



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

**FIRST SECTION**

DECISION

Application No: 2012/1269

Date of Decision: 8/5/2014

**FIRST SECTION**

**DECISION**

**President** : Serruh KALELİ  
**Members** : : Zehra Ayla PERKTAŞ  
Burhan ÜSTÜN  
Hicabi DURSUN  
Zühtü ARSLAN

**Rapporteur** : : Bahadır YALÇINÖZ

**Applicant** : Aziz TURHAN

## **I. SUBJECT OF APPLICATION**

1. The applicant asserted that "*equality before law*" defined in article 10, "*the right to property*" defined in article 35 and "*the right to a fair trial*" defined in article 36 of the Constitution were violated in the action of debt which was filed by the Rectorate of Balıkesir University against him.

## **II. APPLICATION PROCESS**

2. The application was directly lodged by the applicant to the Constitutional Court on 26/12/2012. In the preliminary examination carried out in terms of administrative aspects, it has been determined that there is no situation to prevent the submission of the application to the Commission.

3. It was decided by the Second Commission of the First Section on 23/10/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 4/12/2013, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application and a copy of the application were sent to the Ministry of Justice for its opinion, the Ministry submitted its written opinion to the Constitutional Court on 4/2/2014.

6. The opinion letter of the Ministry was notified to the applicant on 18/2/2014. The applicant submitted his petition including his answers to the opinion of the Ministry on 3/3/2014.

## **III. FACTS AND CASES**

### **A. Facts**

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

8. The applicant was sent to the United States of America in order to perform master and doctoral study in the field of economics on 15/12/1993 within the scope of article 33 of the Code of Higher Education dated 4/11/1981 and numbered 2547 while he was working as a research assistant in the Bandırma Faculty of Economic and Administrative Sciences of Balıkesir University.

9. Following his study, the applicant returned to the country and started working as a research assistant in the Division of Budget and Financial Planning of the Department of Finance in accordance with the decision that the Bandırma Faculty of Economic and Administrative Sciences made at its meeting dated 21/5/2004 and numbered 14.

10. The applicant notified that he resigned from his duty as of 18/10/2005 and the notification reached to the University on 24/10/2005 and the applicant did not come to work

following this date. In the meantime, the applicant started working at the Banking Regulation and Supervision Agency (BRSA).

11. The resignation of the applicant was not accepted on the ground that he was responsible against the university for compulsory service, the applicant was considered to have withdrawn from his duty as of 25/10/2005 by the Dean's Office of the Bandırma Faculty of Economic and Administrative Sciences in accordance with article 94 of the Public Servants Code dated 14/7/1965 and numbered 657.

12. The applicant was requested to pay a total of 299,265.39 US Dollars through the procedure of the Rectorate of Balıkesir University dated 6/9/2006 on the ground that he had not entirely fulfilled his responsibility of compulsory service.

13. One day after this letter, the rectorate stated through a letter dated 7/9/2006 that an opportunity of restructuring is provided as regards the debts of the research assistants who studied abroad in accordance with article 33 of the Code numbered 2547 by considering provisional articles 53 and 54 of added to the Code numbered 2547 with the Code on the Collection and Annulment of Some Public Receivables dated 29/6/2006 and numbered 5535 and that it was necessary to apply to the Rectorate in the event that a request needed to be made to benefit from this opportunity.

14. The applicant filed a request for the re-calculation of his amount of debt according to the Code numbered 5535 through his petition dated 25/9/2006.

15. Following this request, the Rectorate re-calculated the applicant's debt remaining from his responsibility of compulsory service as 55,778.44 TL through its procedure dated 23/3/2007.

16. The applicant requested through the petition which he sent to the university on 18/4/2007 that his responsibility of compulsory service be transferred to the BRSA at which he is still working in accordance with the regulation enacted with article 2 of the Code numbered 5535. Balıkesir University, in the response dated 17/10/2007 which it sent to the applicant in line with the opinion and instruction that it received from the Presidency of Council of Higher Education (CoHE), stated that provisional article 53 added through article 2 of the Code numbered 5535 included a provision requiring that an application be filed before the Council of Higher Education within 3 months following the date on which this article entered into force, that it was not possible to consider the applications which were filed following this date within the scope of the aforementioned Code.

17. The Rectorate filed an action of debt against the applicant before the 2nd Civil Court of First Instance of Balıkesir on 2/7/2010 in order to collect his education and training expenses as he left before completing his responsibility of compulsory service, filed a request for cautionary judgment while filing an action against the applicant and cautionary judgment was imposed by the Court on the immovable property and vehicle that belonged to the applicant.

18. The applicant, in his defense that he submitted in relation to the action, asserted that those who work at public institutions could fulfill the responsibility of compulsory service that they did not fulfill in return for their education expenses at abroad at the institution in which they were currently working in accordance with provisional article 53 added into the Code numbered 2547 through article 2 of the Code numbered 5535, that it was regulated that in this case debt proceeding could be waived, that an application was filed on

25/9/2006 in order to benefit from the aforementioned regulation although no condition of application was sought in order to benefit from this regulation, that on the other hand the period for the responsibility of compulsory service was miscalculated.

19. An expert review was commissioned by the court for the determination of the period of service and the amount of debt of the applicant and according to the report which was submitted to the file, in relation to the request and objection of the applicant, when provisional article 53 added into the Code numbered 2547 was taken into consideration, it was stated that final discretion was left to the court by indicating that the applicant must have applied to the Council of Higher Education within 3 months and he must also have been appointed to another institution by transfer on the date of application, that however the applicant was considered to have withdrawn as his resignation was not accepted, that the administrative proceeding as regards the applicant being considered to have withdrawn became final as he did not apply before the administrative judiciary against it, that an obligation of paying the compensation which was equivalent to his missing compulsory service arose, it was found out that the period for the responsibility of compulsory service of the applicant was 5335 days, that a total receivable of 65,758.52 TL including a principal debt of 32,702.40 TL and an interest of 33,056.12 TL was present as of the date of action.

20. The applicant objected to the expert report through his petition dated 22/11/2011 and stated that there was no legal obstacle against the transfer of his responsibility of compulsory service in accordance with provisional article 53 added into the Code numbered 2547.

21. The court, by partially accepting, partially dismissing the action through its decision dated 1/12/2011 numbered M.2010/361, D.2011/475, decided that the principal receivable of the Rectorate from the applicant was 32,702.40 TL, its receivable of interest was 31,646.97 TL by complying with the request, its total receivable was 64,349.37 TL and this amount be received from the applicant together with the legal interest that would run following the date of action and be given to the Rectorate.

22. On the other hand, the following statements were also included in the aforementioned decision:

*" . It was found out that the documents; the petition of the defendant dated 25.09.2006 (with a request for the calculation of his debt in accordance with the aforementioned Code), our response letter dated 23.03.2007 and numbered 199/2143 and its annexes, the petition of the Defendant dated 18.04.2007 (with a request for the transfer of service), the letter of our Rectorate dated 26/07/2007 and numbered 2700/4978 (for obtaining an opinion from the Council of Higher Education on the transfer of service), the response letter of the Council of Higher Education dated 03.09.2007 and numbered 3756/0221 17, our letter dated 17.10.2007 and numbered 4050/6948 (in relation to the rejection of the request of the Defendant for the transfer of service) were submitted for the file,"*

23. The applicant appealed the decision through his petition dated 18/1/2012 and asserted that his responsibility of compulsory service could be transferred to the BRSA in accordance with provisional article 53 added into the Code numbered 2547, that no period of 3 months was present in order to file a request in relation to this issue, that the defenses that he pleaded in relation to this were not taken into consideration in the Court decision, that the Court delivered the decision by applying the wrong legal regulation to the case, that a different decision was delivered on another person who was in the same situation with him

and whose only difference was to the effect that s/he had filed a case prior to the entry into force of the Code numbered 5535.

24. Upon the application lodged by the applicant before the Ministry of Finance while the appeal examination was going on before the 18th Civil Chamber of the Supreme Court of Appeals, the opinion of the Ministry dated 20/3/2012 and numbered 3527 as to the effect that there was no prejudice in carrying out a proceeding for the applicant within the scope of paragraph three of article 53 of the Code numbered 2547 was submitted to the related Chamber; however, the Chamber did not carry out an evaluation on the claims of the applicant and approved the decision of the Court of First Instance through its decision dated 29/5/2012 and numbered M.2012/4774, D.2012/6461.

25. The request filed by the applicant against this decision for the revision of decision was also dismissed with the decision of the same Chamber dated 18/10/2012 and numbered M.2012/11216, D.2012/11595.

26. The decision was notified to the attorney of the applicant on 28/11/2012.

27. Moreover, upon the request filed by the Rectorate on the applicant before the 5th Enforcement Office of Balikesir following the decision of the Civil Court of First Instance, a total proceeding of 80,631.89 TL composed of the principal receivable, interest and trial expenses was initiated.

## **B. Relevant Law**

28. Provisional article 53 added into the Code numbered 2547 through article 2 of the Code numbered 5535 is as follows:

*"Out of those who have been sent abroad for postgraduate education - training according to article 33 and those who have been sent to another university within the country for postgraduate education - training according to article 35 or those who work in their universities, until the date on which this article enters into force;*

*a) Out of those who have been discharged from their posts due to the failure to complete their education within the period during which they need to stay abroad for postgraduate education - training or who have not been discharged and continue to work and who have been appointed to another public institution by transfer,*

*b) Out of those who have been called to Turkey for whatever reason in any stage of their education,*

*c) Out of those who have been discharged from their posts due to the failure to complete their education within the period during which they need to stay at another university within the country for postgraduate education - training,*

*d) Out of those who have been discharged from their posts due to the fact that they have resigned in any stage of their education, who have been considered to have withdrawn from their duties without starting to work in order to complete their compulsory services at the end of their periods and who have started to work, but leave their posts without completing their compulsory service for which they are responsible,*

*e) Out of those who have been discharged from any university while working in that university in order not to be appointed again,*

*in the event that those who have successfully completed at least the master's degree apply to the Council of Higher Education within three months following the date on which this article enters into force, on the condition that they meet the general conditions stipulated in article 48 of the Code of Public Servants numbered 657, they can be appointed to one of the instructor posts that are suitable for their situation in the higher education institutions to be determined by the Council (in particular the institutions in which their posts were previously present) within three months following the date of application upon the approval of their appointment by the Council of Higher Education. Without being subject to the limitation as regards the implementation thereof once a year for its use towards those whose situations comply with sub-paragraphs (a), (b), (c), (d) and (e), title and degree changes can be performed in the posts of instructors depending on needs through the resolution of the Council of Ministers in accordance with the provision of additional article 1 of the Decree in the Force of Law numbered 78. Those whose appointment is not approved by the Council of Higher Education can resort to the legal remedy within sixty days. Out of those who do not apply to the Council of Higher Education and those whose appointment is not approved by the Council of Higher Education, those who do not apply to the legal remedy and those whose appointment as instructor is not approved through a judicial ruling shall apply to the State Personnel Presidency within one year following the date on which this Code enters into force. These shall be appointed to the vacant civil servant posts of the public institutions and organizations to be determined by the aforementioned Presidency within six months by considering the need of personnel without seeking any condition of examination and without being subjected to the limitations as regards open appointment.*

*However, in the event that those who have not successfully completed the master's degree apply to the State Personnel Presidency within three months following the date on which this article enters into force, on the condition that they meet the general conditions stipulated in article 48 of the Code of Public Servants numbered 657, within three months following the date of application, they shall be appointed to the vacant civil servant posts of the public institutions and organizations to be determined by the aforementioned Presidency by considering the need of personnel without seeking any condition of examination and without being subjected to the limitations as regards open appointment. Those who currently work with the status of Civil servant shall be allowed to perform their compulsory services at the institutions at which they are working.*

*If these are those who currently work at public institutions at the institutions to which they are appointed, they shall fulfill their responsibility of compulsory service as determined within the framework of general provisions at their institutions as regards their education periods within the country or at abroad and the proceeding of the debt amounts initiated in the name of the concerned due to their education shall be renounced and the procedure of collection shall be terminated. In the event there are amounts which have been previously paid by them, the periods which correspond to this amount shall be deducted from the period of compulsory*

*service of the concerned. However, the domestic salaries which those who do not want to return to the university or another public institution have received in return for their services shall not be requested in return for compulsory service. Other payments which are made for their education shall be requested except for these salaries.*

*Out of those who have been granted with the right to education in accordance with provisional article 47 although the situations stipulated in subparagraphs (a), (b) or (c) of paragraph one have occurred, those whose appointment has been made and out of those who have not been discharged from their posts, those about whom a debt proceeding is carried out shall be kept in their posts; the provision of the foregoing paragraph shall also apply on them. The periods during which they have worked at higher education institutions shall be deducted from their compulsory services.*

*In the event that those for whom an assignment in which a responsibility of compulsory service is prescribed again has been made or will be made out of those who fall under the scope of this article and who are appointed to a post of instructor have completed or complete their postgraduate education - training within the framework of this assignment in a successful way, the periods during which they work in this duty shall be deducted from their compulsory services as regards the first assignment and their responsibility of compulsory service shall continue in relation to the second assignment; in the event that they fail, the periods for the responsibility of compulsory service arising out of this assignment shall be added into their previous periods for the responsibility of compulsory service.*

*For all kinds of expenses which are made in foreign currency to those who leave their posts or who are dismissed because of a penalty without completing their compulsory service for which they are responsible after they are appointed to the posts of instructor or civil servant within the framework of the aforementioned provisions and those who fail to fulfill their responsibility of compulsory service due to the fact that they do not apply although they are covered by this article or that they do not meet the general conditions stipulated in article 48 of the Code of Public Servants without considering the amount for which they will be held responsible and the provisions of the undertaking deed that they have signed and of the duly-signed joint guarantee deed and without resulting in the making of payment to the concerned;*

*a) About those whose undertaking deed and duly-signed joint guarantee deed have been received after 5/8/1996 on which additional article 34 of the Code of Public Servants numbered 657 enters into force, calculation shall be made according to the provisions of paragraph two of the aforementioned article without incurring interest for the periods prior to the date of publication of this Code.*

*b) About those whose undertaking deed and duly-signed joint guarantee deed have been received prior to the date of 5/8/1996, calculation shall be made over the amount to be determined by converting it to Turkish Lira over effective selling rate of exchange determined and announced by the Central Bank of the Republic of Turkey on the date on which the payment is actually made in the name of the concerned and by incurring the legal interest determined and announced so as to be valid as of the date of 1/1/2006 for the period that elapses until the date on which this Code enters into force. However, in the event that a situation which is disadvantageous to the debtor occurs as a result of the calculation being made according to these provisions, the provisions of subparagraph (a) shall apply.*

*The calculated amount of debt can be split into installments up to a maximum period of five years by considering the situation of the concerned and the amount that will be made to be paid. The amount that they have previously paid and the amount that corresponds to the periods which pass in their compulsory services shall be deducted from the amount to be determined in accordance with the aforementioned article."*

#### **IV. EXAMINATION AND JUSTIFICATION**

29. The individual application of the applicant dated 26/12/2012 and numbered 2012/1269 was examined during the session held by the court on 8/5/2014 and the following are ordered and adjudged:

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

30. The applicant asserts that "*equality before law*" defined in article 10, "*the right of ownership*" defined in article 35 and "*the right to a fair trial*" defined in article 36 of the Constitution were violated by stating that, in the action of debt filed by the Rectorate of Balikesir University against him due to the responsibility of compulsory service, wrong legal provision was implemented, that his defense was not taken into account either by the local court or the appeal authority, that no justification and evaluation was present in the decision of the local court as regards why he could not benefit from the legal provision that he specified in his defense, that the correct legal provision was implemented in another similar incident and the action for compensation filed by the university was dismissed, that he was obliged to pay compensation in an unjust way as a result of the fact that the wrong legal provision was implemented for him and that some of the compensation was collected by way of enforcement and requests that a decision be delivered on the removal of the violation.

##### **B. Evaluation**

31. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant. It has been necessary to evaluate the claim of violation of the principle of equality by the applicant under a separate heading and to evaluate the part of the application related to his claims as to the effect that he was obliged to make payment in an unjust way as a result of the implementation of the wrong legal provision in the settlement of the dispute and that his right of ownership was also violated due to the compensation a part of which was collected by way of compulsory enforcement as they are linked with his complaints that he has asserted within the scope of the right to a fair trial.

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

##### **a. On His Claim As to the Effect that the Principle of Equality Was Violated**

32. The applicant asserted that the principle of equality was violated by stating that, in a similar incident, the action of debt filed on another person working at the same institution was dismissed, that however the action filed against him was accepted.

33. Paragraphs one and five of Article 10 of the Constitution with the side heading "*Equality before law*" are as follows:

*"Everyone is equal before law without being subject to any discrimination based on language, race, colour, gender, political opinion, philosophical belief, religion, sect or similar grounds.*

*The State organs and administrative authorities must act in compliance with the principle of equality before law in all their proceedings."*

34. Article 14 of the Convention with the side heading of "*Prohibition of discrimination*" is as follows:



*"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status."*

35. It is not possible to evaluate in an abstract manner the claim of the applicant as to the effect that the principle of equality regulated in article 10 of the Constitution and the prohibition of discrimination regulated in article 14 of the Convention have been violated given the expressions in the aforementioned articles and it is absolutely necessary to discuss it in connection with other fundamental rights and freedoms stipulated within the scope of the Constitution and the Convention. In other words, in order to discuss whether the prohibition of discrimination has been violated or not, the claim of violation needs to answer the questions on which fundamental right and freedom the person was subject to discrimination (App. No: 2012/1049, 26/3/2013, § 33).

36. The applicant asserted his application based on the principle of equality in connection with the delivery of different decisions in trial. In other words, he claims that he was subject to discrimination in terms of the right to a fair trial. In this context, it is necessary to examine the claim of the applicant within the framework of article 10 of the Constitution by also considering article 14 of the Convention.

37. The fact that the principle of equality does not have an independent protective function in the examination of an individual application does not constitute an obstacle for the subjection of this prohibition to an expansive interpretation. Even if a conclusion can be reached as to effect that a constitutional right has not been violated when the claim that a right has been violated is examined separately, this situation does not prevent the examination of a discriminative practice towards that right. In this context, even if the relevant fundamental right and freedom has not been violated, a conclusion can be reached as to effect that the discriminative attitude shown in a subject related to that right has violated the principle of equality (App. No: 2012/606, 20/2/2014, § 48).

38. The concept of "*equality*" solely means the requirement in relation to not performing a different treatment for the individuals in the same situation without any objective and reasonable basis. Article 10 of the Constitution in which this concept has become concrete prohibits different forms of treatment "*based on language, race, colour, gender, political opinion, philosophical belief, religion, sect or similar grounds*"; article 14 of the Convention prohibits different forms of treatment based on "*sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*" (App. No: 2012/606, 20/2/2014, § 49).

39. In accordance with paragraph (2) of article 48 of the Code numbered 6216, it can be decided that the applications which are clearly devoid of basis are inadmissible. The applications in which an applicant cannot prove the claims of violation will also be considered to be clearly devoid of basis for this reason (App. No: 2012/665, 13/6/2013, § 20). In parallel with this, the responsibility of explaining and proving the facts and cases which are the subject matter of the application and the connections between the constitutional rights which are the subject matter of the claim of violation belongs to the applicant as a rule (App. No: 2013/2355, 7/11/2013, § 38).

40. The applicant asserts that the action for compensation filed against him was accepted while the action for compensation filed against his colleague that he describes as "*being in the same situation*" and "*having the same legal status*" with him was dismissed and that this situation is contrary to the principle of equality. These expressions used by the applicant and the information included in the application form and the annexes thereof are not suitable for the inference of sufficient reasoning on the evaluation of discrimination. For as much as, the colleague of the applicant that he has pointed as a precedent filed an application in order to benefit from the transfer of the responsibility of service within the period prescribed in provisional article 53 added into the Code numbered 2547 through article 2 of the Code numbered 5535; however his/her request was not sent to the Council of Higher Education due to the mistake of the institution to which s/he filed the application, then the action of debt filed against the relevant person was also dismissed on the ground that the person filed an application within due period. However, the applicant filed a request for the restructuring of debt rather than a request for the transfer of the responsibility of service within the period prescribed in the legal regulation, but his request for the responsibility of service that he filed after the end of the period prescribed in the regulation was dismissed, then the action of debt filed against him was accepted.

41. For the reasons explained, as it is understood that no comparison of equality can be made between the cases of the applicant and his colleague that he has made a subject of comparison which were finalized in a different way due to the fact that they are not in the same legal situation and that for this reason the applicant cannot prove his claim of violation, it should be decided that this part of application is inadmissible due to the fact that "*it is clearly devoid of basis*" without examining it in terms of other conditions of admissibility.

#### **b. On His Claim As to the Effect that the Right to a Fair Trial Was Violated**

42. The applicant claimed that his defense was not taken into account either by the local court or the appeal authority, that no justification was present and no evaluation was made in the decision of the local court as regards why he could not benefit from the legal provision that he specified in his defense, that for these reasons "*the right to a fair trial*" defined in article 36 of the Constitution was violated.

43. It must be decided that this part of the application as regards the claim of the right to a fair trial of the applicant having been violated is admissible as it is not clearly devoid of basis and there is no other reason that will require the delivery of a decision on its admissibility.

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

44. The applicant claimed that "*the right to a fair trial*" defined in article 36 of the Constitution was violated.

45. The Ministry of Justice, in its opinion letter, stated that these issues should be taken into account during the examination of the complaint as to the effect that the decisions of the court and the appeal authority were devoid of justification by indicating that the applicant stated that he should benefit from the regulation brought through the Code numbered 5535 due to the fact that he was currently working at a public institution, that while the unfair action filed by the Rectorate of the University against him was required to be dismissed for this reason, he was ruled to be the debtor without considering his defense on this matter at all; that the court took the expert report as the basis for its final decision, that an evaluation was made on the objection asserted by the applicant as regards the aforementioned

report and final discretion was left to the Court, that it was understood from the final decision that the objection of the applicant was not considered to be appropriate, a decision on the dismissal of this request was also delivered by the Supreme Court of Appeals by stating that there was no reason for appeal and correction.

46. The applicant, other than the claims that he asserted in the application form, stated that the expressions included in the expert report would not render the decisions of the court justified.

47. The claim of the applicant will be examined in terms of the right to a reasoned decision.

48. Paragraph one of Article 36 with the side heading "*Freedom to claim rights*" of the Constitution is as follows:

*"Everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means."*

49. Paragraph three of article 141 of the Constitution with the side heading of "*Publicity of hearings and the need for verdicts to be justified*" is as follows:

*"All types of verdicts of all courts are written together with their justification."*

50. The relevant section of article 6 of the Convention with the side heading of "*Right to a fair trial*" is as follows:

*"In the determination of disputes related to his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

51. The production and evaluation of evidence including the right to call witness during the trial held are accepted within the scope of the principle of the equality of arms accepted as one of the elements of the right to a fair trial and this right and the right to a reasoned decision are also concrete manifestations of the right to a fair trial just as the right to trial in a reasonable time. In many of its decisions over which it carries out an examination in accordance with article 36 of the Constitution, the Constitutional Court includes principles and rights such as the right to a reasoned decision and the principle of the equality of arms which are both stipulated in the wording of the Convention and included within the scope of the right to a fair trial through the case law of the ECtHR within the scope of article 36 of the Constitution by way of interpreting the relevant provision in the evidence of article 6 of the Convention and the case law of the ECtHR (App. No: 2012/13, 2/7/2013, § 38).

52. While the fact that the decisions of the court are reasoned is one of the elements of the right to a fair trial, this right cannot be construed as responding to all kinds of claims and defenses asserted in the trial in a detailed way. For this reason, the scope of the obligation of showing a justification can vary depending on the quality of a decision. Nevertheless, the fact that the claims of the applicant as regards procedure or merits which require a separate and clear response have been left unresponded will result in the violation of a right (App. No: 2013/1213, 4/12/2013, § 26).

53. While the fact that the justifications of the decisions delivered by the courts of remedy are not detailed is construed as the fact that the justifications included in the decisions of the court of first instance are accepted in the decisions of approval (see *García Ruiz v. Spain*, App. No: 30544/96, 21/1/1999, § 26), the fact that the concrete complaints of the applicants as to the effect that their procedural rights have been violated through the appeal applications as regards the significant issues which are not discussed by the court of first instance although the applicants have stated them are not discussed in the appeal examination can be considered as the violation of the right to a reasoned decision (App. No: 2012/603, 20/2/2014, § 49).

54. In the concrete case, the applicant, in his defense petition that he submitted in relation to the action of debt filed against him on the ground that he did not fulfill the responsibility of compulsory service, asserted that those who work at public institutions could fulfill the responsibility of compulsory service that they did not fulfill in return for their education expenses at abroad at the institution at which they were currently working in accordance with provisional article 53 added into the Code numbered 2547 through article 2 of the Code numbered 5535, that it was regulated that in this case debt proceeding could be waived, that he filed an application on 25/9/2006 in order to benefit from the aforementioned regulation although no condition of application was sought in order to benefit from this regulation, that on the other hand the period for the responsibility of compulsory service was miscalculated, the Court of First Instance decided that an expert review be carried out for the settlement of dispute; although it was stated that the applicant could not benefit from provisional article 53 added into the Code numbered 2547, it was stated that the discretion of decision over this issue belonged to the Court and the calculated amount of debt was notified to the Court. The applicant objected to the expert report as to the effect that he could not benefit from the regulation. However, in the decision it delivered on merits, the Court of First Instance decided that the amount of debt determined in the expert report be paid to the Rectorate without carrying out any evaluation on the main claim of the applicant as to the effect that the action should be dismissed due to the regulation as regards the fact that he could complete his responsibility of compulsory service at BRSA.

55. The same issue was asserted in the petition as regards the appeal application filed by the applicant against this decision; as a matter of fact, although he submitted to the 18th Civil Chamber of the Supreme Court of Appeals the opinion of the Ministry of Finance dated 20/3/2012 and numbered 3527 as to the effect that he was also in the scope of paragraph three of article 53 of the Code numbered 2547 while the appeal trial was going on, the aforementioned Chamber decided that the decision of the Court of First Instance be approved without carrying out any evaluation on the claims of the applicant.

56. As can be seen, as it is clear that the objections filed by the applicant in the action of debt filed against him as to the effect that the transfer of responsibility of compulsory service to the institution at which he was working which indicated that he was not a debtor and was based on as the main claim and that there was no time limitations for this request in accordance with the regulation made were only evaluated in the expert report, that the expert did not have any duty other than helping the court for the settlement of dispute and that it is clear that the report that s/he prepared did not have a quality of judicial decision, it is observed that it is not possible to accept that the claim of the applicant which was not discussed and justified in the decision of the court to be responded due to the fact that it was

stated in the expert report, that no justification as regards this issue was included in the decision delivered on the appeal although the same claim was asserted in the appeal phase of the decision.

57. In this case, the claim that the responsibility of compulsory service of the applicant could be transferred to the institution at which he was working and that there was no time limitation for this, which is a significant claim for the settlement of dispute that needs to be responded in a separate and clear way was not discussed and responded in the decision of the Court of First Instance. Although the applicant also asserted the same claim in the appeal remedy which is an effective legal remedy that needs to be exhausted, this claim was not responded in the decision of the Supreme Court of Appeals either and the attitude of the Court of First Instance leaving the claim unresponded was accepted in the same way. For this reason, when the trial process is considered as a whole, a conclusion has been reached to the effect that the right to a reasoned decision of the applicant was violated.

58. For the aforementioned reasons, it should be decided that the applicant's right to a fair trial which is enshrined in article 36 of the Constitution was violated.

59. Members Burhan ÜSTÜN and Hicabi DURSUN have disagreed with this opinion.

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

60. By stating that his constitutional rights were violated, the applicant requests that a decision be delivered on the removal of the violation.

61. Article 50 of the Code numbered 6216 with the side heading "Decisions" is as follows:

*"(1) At the end of the examination on merits, it shall be decided that the right of the applicant has been violated or has not been violated. In the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged. However, legitimacy cannot be reviewed, no decision with the quality of an administrative act and action cannot be delivered.*

*(2) 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."*

62. As the violation determined in the case which is the subject matter of the application arises out of the violation of the right to a reasoned decision that is one of the elements of the right to a fair trial and there is legal interest in the removal of the violation by carrying out a retrial, it should be decided that a copy of the decision be sent to the relevant court in order to carry out a retrial for the removal of the violation and its consequences in accordance with paragraphs (1) and (2) of the Code numbered 6216.

63. It should be decided that 172.50 TL deposited by the applicant as the amount of fee be paid to the applicant.

## V. JUDGMENT

In the light of the reasons explained, it is decided on 8/5/2014

### A.

1. **UNANIMOUSLY** that the claim of the applicant to the effect that the principle of equality was violated is **INADMISSIBLE** as "*it is clearly devoid of basis*",

2. **UNANIMOUSLY** that his claim as to his right to a reasoned decision was violated is **ADMISSIBLE**,

3. **BY MAJORITY OF VOTES** and the dissenting votes of Burhan ÜSTÜN and Hicabi DURSUN that the right to a reasoned decision **WAS VIOLATED**,

**B. UNANIMOUSLY** that a copy of the decision be **SENT** to the 2nd Civil Court of First Instance of Balıkesir for carrying out a retrial in order for the violation and the consequences thereof to be removed,

**C. UNANIMOUSLY** that the trial expense of 172.50 TL be **PAID TO THE APPLICANT**,

**D.** That the payment be made within four months as of the date of application by the applicant 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  
Serruh KALELİ

Member  
Zehra Ayla PERKTAŞ

Member  
Burhan ÜSTÜN

Member  
Hicabi DURSUN

Member  
Zühtü ARSLAN

## **LETTER OF DISSENTING VOTE**

The applicant asserted that paragraph three of provisional article 53 of the Code numbered 2547 which should have been implemented for him was not implemented, that his action was dismissed in the action that he filed, that however there was no justification in the decisions of the court and the Supreme Court of Appeals as regards this issue, that "the right to a fair trial" defined in article 36 of the Constitution was violated.

The principle of the decisions of courts being reasoned is among the elements of the right to a fair trial. This right does not mean that every claim and defense will be answered or responded except for responding to the claims and defenses as regards procedure and merits. However, if one of the asserted issues is accepted, in the event that it is influential on the result of the action, the court can be obliged to provide a certain and clear response on this matter. Even in such a case, if expressed in a clear way, an implied dismissal can also be sufficient. On the other hand, as the justifications shown by subordinate courts in their decision will be accepted by the authorities of remedy, there is no need to show justification in a separate way in the aforementioned decisions. As a matter of fact, the case law of the ECtHR is also in the same vein.

The issues asserted by the applicant was clearly evaluated in the expert report, the report was notified to the applicant and he was allowed to file an objection, the expert report was referred and the evaluation in it was agreed by the court, thus, justification was formed on the asserted issue. The Supreme Court of Appeals which approved the decision of the court and dismissed the request of the applicant for the correction of the decision also shared the same opinion.

Due to the reasons explained, I do not agree with the majority opinion which accepted that the right to a fair trial was violated due to the lack of justification.

Member

Burhan ÜSTÜN