REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Ş.Ç. APPLICATION

(Application Number: 2012/1061)

Date of Decision: 21/11/2013

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DECISION

President	: Serruh KALELİ
Members	: Mehmet ERTEN
	Zehra Ayla PERKTAŞ
	Erdal TERCAN
	Zühtü ARSLAN
Rapporteur	: Cüneyt DURMAZ
Applicant	**:** Ş. Ç.

I. SUBJECT OF APPLICATION

1. The applicant who was temporarily assigned for a total of 12 months in a place other than the city in which he was residing asserted that his rights which were guaranteed in the Constitution were violated by stating that allowance was not paid to him after six months, that however, he was entitled to have allowance according to the Allowance Code numbered 6245 as he was assigned for different works, that he was not able to obtain any result although he applied to the High Military Administrative Court (HMAC).

II. APPLICATION PROCESS

2. The application was lodged by the applicant through the 2nd Administrative Court of Mersin on the date of 7/12/2012. As a result of the preliminary examination that was carried out in terms of administrative aspects, it was determined that there was no situation which prevented the submission of the application to the Commission.

3. It was decided on the date of 4/3/2013 by the Third Commission of the First Section that the admissibility examination be carried out by the Section, that the file be sent to the Section as per paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.

III. FACTS AND CASES

A. Facts

4. As expressed in the application petition, the facts are summarized as follows:

5. The applicant who worked as a petty officer at Gölcük Navy Command within the scope of the building of the ship TCG Heybeliada was assigned for a total of 12 months at İstanbul Shipyard Command through six separate message orders between the dates of 28/7/2010–21/7/2011.

6. Although allowance was paid to him for the initial period of six months with regard to the assignment in question in accordance with article 42 of the Allowance Code dated 10/2/1954 and numbered 6245, no payment was made for the subsequent period of six months.

7. In the case which the applicant filed to the High Military Administrative Court on the date of 9/1/2012, he asserted that allowance payment for a total of 185 days needed to be made to him by stating that the assignments which were separately made on various dates were not for the same work, that nevertheless, no allowance payment was made to him for the second period of six months, that however, payment was made to those who were assigned in Aydın class mine hunting ships and were in a similar position also for the second period of six months.

8. In the decision of the Third Chamber of the HMAC dated 12/7/2012 and numbered M.2012/272, D.2012/1488, the dismissal of the case was adjudged by stating that it was not possible to pay allowance to the same person for the same work at the same place for more than 180 days within a period of one year in case of being sent to another place within the country for a temporary assignment according to the provision of article 42 of the Code numbered 6245, that the plaintiff was temporarily assigned at the same place (İstanbul Shipyard Command) within the country within a period of one year, that as the activities of construction, outfitting, testing and trial for Heybeliada which was the first ship of MİLGEM project were carried out at İstanbul Shipyard Command, this temporary assignment was carried out for the same purpose with six separate message orders and in the form of six uninterrupted and subsequent periods from the date on which Heybeliada staff assigned under the order of this command reported to this command to the temporary delivery of the ship, that each temporary assignment in each period was a part of a whole, that the activities which were carried out in a temporary assignment in each period were integral parts of a system which needed to be considered as a whole, that for these reasons, the assignment of the plaintiff carried out between the dates of 28/7/2010 and 27/7/2011 were for "*the same work*", that the fact that this temporary assignment was carried out in the form of more than one interrupted and subsequent period through separate assignment orders and by way of giving various assignment names would not mean that they were for "*a separate work*".

9. The applicant's request for correction was dismissed by the same Court through the decision dated 8/11/2012 and numbered M.2012/1697, D.2012/2192. The decision of dismissal was notified to the applicant on 21/11/2012.

B. Relevant Law

10. Article 42 of the Code numbered 6245 is as follows:

"*Per diem allowances given to those who are sent to another place through a temporary assignment from the date of arrival at the place of assignment:*

a. They cannot be given to the same person at the same place and for the same work for more than 180 days within the country within a period of one year. They shall be paid in full for the first 90 days, and at the rate of 2/3 for the subsequent 90 days.

b. They shall be paid in full for the first 180 days, and at the rate of 2/3 for the subsequent days at abroad.

Pauses which will occur in temporary assignments cannot result in increasing these periods or the amount of per diem allowances."

11. Paragraph (1) of article 14 of the Decree in the Force of Code Regarding the Delivery of Legal Services in Public Administrations within the scope of General Budget and Administrations with Special Budgets dated 26/9/2011 and numbered 659 with the side heading "*Nature of representation in cases and ruling on counsel's fee and distribution thereof*" is as follows:

"For proceedings and hearings carried out at enforcement offices by administrators of legal departments, directors of procedure, legal advisors and lawyers in the capacity of attorneys of administrations and in judicial and administrative cases including those that are subject to the arbitration procedure, in the event that these cases are concluded in favor of administrations, counsel's fees shall be decided upon in favor of administrations based on the amount to be ruled upon as per the relevant legislation in cases and actions represented and followed by these."

12. Article 17 of chapter two titled "*The Fee to be Paid for Legal Assistances Which are Made in Judicial Authorities and Enforcement and Bankruptcy Offices and Whose Subject is not Money or cannot be Appraised by Money*" of 2011-2012 Minimum Attorney's Fee Tariff which entered into force upon publication in the Official Gazette dated 21/12/2011 and numbered 28149 is as follows:

17.	*For the cases which are tried at first instance before the Council of State and the High Military Administrative Court*	
	a. If there is no hearing	*TRY 1,200.00*
	b) If there is a hearing	*TRY 2,400.00*

IV. EXAMINATION AND JUSTIFICATION

13. The individual application of the applicant dated 7/12/2012 and numbered 2012/1061 was examined during the session held by the court on 21/11/2013 and the following were ordered and adjudged:

A. Claims of the Applicant

14. The applicant asserted that the fact that no allowance payment was made to him for the second period of six months while allowance payment was made to the persons in a similar position was contrary to the principle of equality stipulated in article 10 of the Constitution, that the fact that he was not able to receive the payment which he deserved although he worked with an assignment order was contrary to the prohibition of forced labour regulated in article 18 of the Constitution, that the fact that two members of the court which issued the decision on him were officer members who were not from the class of judges constituted a contrariety to the right to a fair trial regulated in article 36 of the Constitution, that the fact that the HMAC adjudged on the counsel's fee for him and his other 40 friends although the attorney's counsel's fee was regulated anew in collective cases through the decision of the 10th Chamber of the Supreme Court of Appeals dated 7/6/2012 and numbered M. 2012/1795, D.2012/10684 and the fact that the state paid TRY 200 in the cases which it

lost while it received TRY 1,200 for the cases which it won were contrary to the principle of the state of law.

B. Evaluation

1. The Claim that the Principle of Equality and the Prohibition of Forced Labour were Violated Due to the Fact that No Allowance Payment was Made

15. The Constitutional Court is not bound by the legal description of the facts made by the applicant. Although the applicant asserted claims with regard to the principle of equality and the prohibition of forced labour, it is seen that the applicant mainly complained about the fact that no allowance payment was made to him for the second period of six months while allowance payment was made to the persons whom he claimed to be in a similar position and about the result of decision issued in the case which he filed before the HMAC with the request for the cancellation of this action of the court. For this reason, the claims which the applicant asserted by establishing a connection with the principle of equality and the prohibition of forced labour were evaluated within the scope of the claim in relation to the violation of the right to a fair trial.

16. Paragraph four of article 148 of the Constitution is as follows:

> "*In individual application, examination cannot be done on matters that need to be taken into account in the legal remedy.*"

17. Paragraph (2) of article 48 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 is as follows:

> *"The Court, ... can decide on the inadmissibility of the applications which are clearly devoid of basis."*

18. Paragraph (6) of Article 49 of the Code numbered 6216 with the side heading of *"Examination as regards the merits"* is as follows:

> *"Examinations of the sections regarding individual applications lodged against a court decision shall be limited to whether or not a fundamental right has been violated and the determination of how such violation can be remedied. Examination on issues that have to be observed in legal remedies shall not be performed by the sections.*

19. It is stated under paragraph (2) of article 48 of the Code numbered 6216 that it can be ruled by the Court on the inadmissibility of applications that are clearly devoid of basis. In paragraph four of article 148 of the Constitution, it is regulated that the complaints which are evaluated within the scope of applications that are clearly devoid of basis and are related to the matters that need to be taken into account in the legal remedy cannot be examined in an individual application.

20. In accordance with the aforementioned rules, as a principle, the proof of the material incidents and cases which are made the subject matter of a case before the courts of instance, the evaluation of the evidence, the interpretation and implementation of legal rules and whether or not the conclusion reached as regards the dispute by the courts of instance is fair in terms of merits cannot be the subject matter of the examination of an individual application. The only exception to this is the fact that the determinations and conclusions of the courts of instance contain an obvious arbitrariness in a way which disregards justice and

common sense and that this situation automatically violates the rights and freedoms within the scope of the individual application. In this framework, applications with a quality of legal remedy complaint cannot be examined by the Constitutional Court in terms of merits unless there is an obvious arbitrariness (App. No: 2012/1027, 12/2/2013, § 26).

21. In the incident which is the subject matter of the application, when the claims of the applicant and the justification of the court are examined, it is understood that the essence of the claims is related to the fact that there was no accuracy in the interpretation by the HMAC of the phrase "*the same work*" in the rule "*They* (allowance) *cannot be given to the same person at the same place and for the same work for more than 180 days within the country within a period of one year*." as stipulated in article 42 of the Code numbered 6245 and to the result of the trial in terms of the merits. It is seen that within the scope of the trial, the applicant asserted his claims on this subject and that the Third Chamber of the HMAC explained in detail in its decision on which grounds it did consider the assignment carried out for a total period of 12 months through 6 separate message orders within the scope of the same work against the claims of the applicant (§ 8).

22. The right to a fair trial provides the individuals with the opportunity to scrutinize whether the trial process and procedure rather than the decision delivered at the end of the case are fair or not. For this reason, in order for the complaints as regards fair trial to be examined in an individual application, the applicant needs to have submitted information or a document with regard to a deficiency, negligence or obvious arbitrariness which is not evaluated as for the elements that result in the establishment of the court decision such as the fact that the rights of the applicant were not respected during the trial, that in this context, s/he was not informed about the evidence and opinions which the opposite party presented during the trial or could not find the opportunity to object against them in an effective manner, that s/he could not present his/her own evidence and claims or that his/her claims as regards the settlement of the dispute were not heard by the court of instance or that the decision did not have any justification. In the incident on hand, it is understood that the applicant did not submit any information or document as to the effect that the trial process was contrary to equity, that on the contrary, he voiced the complaint as to the effect that the content of the decision issued by the court as a result of the misinterpretation of the rule applied in the case was unfair.

23. For the reasons explained, as it is understood that the claims which were asserted by the applicant as to the effect that the fact that allowance payment was not made to him after six months constituted a contrariety to the principle of equality and the prohibition of forced labour have the quality of a legal remedy complaint, and that the decision of the court of instance does not contain any obvious arbitrariness either, it should be decided that this part of the application is inadmissible due to the fact that "*it is clearly devoid of basis*" without examining it in terms of other conditions of admissibility.

2. The Claim that the High Military Administrative Court was not Independent

24. Additionally, the applicant alleged that his right to trial by an independent and impartial tribunal was violated due to the members who were assigned to the HMAC, but were not from the class of judges. However, with regard to this claim of his, the applicant stated that a legal regulation was made in relation to only the officer members who were assigned to military courts and that the contrariety on this subject was eliminated, that however, the contrariety still continued to exist in the practice of the HMAC.

25. Applications in which the applicant cannot prove his/her claims of violation, there is no intervention in fundamental rights or it is clear that the intervention is legitimate and applications which are composed of complicated or forced complaints can be considered to be clearly devoid of basis (App. No: 2012/1334, 17/9/2013, § 24).

26. Nevertheless, as specified by the Constitutional Court while this subject was previously being examined, the establishment, status and duties of the HMAC are ensured in the Constitution and the relevant Code. It is seen that the independence of the military judges assigned to the HMAC is guaranteed through the provisions of the Constitution and the relevant Code, that there is no matter which will damage the independence of military judges in terms of the procedures of assignment and working, that they do not have to be accountable against the administration due to their decisions, that matters with regard to discipline are examined and concluded by the High Disciplinary Board of the HMAC (App. No: 2013/1134, 16/5/2013, § 29).

27. Due to the reasons explained, it should be decided that the applicant's claims in this part which do not have any aspect which requires diverging from this decision are inadmissible due to the fact that they are *"clearly devoid of basis"* as no clear violation is determined in the decisions of the courts of instance.

3. The Claim that the Adjudged Counsel's Fee Violated the Principle of the State of Law

28. Lastly, the applicant asserted that the counsel's fee of TRY 1,200 adjudged against him as a result of the dismissal of the case which he filed with the request for the cancellation of the action in relation to the dismissal of his request for an allowance payment be made in the incident which is the subject of the application violated the principle of the state of law. However, this claim can be evaluated within the scope of the right to access to court which is one of the elements of the right to a fair trial due to the fact that it is made more difficult to file a case and is contrary to fairness.

29. As a matter of fact, the claims of violation that were brought forward with regard to the same subject with similar justifications were examined in the decision dated 2/10/2013 and numbered 2013/1613. In the decision in question, it was primarily stated that in the event that a legislative act or a regulatory administrative act resulted in the violation of a fundamental right and freedom, an application could not be lodged directly against these acts, but it could be lodged against the acts, actions and negligences which had the nature of the implementation of the legislative or regulatory administrative act through individual application, that in the case which was the subject of the application, a counsel's fee was adjudged in favor of the administration as per the regulation introduced through the DIFC numbered 659, that therefore, it was understood that the provisions which this regulatory administrative act prescribed were applied on the case, that the application on hand also needed to be considered in this respect and the claims were examined within the scope of the right to access to court (App. No: 2013/1613, 2/10/2013, § 37, 39).

30. The applicant's claim as to the effect that "*the state paid TRY 200 in the cases which it lost while it received TRY 1,200 for the cases which it won*" is not a situation which occurred in the incident which is the subject of the application, but is a situation which occurred in the trial which is the subject of the decision of the 10th Chamber of the Supreme Court of Appeals dated 7/6/2012 and numbered M.2012/1795, D.2012/10684 which adjudged that the fact that the attorney's counsel's fee was ruled instead of the fee of writing a petition

for each case "*in a series of cases filed by the same attorney*" was inappropriate as exemplified by the applicant. In the incident which is the subject of the application, the applicant became a party to the trial as the plaintiff by himself and through the decision of dismissal of the case, the counsel's fee of TRY 1,200 which was determined as fixed in accordance with "*2011–2012 Minimum Attorney's Fee Tariff*" which entered into force upon publication in the Official Gazette dated 21/12/2011, numbered 28149 was adjudged against him. In this case, it needs to be accepted that the applicant cannot assert the contrariety of an administrative regulation to a principle regulated in the Constitution in an abstract manner and that he can only assert claims in terms of the counsel's fee adjudged against him.

31. Through the DIFC numbered 659 which entered into force upon publication on the date of 2/11/2011 before the case which is the subject of the application was filed, the title of party was granted to the attorneys assigned in the administration, it was regulated that the counsel's fee would be ruled upon in favor of the administration in the event that the case was dismissed. The counsel's fee is a fee which is adjudged in favor of the party that makes a legal contribution to a case and whose case is accepted. This obligation of fee which is not certain in advance as to in whose favor or to whose detriment it will be at the stage of case is a procedural rule and is also related to the right to access to court. It is necessary that the imposed fee does not restrict the essence of this right in a damaging way, pursues a legitimate aim, is clear and proportionate and does not constitute a severe burden on the applicant (App. No: 2013/1613, 2/10/2013, § 38).

32. The counsel's fee is a trial expense and these kinds of expenses constitute an intervention in the right to access to court as a rule. However, certain liabilities can be envisaged for applicants in order to reduce the number of cases by preventing unnecessary applications and thus concluding disputes within a reasonable period of time without keeping courts busy in vain. Determining the scope of these liabilities falls within the discretionary authority of public authorities. It cannot be stated that the right to access to court is violated unless the envisaged liabilities render it impossible or extremely difficult to file a case. Therefore, the counsel's fee to be charged upon the applicant in the event that he loses the case should be considered within this framework (App. No: 2013/1613, 2/10/2013, § 39).

33. While the examination of proportionality is carried out with regard to the counsel's fee, matters such as what the prescribed amount means under the conditions of the country, the applicant's ability to pay and the special conditions of the case should be taken into consideration. In the incident on hand, the fixed counsel's fee of TRY 1,200 was adjudged against the applicant. The applicant did not submit any information and document as to the effect that he did not have the ability to pay this fee which approximately amounts to the minimum wage of 1.5 months. When the monthly income of the applicant who is a public official which he continuously obtains is also taken into consideration, it cannot be mentioned that the prescribed counsel's fee imposed a severe economic burden on the applicant in a way that would make it impossible or make it extremely difficult for him to file a case and that thus, it constituted a disproportionate intervention in his right to access to court.

34. Due to the reasons explained, it should be decided that this part of the application is inadmissible due to the fact that "*it is clearly devoid of basis*".

V. JUDGMENT

A. In the light of the reasons explained; it is **UNANIMOUSLY** decided on 21/11/2013 that the application is **INADMISSIBLE** due to the reasons

1. That the applicant's complaints as to the effect that his right to a fair trial was violated as no allowance payment was made *"are clearly devoid of basis"*,

2. That the applicant's claim as to the effect that the High Military Administrative Court was not independent is *"clearly devoid of basis"*,

3. That the applicant's claim with regard to the counsel's fee is *"clearly devoid of basis"*,

B. That the trial expenses be left on the applicant.

President	Member	Member
Serruh KALELİ	Mehmet ERTEN	Zehra Ayla PERKTAŞ

Member	Member
Erdal TERCAN	Zühtü ARSLAN