



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

**SECOND SECTION**

**DECISION**

Application No: 2012/1052

Date of Decision: 23/7/2014

## SECOND SECTION

### DECISION

<b>President</b>	: Alparslan ALTAN
<b>Members</b>	: Serdar ÖZGÜLDÜR Osman Alifeyyaz PAKSÜT Recep KÖMÜRCÜ Engin YILDIRIM
<b>Rapporteur</b>	: Recep ÜNAL
<b>Applicant</b>	: İbrahim Can KIŞI
<b>Counsel</b>	: Att. Vefa TOKLU

#### I. SUBJECT OF APPLICATION

1. The applicant alleged that he was deprived of a significant portion of the compensation he was entitled to as a result of the refusal of his request of amendment pertaining to the outcome of the claim after having learned his material damage determined by an expert report within the framework of a full remedy action heard at the High Military Administrative Court (HMAC) and that therefore his rights to a fair trial, property and an effective remedy were violated and requested compensation.

#### II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on 12/12/2012. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the Third Commission of the Second Section on 26/9/2013 that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. It was decided by the Second Section during the meeting held on 7/1/2014 that the examinations for admissibility and merits of the application be conducted together and a copy be sent to the Ministry of Justice for its opinion.

5. The incidents and facts which are the subject matter of the application were notified to the Ministry on 7/1/2014. The Ministry presented its written opinion to the Constitutional Court on 6/3/2014.

6. The opinion letter of the Ministry was notified to the applicant on 14/3/2014. The applicant submitted his petition containing his answers to the opinion of the Ministry on 19/3/2014.

### **III. INCIDENTS AND FACTS**

#### **A. Incidents**

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

8. The applicant joined his recruit training unit on 27/5/2009 in order to fulfill his military service, he was then assigned to the 7th Border Company of the 2nd Border Battalion of the 6th Border Regiment located in Özalp district of the province of Van on 16/9/2009 following the completion of his training.

9. Upon the applicant's recourse to his superiors due to his complaint of pain and visual impairment in his eye during his watch duty between the hours of 03:00 and 05:00 on 9/8/2010 while continuing his service at the mentioned military unit, he was sent to the infirmary of the Battalion to which they were attached the following day and was referred to Van Military Hospital following his examination there.

10. Following his examination at Van Military Hospital on 11/8/2010, the applicant was diagnosed with “*minimal vitreal hemorrhage in left eye - left maculopathy*” and was referred to Ankara Gülhane Military Medical Academy (GATA) for further examination and treatment.

11. The applicant was discharged on 25/8/2010 upon the completion of the period pertaining to his military service.

12. Following his examination and treatment actions at Ankara GATA Hospital, it was determined with the medical report dated 28/12/2010 that the applicant's left eye was capable of 0,2 sight, trimonthly controls were recommended with the diagnosis of “*macular hole in the left eye*” and it was determined that the conclusion was “*His condition is suitable for A/9 F-1. Fit for military service. He is not eligible to become a commando or military driver. Eligible for discharge to his company.*”

13. The applicant applied to the Ministry of National Defense on 4/11/2011 and requested compensation. Upon the failure of the administration to respond within the legal period of 60 days, the applicant filed a full remedy action on 17/3/2011 with the request of legal aid.

14. It was decided with the decision of the Second Chamber of the HMAC dated 30/3/2011 and numbered M.2011/478, D.2011/433 that the applicant's legal aid request be accepted and that his petition be dismissed as per paragraph (B) of article 45 of the Code of the High Military Administrative Court dated 4/7/1972 and numbered 1602.

15. Upon this decision, 50.000,00 TL material and 20.000,00 TL moral compensation was requested in favor of the applicant, 2.500,00 TL each was requested in moral compensation in favor of the other plaintiffs (the mother and father of the applicant) through the renewed petition that was submitted to the HMAC on 28/4/2011 with the claim that the 80% visual impairment that occurred in the applicant's left eye happened as a result of service negligence of the defendant administration.

16. As a result of the examination conducted by the Forensics Department of GATA, it was determined that the functional loss in the applicant's left eye amounted to a complete loss of function of one of the sensory organs, that he had lost 23,2% percent of his earning capacity in the profession. In the opinion letter drafted by a member of faculty of the Ophthalmology Department of the same institution indicated that the damage that occurred in the applicant's eye was an acute situation that recently developed and that the cause that led to this could have been a thermal or blunt trauma.

17. Through the expert opinion dated 5/3/2012 that was submitted to the HMAC, with regard to the applicant's disability, which has been determined to be 23,2%, an opinion was provided to the effect that 96.249,00 TL was needed to be paid in material compensation.

18. The applicant notified the High Court with the petition dated 16/3/2012 that he wished to amend his material compensation request to be 96.249,00 TL and his moral compensation request to be 15.000,00 TL.

19. With the decision of the Second Chamber of the HMAC dated 4/4/2012, it was concluded that the disability of the the applicant, which had occurred during his military service, stemmed from the administration's service negligence and it was decided with a majority of votes that 50.000,00 TL material and 20.000,00 TL moral compensation be paid to the applicant, that the legal interest to be calculated at 9% annually be applied from the date of the case to the date of payment, that the compensation requests of the other plaintiffs (the mother and father of the applicant) be dismissed, that the 210,00 TL expert fee that had been collected from the applicant be paid to the applicant by the defendant administration.

20. As per the rule to the effect that “*the parties may not have any claim based on the defenses that they will plead or the second petitions they will submit after expiration of the period*” contained within paragraph four of article 46 of the Code numbered 1602, it was decided in the same decision to dismiss the applicant's amendment request with the justification that changing and expanding the claim and the defense are prohibited in administrative justice and that it is not possible for plaintiffs to increase the outcome of the claim through amendment outside its due period.

21. The applicant seized the correction remedy against the decision of the HMAC with the petition dated 21/6/2012, it was decided with the decision of the Second Chamber of the HMAC dated 14/11/2012 and numbered M.2012/565, D.2012/1031 to dismiss the correction request. This decision was notified to the applicant on 29/11/2012.

## **B. Relevant Law**

22. Paragraph four of article 46 of the Code numbered 1602 amended with article 1 of the Code Regarding Amendments In Various Codes Within the Framework of Human Rights and the Freedom of Expression dated 11/4/2013 and numbered 6459 is as follows:

*“The parties may not have any claim based on the defenses that they will plead or the second petitions they will submit after expiration of the period. (Additional sentence: 11/4/2013-6459/1 art.) However, as for the full remedy actions, the amount specified in the plaint may be increased for once only irrespective of the period or other rules of procedure until the final decision is made on condition that the fee is paid and the petition on increasing the amount shall be notified to the opposite party for response within thirty days.”*

## **IV. EXAMINATION AND JUSTIFICATION**

23. The individual application of the applicant dated 12/12/2012 and numbered 2012/1052 was examined during the session held by the court on 23/7/2014 and the following were ordered and adjudged:

#### **A. Claims of the Applicant**

24. The applicant asserted that he had increased the outcome of the claim pertaining to material compensation via amendment following his acknowledgment of the real damage that was the subject of the case within the framework of the trial of the full remedy action he had filed at the HMAc, that the HMAc did not accept this request based on the justification of prohibition of changing the outcome of claims in administrative justice and ruled on 50.000,00 TL compensation that was requested in the petition, that in this way he could obtain only half of the compensation he was entitled to, that therefore his rights to a fair trial, property and an effective remedy were violated and requested compensation.

#### **B. Evaluation**

25. The Constitutional Court is not bound by the legal qualification of the fact made by the applicant, it appraises the legal definition of the facts and cases itself. Accordingly, the essence of the applicant's complaint pertains to his inability to claim the part of the receivable compensation, which was determined in the expert report that was obtained during the trial, that exceeds the amount he requested while filing the case, therefore, to the right to access to court, which is included among the guarantees of the right to a fair trial. For this reason, it was not deemed necessary to conduct a separate examination within the framework of articles 35 and 40 of the Constitution.

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

26. There is no doubt that the compensation of individual damages of military personnel stemming from the acts and actions of the military administration is included within the scope of the protection field of the right to a fair trial that is regulated in the Constitution and the Convention (App. No: 2012/791, 7/11/2013, §§ 26-30).

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

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

28. In the opinion letter of the Ministry, it was stated by referring to the ECtHR case law that especially in circumstances where the trial takes a long time in actions for compensation, the fact that the appraised compensation suffers a significant loss of value as a result of the insufficiency of the interest for late payment, which is envisaged to balance the receivable amount, in the face of the inflation rate was considered as a violation of the Convention, that this situation would create problems in terms of establishing the fair balance that needs to be observed between the damage that occurs and the appraised compensation, that, in order for this problem to be resolved, the concerned needed to be granted the possibility of requesting the reevaluation of the amount determined in the petition during the trial phase just like the case is with the amendment action in the domestic legal system, that with the Code numbered 6459, which was published in the Official Gazette and entered into force on 30/4/2013, the structural problem was resolved with the introduction of the amendment mechanism into the administrative trial procedure.

29. In his statement petition in response to the opinion of the Ministry, the applicant stated that the real amount of the damage he had suffered became known during the trial phase with the expert examination dated 5/3/2012, that the ensuing request for amendment was dismissed as per the provision of the related Code, that his real damage was not compensated as a result, that a legal amendment was made and potential violations were prevented approximately six months after the decision, that it was acknowledged in this manner that this situation created rights violations, that however, it was not possible to compensate the loss that had occurred via this amendment, which was made after the decision had been finalized, that, as a result, the loss he incurred was 41.249,00 TL.

30. The right to access to court is among the guarantees of the right to a fair trial, which is regulated under article 36 of the Constitution (App. No: 2012/144, 2/10/2013, § 28; App. No: 2012/791, 7/11/2013, § 51; App. No: 2012/1061, 21/11/2013, § 28; App. No: 2013/711, 3/4/2014, § 41).

31. The right to access to court refers to the ability to take a dispute and a request within the framework of this dispute before a court and to request the conclusion of these in an effective manner. Restrictions that prevent an individual from applying to the court or render meaningless the court decision (App. No: 2012/791, 7/11/2013, § 52) or the fact that the individual has applied to the court in person may violate the right to access to court.

32. The right to effective access to court requires the existence of a coherent system in terms of applying to courts and those individuals willing to file cases to have clear, practical and effective opportunities in terms of accessing the courts. Especially legal uncertainties or uncertainties in practice may violate individuals' right to access to court (For a decision of the ECtHR in the same vein see *Geffre v. France*, App. No: 51307/99, 23/1/2003, § 34). For this reason, while applying procedural rules, the courts should refrain from excessive formalism, which can violate the right to a fair trial, on the one hand and excessive flexibility, which can lead to the removal of procedural rules regulated by codes, on the other (For decisions of the ECHR in the same vein see *Walchli v. France*, App. No: 35787/03, 26/7/2007, § 29; *Eşim v. Turkey*, App.No: 59601/09, 17/9/2013, § 21).

33. Even though no reason for restriction is envisaged under article 36 of the Constitution with a view to the freedom to claim rights, it cannot be stated that this is an absolute right, which cannot be restricted in any way. It is acknowledged that even rights for which no special reason for restriction is envisaged have certain limits stemming from their nature. Moreover, even though no reason for restriction is included in the article that regulates the right, it can be possible to restrict these rights by relying on rules that are covered under other articles of the Constitution. It is clear that a number of regulations pertaining to the scope and utilization conditions of the right to file cases are the rules that demonstrate the limits stemming from the nature of the freedom to claim rights and determine the norm area of the right. However, these limitations cannot be in violation of the assurances contained within article 13 of the Constitution (CC, M.2010/83, D.2012/169, D.D. 1/11/2012).

34. According to article 13 of the Constitution with the side heading “*Restriction of fundamental rights and freedoms*”, fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant articles of the Constitution and by law without prejudice to their essence. In addition, 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.

35. Even though the regime pertaining to the limitation of the right to a fair trial is not regulated under article 6 of the Convention, which is the basis for the right to access to court, the ECtHR acknowledges that this does not mean that the right to access to court cannot be restricted under any circumstances, that, due to the nature of the right, it is inevitable for the state to carry out certain restrictions and regulations regarding the access to court and that for this reason the signatory states possess an area of discretion regarding this matter. However, these restrictions need to be of a quality not to bear prejudice to the essence of the right, based on a legitimate purpose and the means that is used need to be proportionate to the purpose of restriction, burdens that are hard to bear should not be imposed to the detriment of the individual in such a manner as to disrupt the fair balance that is tried to be struck between the requirements of public benefit and the rights of the individual (see *Ashingdane v. United Kingdom*, App. No: 8225/78, 28/5/1985, § 57; *García Manibardo v. Spain*, App. No: 38695/97, 15/2/2000, § 36; *Sabri Güneş v. Turkey*, App. No: 27396/06, 24/5/2011, § 56).

36. As a conclusion, the restrictions pertaining to the right to access to court, which is not absolute and can be restricted, should not restrict the essence of the right in a damaging way, should pursue a legitimate aim, be clear and proportionate and should not constitute a severe burden on the applicant (App. No: 2013/1613, 2/10/2013, § 38).

37. Restrictions regarding the matter of filing cases constitute an intervention to the right to access to court as a rule. These restrictions may be direct in the form of envisaging a number of procedural conditions such as periods and the like or they can also appear in the form of restricting the dispositions of the parties to a case that is pending before a court pertaining to the right or interest that is the subject of the case. The fact that a certain part of the receivable could not be accessed due to the inability of increasing the claim amount pertaining to a receivable that is the subject of an action for compensation or a full remedy action during the trial phase is a matter that requires examination within the framework of the right to access to court as a restriction with regard to the filing of a case in the sense described above.

38. The amount of receivable compensation is a phenomenon that can be determined within the discretionary authority of the court after expert examination and similar research. Due to this feature of the compensation facility, it is not possible to exactly know or foresee the amount of compensation to which one is entitled before the case is filed. Overcoming this uncertainty faced during the phase of filing the case through the means of correcting the amount of claim later on (amendment) is not possible prior to 30/4/2013 as per the Code numbered 1602 (App. No: 2012/791, 7/11/2013, § 56). Therefore, it is inevitable that the plaintiff party will need to amend the outcome of the claim as the case is continuing in order not to suffer any loss of right.

39. In the concrete incident, the applicant requested 50.000,00 TL in material compensation and 20.000,00 TL in moral compensation as a result of the disability he had suffered. In the expert report that was obtained within the framework of the trial, an opinion was provided to the effect that 96.249,00 TL needed to be paid to the applicant in material compensation. In this manner, the applicant, who found out that the amount of material compensation he was entitled to surpassed the amount he had requested, notified the High Court that he wished to amend his request of material compensation to be 96.249,00 TL and his request of material compensation to be 15.000,00 TL. The HMC dismissed the applicant's amendment requests with the justification that changing and expanding the claim and the defense are prohibited in administrative justice and that it is not possible for plaintiffs to increase the outcome of the claim through amendment outside its due period as per

paragraph four of article 46 of the Code numbered 1602 and delivered its decision by taking the amounts requested in the petition as the basis. It is clear that the fact that the applicant was deprived of a certain portion of his receivable compensation due to his inability to update his request constitutes an intervention in the right to access to court, and paragraph four of article 46 of the Code numbered 1602 constitutes the basis for this intervention.

40. Under paragraph four of article 46 of the Code numbered 1602, the expression *“The parties may not have any claim based on the defenses that they will plead or the second petitions they will submit after expiration of the period.”* is adjudged. Although an exception is envisaged with regard to full remedy actions with the sentence *“However, as for the full remedy actions, the amount specified in the plaint may be increased for once only irrespective of the period or other rules of procedure until the final decision is made on condition that the fee is paid and the petition on increasing the amount shall be notified to the opposite party for response within thirty days.”* that is added to the same paragraph with article 1 of the Code numbered 6459 and the possibility of increasing the amount that is requested in the petition only for once is granted, the decision of the HMAC that is the subject of the application was finalized on 14/11/2012 and it was not possible for the applicant to benefit from this regulation, which entered into force on 30/4/2013.

41. The right to a fair trial, which is one of the indispensable elements of a democratic rule of law, should be guaranteed in the broadest manner possible for all individuals. On the other hand; legal acts, actions and rules remaining under the constant threat of lawsuits does not accord with the principles of legal stability and legal security, which are elements of the rule of law. For this reason, a reasonable balance needs to be observed between the freedom to claim rights and the requirements of legal stability and legal security (CC, M.2010/83, D.2012/169, D.D. 1/11/2012). It is understood that the regulation under paragraph four of article 46 of the Code numbered 1602 aims to discipline the cases filed against the military administration and the requests submitted within the scope of these cases, to prevent procrastination of cases and prevent uncertainties by ensuring that they are followed more seriously. It is clear that these aims, which can be evaluated within the framework of the idea of concluding cases with minimum expense and as soon as possible that is contained under paragraph four or article 141 of the Constitution, are legitimate.

42. The essence of a right means the core which, when violated, renders the fundamental right and freedom in question meaningless and with this aspect, provides a minimum inviolable area of guarantee for the individual in terms of each fundamental right. In this framework, it should be accepted that the restrictions which considerably make the exercise of a right difficult, make the right non-exercisable or remove it violate the essence of the right (CC, M.2002/112, D.2003/33, D.D. 10/4/2003). The aim of the principle of proportionality is the prevention of the restriction of fundamental rights and freedoms more than necessary. In accordance with the decisions of the Constitutional Court, the principle of proportionality covers the elements of proportionality that define the availability which means the fact that the means used for restriction is suitable for achieving the aim of restriction, the obligation which points to the obligation of the restrictive measure in order to achieve the aim of restriction and the proportionality that corresponds to the fact that the means and aim are not within a disproportionate measure and the fact that the restriction does not impose an immoderate measure (CC, M.2012/100, D.2013/84, D.D. 4/7/2013).

43. At this point, in order to determine whether or not a restriction has been made by complying with the indicated criteria, in the face of the legitimate aim which formed the basis of the measure which is claimed to have violated the right to access to court, it is obligatory to consider the severity of the sacrifice which was incumbent upon the individual and to



determine whether or not a fair balance was struck between the protection of the requirements of the pursued public interest and the fundamental right of the individual. This balance, which is valid in terms of the restriction of all fundamental rights and freedoms stipulated in the Constitution through article 13 of the Constitution, should also be taken into account in the restriction of the right to access to court.

44. The applicant, whose right of amendment request was restricted in the trial that is the subject of the application, was able to access only a portion of 50.000,00 TL of the 96.249,00 TL of material compensation that was calculated by the expert. It was concluded that the burden that the applicant, who was thus deprived of a significant portion of his receivable compensation and is understood to have unfavorable material circumstances as per the legal aid decision that was delivered in his favor, was forced to bear is was disproportionate to the legitimate aims that were pursued; that therefore, the intervention was not proportionate.

45. Due to the aforementioned reasons, it should be decided that the applicant's right to access to court guaranteed in Article 36 of the Constitution was violated.

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

46. The applicant requested the compensation of his loss of 41.249,00 TL in order for the consequences of the violation to be removed.

47. The Ministry provided an opinion to the effect that a decision of compensation in line with fairness within the framework of the compensation amounts ruled upon by the Constitutional Court in violation decisions in similar applications would be appropriate.

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

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

49. In terms of the concrete application, it was concluded that the applicant was deprived of a certain portion of his receivable compensation as a result of the decision of the HMC where the applicant's request for amendment was not taken into consideration and that, for this reason, the applicant's right to access to court was violated. It is clear that the applicant suffered a material loss of 41.249,00 TL as a result of the determined violation, no legal benefit was deemed to exist in resorting to a retrial with a view to removing the consequences of the violation, which is limited to a material loss. For this reason, it should be decided that 41.249,00 TL be paid to the applicant in material compensation in order to remove the consequences of the violation.

50. It should be decided that the trial expenses of 1,672.50 TL in total composed of the fee of 172.50 and the counsel's fee of 1,500.00 TL which were made by the applicant and determined in accordance with the documents in the file be paid to the applicant.

## **V. JUDGMENT**

In light of the reasons explained, it was decided **UNANIMOUSLY** on 23/7/2014 that;

**A.** The applicant's claim as to the point that the right to access to court guaranteed under Article 36 of the Constitution was violated is **ADMISSIBLE**,

**B.** The right to access to court guaranteed under Article 36 of the Constitution WAS VIOLATED,

**C.** 41,249.00 TL BE PAID to the applicant in material COMPENSATION,

**D.** The trial expenses of 1,672.50 TL in total composed of the fee of 172.50 and the counsel's fee of 1,500.00 TL, which were made by the applicant be PAID TO THE APPLICANT,

**E.** That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment.

President  
Alparslan ALTAN

Member  
Serdar ÖZGÜLDÜR

Member  
Osman Alifeyyaz PAKSÜT

Member  
Recep KÖMÜRCÜ

Member  
Engin YILDIRIM