents from an external point of view. When

*the evidence collected is submitted to an objective observer, if it is sufficient to form an opinion in the observer that the suspect or the defendant may have committed the attributed crime, there is reasonable suspicion in the concrete incident. In other words, plausible reasons or reasonable suspicion requires "the existence of incidents, facts or information which was necessary to convince an objective observer that the person accused may have committed the attributed crime". [*Fox, Campbell and Hartley v. United Kingdom, *no. 12244/86 12245/86 12383/86, 30 August 1990, paragraph 32;* O'Hara v. United Kingdom, *no: 37555/97, par. 34).*

According to the decisions of the ECtHR, in order for a person to be deprived of his/her liberty within the scope of the provision 5/1-c of the Convention, "the existence of reasonable suspicion" at the beginning is sufficient and "reasonable suspicion needs to sustain its existence" in terms of the continuation of detention. However, the existence of reasonable suspicion is not sufficient per se in terms of the continuation of detention beyond a specific time and the existence of a real public interest that will legitimize deprivation from liberty is sought.

In its decisions that it made on applications involving the claim that the detention period exceeded the reasonable time period, the Constitutional Court emphasized that whether the detention period is reasonable or not is not possible to evaluate within the framework of a general principle and that whether the period during which a defendant is kept under detention is reasonable or not should be evaluated in accordance with the peculiarities of each case (individual application decision numbered 2012/1303 and dated 21 November 2013; par. 51; individual application decision numbered 2012/1272 and dated 4 December 2013).

It is stated that the evaluation of the examination of the complaint, in terms of admissibility conditions and merits, that his detention exceeded the reasonable amount of time, the scope and unique complexity level of the case in which the applicant is being tried, whether or not the judiciary body sustains trial in a way to show all types of attention and prudence that are expected from it, the amount of time during which the applicant was detained, the justification that was submitted by the local court for the continuation of the detention of the applicant and specifically used since the date of 27 July 2012 need to be evaluated by also taking into consideration the decisions of the ECtHR.

36. The declaration of the applicant within this scope is as follows:

"Continuing the detention by repeating the matters that are stated in the application, without indicating "relevant" and "sufficient" justification and without "personalizing" the justification violates personal liberty and security.

C. Evaluation

37. It is considered that the claims of the applicant on the fact that his personal liberty was violated are within the scope of personal liberty and security due to the facts that the decisions on detention and the continuation of detention that were made at each stage, namely the investigation, trial by the court of first instance and post-conviction decision, were made by courts that were not *"competent"* , that the requests for release were turned down without indicating *"relevant"* and *"sufficient"* justification and that no decision was made on the request for release after the judgment was issued.

38. The application which involves the claims that paragraphs two, three, seven and eight of article 19 of the Constitution were violated needs to be examined in terms of admissibility by taking into consideration the opinion of the Ministry of Justice and the statements of the applicant within the scope of the stages of trial by the court of first instance and post-conviction decision.

1. Admissibility

a. **In Terms of Detention at the Stage of Trial by the Court of First Instance**

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

> *"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force."*

40. Paragraph (5) of article 47 of the Code numbered 6216 with the side heading *"Procedure of individual application"* is as follows:

> "*The individual application should be made within thirty days starting from the date of the exhaustion of legal remedies; from the date when the violation is learned if no remedies are set forth.*" …".

41. In summary, the applicant states that detention was continued in a way to exceed a reasonable time period through decisions that were made by a judicial body which was not legally *"competent"*, without indicating *"relevant*" and *"sufficient"* justification and by repeating legal statements and that the opportunity to be released under judicial control was not taken into consideration and thus asserts that his personal liberty was violated.

42. After stipulating as a principle in paragraph one of article 19 of the Constitution that everyone has the right to personal liberty and security, the cases in which persons can be deprived of their freedom are listed in a limited way in paragraphs two and three thereof on the condition that their forms and conditions are stipulated in code. Therefore, the deprivation of the person from liberty can only be the case in the event that one of the cases specified within the scope of the aforementioned article of the Constitution exists (App. No: 2012/239, 2/7/2013, § 44). Similar to the rules that are included in the Constitution, it is stipulated in paragraph 1 of article 5 of the European Convention on Human Rights (ECHR) that everyone has the right to personal liberty and security, that no one can be deprived of his/her liberty except for the cases that are specified in sub-paragraph (a) and (f) of the said paragraph and without being in conformity with the procedure that is set forth by code.

43. In article 13 of the Constitution with the heading*"Restriction of fundamental rights and freedoms"*, it is stipulated that fundamental rights and freedoms may only be

restricted on the basis of the reasons that are mentioned in the relevant articles of the Constitution and by law without prejudice to their essence, that these restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality. The criterion in article 19 of the Constitution that the forms and conditions of cases when the right to personal liberty and security can be restricted are stipulated in law is in congruence with the rule in article 13 of the Constitution that fundamental rights and freedoms can only be restricted by code (App. No: 2012/239, 2/7/2013, § 44).

44. The liability to ensure the conformity of the restrictions in relation to personal liberty and security with the principles and procedures that are stated in code belongs, in principle, to administrative bodies and courts of instance. The administrative bodies and courts are liable to obey the legal rules in relation to principle and procedure. The purpose of article 19 of the Constitution is to protect the individual from deprivation of his/her liberty in an arbitrary way and, in exceptional cases that are set forth in the article, the restrictions that are to be applied to personal liberty need to be in conformity with the purpose of the article and not to lead to any arbitrary practice. For this reason, as per the rule which is included in paragraph three of article 19 of the Constitution that the forms and conditions of deprivation from liberty be stipulated in law, whether or not the status of being detained of the applicant has *"legal"* basis, and, in cases where law permits deprivation from liberty, whether or not the implementation of law is sufficiently accessible, irrefutable and predictable in order to prevent arbitrariness as per the principle of the rule of law need to be examined by the Constitutional Court (App. No: 2012/239, 2/7/2013, § 45).

45. According to this, deprivation from liberty can only be the case in the event that one of the cases which are specified within the scope of article 19 of the Constitution exists. The cases where the liberty of individuals can be restricted are listed in a limited way. In this framework, in accordance with paragraph three of article 19 of the Constitution, persons against whom there is strong evidence of delinquency can only be detained through a decision by a judge in order to prevent their escape and to prevent the destruction and manipulation of evidence. Detention needs to be in conformity with the forms and conditions that are set forth in law. In paragraph 1 of article 5 of the ECHR, it is stipulated that deprivation from liberty as set forth in cases which are stated in sub-paragraphs (a) and (f) can be carried out *"in accordance with the procedure that is set forth by code"*.

46. Taking into consideration the criteria to be in conformity with *"the forms and conditions that are set forth in code"* in article 19 of the Constitution and *"the procedure that is set forth by code"* in article 5 of the ECHR, it is necessary to strictly conform to the condition of *"lawfulness"* in deprivation from liberty.

47. In the individual applications that are lodged with the claim that the ongoing detention is contrary to the law, the main aim of the complaints is to determine that the detention is contrary to the law or that there is no reason or reasons that justify the continuation thereof. In the event that this determination is made, accordingly, the presence of the legal grounds shown as the justification for the continuation of the state of detention will come to an end and thus, it will pave the way for the person to be released. In an application lodged for this purpose, it will be taken into account whether an examination has been conducted over the objection remedy in accordance with the principles such as the adversarial trial and/or the equality of arms. Therefore, it is possible to lodge the individual applications to be lodged due to the aforementioned reasons and in order to issue a decision that will

ensure the release as long as the state of detention continues on the condition that the ordinary legal remedies are exhausted (App. No: 2012/726, 2/7/2013, § 30).

48. However, if a judgment has been made about the person at a court of first instance, the request in terms of individual application will be limited to the determination of the contrariety to law of the *"detention on the basis of a criminal charge"* (App. No: 2012/726, 2/7/2013, § 31).

49. If the person has been convicted through the decision of the court of first instance at a court case that he is being tried at without being released, the status of detention ends as of the date of conviction. For in that case, the legal status of the person goes out of the scope of being *"detained on the basis of a criminal charge"*. In terms of the examination of individual application, the significant difference between the conditions of detention and adjudging a conviction requires that. Because of the fact that a decision on conviction has been made, it is accepted that it is proven that the charged crime is committed and that the perpetrator is responsible for this and thus a punishment restricting freedom is adjudged in relation to the accused. Together with the conviction, the strong suspicion of crime and the status of detention in connection with a reason for detention of the person ends. In this regard, the conviction decision shall not separately need to be finalized. The European Court of Human Rights (ECtHR) and the Supreme Court of Appeals do not consider the status of being detained after the decision of conviction as detention. The ECtHR considers the detention of a defendant who is convicted by the decision of a court of first instance after the said decision of conviction to be *"detention after conviction"* as per sub-paragraph (a) of paragraph one of article 5 of the ECHR and does not take it into consideration in the calculation of the duration of detention (App. No: 2012/726, 2/7/2013, § 33).

50. The status of being deprived of one's liberty *"due to incrimination"* is considered to be within the scope of sub-paragraph (c) of paragraph one of article 5 of the ECHR whereas the status of depriving from liberty that is considered to be *"detention after conviction"* is considered to be within the scope of sub-paragraph (a) of paragraph one of article 5. In both cases, there is no doubt that the decisions that bear the consequence of deprivation from liberty need to fulfill the condition of being *"in accordance with a procedure prescribed by law"*.

51. The beginning of the period that is spent under detention *"due to incrimination"* is the date of being arrested and taken under custody in cases where the applicant is arrested and taken under custody for the first time whereas it is the date of detention in cases where s/he is directly detained. The end of the period is, as a rule, the date on which the individual is released or the date when the judgment is made by the court of first instance (App. No: 2012/1137, 2/7/2013, § 66). The evaluation of whether the period that is spent under detention *"due to incrimination"* is reasonable or not will be made by taking into consideration the period that elapsed between the dates stated.

52. In the concrete incident, the applicant was detained after his statement was taken by the Public prosecutor on the date of 5/1/2012 due to the attributed crimes through the decision dated 6/1/2012 and numbered Inquiry 2012/10 of the 12th Assize Court of Istanbul. The status of detention in this sense ended on the date of 5/8/2013 when the decision of conviction was announced during the trial that continued under detention.

53. It is understood that the applicant was deprived of his liberty *"due to incrimination"* until the date of 5/8/2013 and that deprivation from liberty was within the scope of *"detention after conviction"* following the date of 5/8/2013.

54. In lieu of these determinations, an individual application that is based on claims of being deprived from liberty *"due to incrimination"* through unjustified decisions which are rendered by a court not having *"competence"* needs to be lodged after the remedies are exhausted at every stage when a decision is made to sustain detention while the trial at the court of first instance continues and except for release, within due time following the decision of conviction with which this situation is removed. The ECtHR also stated that an application within the scope of *"detention due to incrimination"* which is not lodged within six months following the decision of conviction is not within due time (*Atalay Öztürk v. Turkey,* (S.D.) App. No: 54890/09, 7/1/2014, § 37-41)

55. One of the conditions for the admissibility of individual applications is the period of application. The period is a procedural condition that needs to be taken into consideration at any stage of the application.

56. As per paragraph number (5) of article 47 of the Code numbered 6216 and paragraph number (1) of article 64 of the Internal Regulations, individual applications need to be lodged within thirty days after the date when remedies are exhausted or the date when the violation is learned if no remedy is set forth (App. No: 2013/2001, 16/5/2013, § 14, 15).

57. In the concrete incident, the status of being detained *"due to incrimination"* ended on the date of 5/8/2013 when the decision of conviction was announced during the trial that continued under detention.

58. It is concluded that there is *statute of limitations* in the application in terms of the complaints that paragraphs two, three and seven of article 19 of the Constitution are violated.

b. **In Terms of Detention After the Decision of Conviction**

59. In the court case lodged in relation to the applicant for the crimes of *"attempting to extirpate the Government of the Republic of Turkey or preventing it from doing its duties" and "establishing and leading an armed terrorist organization",* it has been stated with the decision of the 13th Assize Court of İstanbul dated 5/8/2013 in the file numbered Merits 2009/191 that the actions of the applicant as a whole constituted the crime of *"attempting to extirpate the Government of the Republic of Turkey or preventing it from doing its duties through the use of force and violence"* and it has been decided that the applicant be penalized with lifelong imprisonment and his state of detention be continued.

60. On the date of 12/8/2013, the applicant objected to the decision regarding the continuation of detention that was made together with the decision of conviction at the end of the trial and the objection was rejected on the date of 22/8/2013.

61. The reasoned decision in relation to the judgment that was pronounced has not been included in the file yet.

62. The applicant made a request to be released in the period when he was under de jure detention after the decision of conviction, the 13th Assize Court of İstanbul decided on the date of 31/12/2013 that there were no grounds for making a decision about the request. The objection that is lodged against this decision was rejected with the decision of the 14th Assize Court of İstanbul dated 20/1/2014.

63. The applicant points out that, due to the fact that the acts that are subject to the accusations attributed to himself are relevant to the duty, his status of being detained persists through a court decision that is made at the end of the trial which was held by a court other than the Supreme Criminal Tribunal as stipulated in the Constitution, and states that it is necessary to make a decision about the request for release upon evaluating the other matters that are accepted as reason for detention except for the *"criminal suspicion"* and the provisions for judicial control in the period after the decision of conviction.

64. It is asserted that the liberty of the person is violated due to the fact that the justification for the decision of conviction was not declared and that no decision was made in relation to the request for release despite the fact that the legal period was exceeded as the status of being detained continued within the framework of the decision of conviction that is made by a judicial body which is legally not *"competent"* in terms of the condition of being in compliance with the procedure that is set forth by law.

65. It is seen that the complaints of the applicant in relation to the competence of the adjudication body and to the fact that a decision was not made on the request for release due to the fact that the justification of the decision of conviction was not put into the case file within legal period are not devoid of basis. It is possible to make the application in relation to the complaint that deprivation from liberty was not *"legal"* due to the decision that was made by a judicial body which was not *"competent"* after exhausting ordinary legal remedies for as long as the status of being detained persists.

66. As it is understood that the complaints in relation to de jure detention following the decision of conviction are not explicitly devoid of basis and that there is no other reason for inadmissibility, it needs to be decided that this part of the application is admissible.

2. In Terms of Merits

67. Paragraphs one, two, three, seven and eight of article 19 of the Constitution are as follows:

> *"Everyone has personal liberty and security.*
>
> *No one can be deprived of his/her liberty except for the following cases, the procedure and conditions of which are specified in the law:*
>
> *Execution of penalties restricting liberty and of security measures ruled by courts; arrest or detention of an individual as required by a court verdict or an obligation set forth in law; execution of an order for the rehabilitation of a minor under supervision or for bringing him/her before the competent authority; execution of a measure taken in compliance with the principles specified in the law for the treatment, education or rehabilitation at an institution of*

a mentally ill person, a drug or alcohol addict, a vagabond who poses a threat to the society or a person who may possibly spread diseases; arrest or detention of a person who illegally attempts to enter or enters into the country, or for whom a deportation or extradition order is issued.

Individuals against whom there is strong evidence of delinquency may only be detained through a decision by a judge in order to prevent their escape, prevent the destruction or manipulation of evidence or in other circumstances as such which are specified in law and require detention. Arresting without a decision by a judge may only be possible in the event of in flagrante delicto or in cases where a delay is prejudicial; the conditions for this are indicated in law.

...

Detained individuals have the right to request being tried within a reasonable time and being released during investigation or prosecution. Release can be linked to a guarantee in order to ensure that the relevant individual is present at the court during trial or that the sentence is executed.

For any reason whatsoever, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is made about his/her case as soon as possible and in order to be released immediately if such restriction is in violation of law.

68. Paragraphs one, three and four of article 5 of the European Convention of Human Rights are 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 andin accordance with a procedure prescribed by law:

a) The lawful detention of a person after conviction by a competent court;"

...

c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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."

69. The applicant objected on the date of 12/8/2013 to the decision on his de jure detention together with his conviction and the objection was definitively rejected with the decision dated 22/8/2013 at the end of the evaluation that was made in accordance with the objection procedure (§ 14).

70. There is no hesitation that the applicant was under de jure detention following the decision of conviction that was dated 5/8/2013. Therefore, the status of the applicant has gone beyond the scope of *"detention in relation to suspicion of crime"* within the sense of paragraph three of article 19 of the Constitution and has transformed into *"detention in relation to a decision of conviction"* within the scope of paragraph two. At this stage, as per the relevant legislation, if the justification of the provision that is the basis for depriving from liberty was not completely recorded in the minutes together with the judgment, it should be put in the case file within fifteen days at the latest following its announcement.

71. Furthermore, article 104 of the Code numbered 5271 includes the provisions that the suspect or the defendant can request his/her release at any stage of the investigation and prosecution phases, that whether the status of detention of the suspect or the defendant shall continue or whether the suspect or the defendant will be released will be decided by the judge or the court, that the decision on the request for release shall be made by the relevant chamber of the Supreme Court of Appeals or the General Penal Assembly of the Supreme Court of Appeals when the file comes to the Supreme Court of Appeals.

72. In order to be able to make an appeal examination on the court case in which the trial at the court of first instance ended, first the reasoned decision needs to be put in the case file and then the parties that make a request for appeal need to have the opportunity to notify their objections, if any, in relation to the justification which sets the basis for the judgment announced.

73. Since the justification in relation to the final decision that is announced on the date of 5/8/2013 was not put in the case file as of the date of application, it is seen that it is not possible to send the file to the Supreme Court of Appeals in order for appeal examination to be made and that it is not possible for the relevant Chamber of the Supreme Court of Appeals to make a decision in relation to the request for release.

74. The basis for the complaints of the applicant is that the decisions on depriving from liberty were made by a court that did not have *"competence"* and that depriving from liberty without a *"relevant"* and *"sufficient"* justification was sustained in a way to exceed *"reasonable duration"*. The applicant does not assert that his right to a fair trial within the scope of *'being tried by a judicial body that is established by law'* that is guaranteed in articles 36 and 37 of the Constitution and in paragraph 1 of article 6 of the ECHR was violated. At this stage, the applicant complains about the lack of venue on the part of the judicial body that made the decisions in relation to being deprived from liberty and about the contrariety of these decisions to constitutional principles.

75. It is seen that the crimes that were attributed to the applicant were taken as the basis in the determination of the judicial bodies which would run the investigation and prosecution, that the objections in relation to the competence of the court were rejected during the trial process by taking into consideration the crimes that were claimed to have been committed (*attempting to extirpate the Government of the Republic of Turkey or preventing it from doing its duties through the use of force and violence, founding and leading an armed terrorist organization*) and that, as a result, the trial went on and the final decision was made.

76. At the end of the court case in which the applicant was tried under detention starting from the date of 6/1/2012 for the crimes of *"attempting to extirpate the Government of the Republic of Turkey or preventing it from doing its duties through the use of force and*

violence" and *"founding and leading an armed terrorist organization"* upon the indictment of the Chief Public Prosecutor's Office of Istanbul dated 2/2/2012, the 13th Assize Court of Istanbul pronounced in its decision dated 5/8/2013 that the actions of the applicant as a whole constituted the crime of *"attempting to extirpate the Government of the Republic of Turkey or preventing it from doing its duties through the use of force and violence"* and decided that the applicant be convicted only in terms of this crime. No decision was made for separately convicting the applicant for *"leading an armed terrorist organization"*.

77. It is stated as it is mentioned in the conclusion of the indictment that the applicant committed the attributed crimes by *"conducting and organizing black propaganda and disinformation activities by means of the said Internet web sites and the memorandum that is issued with the purpose of legitimizing those web sites, openly issuing oral or written declarations in order to influence the ongoing investigation and prosecution towards Ergenekon Armed Terrorist Organization through the press statements he gave and various activities that he conducted in line with the objectives of the organization, pressurizing State administrators, debilitating the State authority, establishing an environment of chaos and disturbance by distorting public order in the country whenever necessary, provoking the public against the State administrators and establishing an environment of anarchy, thus attempting to partially or completely prevent the government from performing its duties through such methods of force and violence, managing the psychological operational activity through his position and influence on other suspects with the title of middle manager as of the date of offence, guiding the members of the organization, all in order to establish a military coup environment in line with the objectives of Ergenekon Armed Terrorist Organization"*.

78. It is seen that the objection and claims of the applicant in relation to the definition of the acts and that the trial competence within this scope belongs to the Supreme Criminal Tribunal does not lack basis objectively when the above-stated facts are taken into consideration. The objection which is within this scope needs to be evaluated in terms of the criterion of deprivation from liberty being in conformity with the procedure that is set forth in law.

79. As the appeal process in the trial that is the subject of the application is not finalized, the legal remedies in relation to the above-stated matters have not been exhausted yet. However, it is seen that there are constitutional guarantees also at this stage within the scope of being deprived from liberty. It needs to be examined *"as soon as possible"* whether deprivation from liberty is *"legal"* or not as per the rule *"For any reason whatsoever, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is made about his/her case as soon as possible and in order to be released immediately if such restriction is in violation of the law"* that is included in paragraph eight of article 19 of the Constitution.

80. As per this provision of the Constitution, an individual whose liberty is restricted has the right to apply to an authorized judicial body in order to ensure that a decision is made about his/her case as soon as possible and in order to be released immediately if such restriction is in violation of the law. As no distinction is made in the paragraph in terms of the reason for restriction, the right to application is not limited to being deprived from liberty due

to strong suspicion of crime and detention. This guarantee also applies to the cases of being deprived from liberty that are stated in paragraph two of article 19 of the Constitution.

81. The concept of the conformity of deprivation from liberty with law also covers the body that makes the decision thereon having legal venue. In this framework, the objection of the applicant that the court which made the decision on him was not competent, that the trial competence rested with the Supreme Criminal Tribunal is relevant to the legality of deprivation from liberty.

82. It is apparent that the definition of the acts in relation to the attributed crimes is directly related to the claim that the case needs to be heard at the Supreme Criminal Tribunal and that, in this framework, the objections in relation to the fact that the trial body was not competent and on the definition of acts will be considered by the appeal body *ex officio*.

83. However, it is seen that the restriction of the liberty of the applicant may continue until a final judicial decision is made in relation to these matters. In the meantime, the consequence that the applicant is deprived from his liberty *"without conformity with the procedure that is set forth by law"* may arise. Therefore, it is necessary to eliminate through legal remedies the possibility that an irreparable victimization occurs on the part of the applicant by taking into consideration the objection in relation to the competence of the trial body at this stage.

84. Due to the fact that the reasoned decision has not been put into the file for a period exceeding seven months starting from the date of judgment, the consequence that the applicant has not been able to take before the appeal body his claim that the decision on the continuation of detention in connection with the conviction was taken by an incompetent court, that, therefore, deprivation from liberty is not legal. It cannot be said that the fact that the applicant could not exercise his right to get the legality of the decision in relation to being deprived from his liberty examined before the appeal body is in compliance with the principles of legal security and legal certainty.

85. At the stage following the final decision that is rendered during the trial at the court of first instance, the applicant has lodged a request at the 13th Assize Court of Istanbul which held the trial on 31/12/2013 that he be released. As of this date, it is seen that the reasoned decision has not been announced by the Court and, in addition, it has been decided that there is no grounds to make a decision on the request on the justification that *"the prosecution phase was completed and it was decided to reject the objection that was lodged against the decision of de jure detention"*, thus, the merits have not been delved into and an efficient legal examination has not been held in relation to the request. This situation renders the right that is guaranteed in paragraph eight of article 19 of the Constitution dysfunctional.

86. Due to the reasons explained, taking into consideration the facts that an appeal examination could not be held since the reason was not announced in the period that elapsed starting from the announcement of the judgment, that the claim that deprivation from liberty is not legal and the request for release have not been examined by the appeal body, a decision needs to be made by the court that held the trial in relation to the request by also considering the provisions of judicial control. Therefore, it needs to be decided that paragraph eight of article 19 of the Constitution has been violated.

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

87. Under paragraph number (1) of article 50 of the Code numbered 6216, it is indicated that in the event that a violation decision is delivered at the end of the examination on merits, the necessary actions to remove the violation and its consequences are adjudged; however, it is adjudged that a review for legitimacy cannot be done, that a decision with the quality of administrative act and action cannot be delivered.

88. In the application, it has been concluded that paragraph eight of article 19 of the Constitution was violated. The applicant does not have any request for non-pecuniary compensation. In order to remove the violation within the scope of liberty and security of person, a decision needs to be made by the trial body in relation to the merits of the request of the applicant for release by also taking into consideration the provisions of judicial control.

89. It has been necessary to make a decision that the trial expenses of TRY 1,706.10 in total, composed of the application fee of TRY 206.10 and the counsel's fee of TRY 1,500.00, which were made by the applicant, be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on the date of 6/3/2014;

A. That the complaints of the applicant

1. within the scope of being deprived from liberty that continued during trial at the court of first instance are UNACCEPTABLE due to *"statute of limitations"*,

2. That, since the reason for the decision of conviction was not put into the case file within the legal period, the complaints fora decision on the request for release not being made are ACCEPTABLE,

B. That, due to the fact that the claim that deprivation from liberty is not legal is rejected by its Court without being efficiently examined and that it could not be taken before the Supreme Court of Appeals since the reasoned decision in relation to conviction was not announced, paragraph eight of article 19 of the Constitution is VIOLATED within the scope of *liberty and security of person*,

C. That, in order for due action to be taken and a decision to be made in relation to the request of the applicant for release, a copy of the decision be sent to its Court ,

D. that the trial expenses of TRY 1.706,10 in total, composed of the application fee of TRY 206,10 and the counsel's fee of TRY 1.500,00, which were made by the applicant, be PAID TO THE APPLICANT.

President	Member	Member
Alparslan ALTAN	Engin YILDIRIM	Celal Mümtaz AKINCI

Member Muammer TOPAL	Member M. Emin KUZ