REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2012/660

Date of Decision: 7/11/2013

FIRST SECTION

DECISION

President	:	Serruh KALELİ
Members	:	Mehmet ERTEN
		Zehra Ayla PERKTAŞ
		Erdal TERCAN
		Zühtü ARSLAN
Rapporteur	:	Cüneyt DURMAZ
Applicant	:	Kamil KOÇ
Counsel	**:**	Att. Cavit ÇALIŞ

I. SUBJECT OF APPLICATON

1. The applicant, who received treatment for a long period following an accident he had, alleged that his rights defined under article 36 of the Constitution were violated by indicating that, in the case he filed at the High Military Administrative Court with the request that the action pertaining to his assignment to a duty located in another province while his treatment was ongoing be annulled, a decision was delivered to dismiss the case due to statue of limitations despite the fact that the period to file the case started from the notification of the action to himself and that he filed the case within its due period, that certain information and documents were not notified to him during the trial.

II. APPLICATION PROCESS

2. The application was directly lodged by the attorney of the applicant on 16/11/2012. In the preliminary examination 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 on 25/12/2012 by the First 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 clause (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. In the session held by the Section on 26/3/2013, it was decided that the examination of admissibility and merits of the application be carried out together as per subparagraph (b) of paragraph (1) of article 28 of the Internal Regulation of the Constitutional Court. The facts and cases, which are the subject of the application, were notified to the Ministry of Justice on 1/4/2013 and the Ministry submitted its opinion to the Constitutional Court on 3/6/2013.

5. The opinion submitted by the Ministry of Justice to the Constitutional Court was notified to the applicant on 5/6/2013 and the applicant submitted his opinion to the Constitutional Court on 28/6/2013.

III. INCIDENTS AND FACTS

A. Incidents

6. As expressed in the application petition, the incidents are summarized as follows:

7. The applicant, who worked as an officer at the Special Forces Command Ankara Gölbaşı Natural Disaster Rescue (NDS) Battalion Command, was injured in his right knee as a result of the accident he had on 12/6/2009 in Ankara during the "*compulsory parachute jumps*" for the year 2009.

8. The applicant, who received treatment at and obtained rest reports from various military hospitals, underwent arthroscopic surgery at Gülhane Military Medical Academy (GMMA) on 5/4/2010.

9. The applicant was appointed to Ağrı Doğubayazıt 1. Mec. Inf. Brig. 2. Mec. Inf. Bat. Com. Sup. Comp. Command with the September 2010 General Officer Assignments.

10. The applicant, who obtained rest reports on numerous occasions following the operation he had, was re-operated at a private hospital in Ankara on 31/5/2011.

11. Regarding the applicant, who was referred to the GMMA Health Board with the decision that he was "*incapable of fulfilling his B 61 F4 type duty*" as a result of the examination carried out at the GMMA orthopedics department on 22/9/2011, a decision was delivered with the health board report dated 2/2/2012 and numbered 971 to the effect that he was "*incapable of fulfilling his 61/B/4 36/A/1 type duty. It is suitable that he be assigned in classes marked with (+) in the classification chart number 2 of the TAF HCR pertaining to the L.F.C.*"

12. While a case was filed at the High Military Administrative Court for the determination of the applicant's new class due to the report that had been issued, the classification actions are still ongoing.

13. The applicant, who was re-operated at a private hospital on 3/2/2012, received a rest report for a total period of 4 months. The treatment process of the applicant is still ongoing.

14. The action pertaining to the assignment of the applicant to Ağrı Doğubayazıt within the scope of the September 2010 Officer Assignments was notified to the applicant on 21/3/2012.

15. The applicant filed a case at the High Military Administrative Court (HMAC) on 11/4/2012 with the request that the assignment action be annulled. The First Chamber of the HMAC dismissed the case due to statue of limitations with its decision dated 6/6/2012 and numbered M.2012/577, D.2012/722. In the justification for the decision of dismissal, it was indicated that although the action of assignment was notified to the applicant on 21/3/2012, the assignments were published over KARANET Personnel Administration Information System (PAIS) on 17/9/2010 for individual and corporate users, that the plaintiff received this

action on his personal page, that he then completed an assignment satisfaction survey, that the plaintiff saw his assignment in the announcements section through the KARANET user report and that he had talks with officers tasked at the assignment department, that the applicant learned about the assignment action on 17/9/2010, that the case was filed approximately 1,5 years later on 11/4/2012 whereas it needed to have been filed within sixty days for the annulment of the action.

16. The applicant requested the correction of the decision on 9/7/2012 by alleging that the decision on the dismissal of the case due to statue of limitations despite the fact that he filed his case within its due period starting from the notification of the assignment action to him was erroneous. This request of the applicant was dismissed by the same Court with the decision dated 9/10/2012 and numbered M.2012/2535, D.2012/1027. The decision of dismissal was notified to the applicant on 18/10/2012.

B. Relevant Law

17. Paragraph one of article 40 of the Code of High Military Administrative Court numbered 1602 with the heading of *"Period for filing a case"* is as follows:

> "*The period for filing cases at the High Military Administrative Court shall be sixty days starting from the date of written notification in all sorts of actions in circumstances where no separate period is indicated in codes. In cases where notification is made through notice as per the provisions in codes that are specific to those whose addresses are not definite, unless a provision to the contrary exists in the special code, the period shall start fifteen days after the deadline of the notice.*

18. Article 47 of the Code Numbered 1602 with the side heading "*Giving files to the Office of the Chief Prosecutor*" is as follows:

> "*The case files shall be given to the Office of the Chief Prosecutor by the Secretariat General after the petitions and defenses are received or once the response periods have elapsed. The files shall be sent back to the Secretariat General once the opinion of the Office of the Chief Prosecutor is received. The opinion of the Office of the Chief Prosecutor shall be notified to the parties by the Secretariat General. The parties can submit their opinions in writing to the Court within seven days starting from the date of notification. This period cannot be extended. Once the responses of the parties are received or the response period has elapsed, the files shall be sent to the competent administration via the Secretariat General.*"

19. Paragraphs four, five, six and seven of article 52 of the Code numbered 1602 with the side heading "*Examination outside the file*" are as follows:

> *(Amended paragraph four: 19/6/2010-6000/20 art.) The information and documents in the case file shall be open to the parties and their attorneys. So much so that; of the information, documents and files that have been made to be brought by the court or sent by the administration, those regarding which a condition has been imposed not to be examined by the parties and their attorneys for the purposes of protecting the special information, honor, dignity and safety of other individuals and instances or keeping the investigation methods of the administration secret as well as those in the personal file of the personnel except for the subject of the case cannot be made to be examined by the parties and their attorneys.*
>
> *(Additional paragraph: 19/6/2010-6000/20 art.) If the information and documents that are of such a nature that they cannot be made to be examined by the parties and their*

attorneys are of such a quality as not to be able to be separated from other documents that are open to the parties and their attorneys as per their locations, the copies that will be made to be examined by the parties and their attorneys shall be sent separately as the relevant parts are blacked out by the administration.

(Additional paragraph: 19/6/2010-6000/20 art.) The plaintiff party or his/her attorney can object to the court with the claim that the information and documents that have been blacked out or not provided are matters that would constitute the basis for the defense. Information and documents that were previously blacked out or not provided can be made to be examined by the opposing party within the framework to be determined by the court, in matters that are deemed to be rightful following the examination of this objection by the court.

(Additional paragraph: 19/6/2010-6000/20 art.) Information and documents that are obtained as per these provisions and are classified cannot be used by the parties and their attorneys for another purpose outside the court. The relevant provisions of codes shall remain reserved regarding those who act to the contrary."

20. Article 120 of the Code of Personnel of the Turkish Armed Forces numbered 926 with the side heading "*Period of starting in assignment to duty*" is as follows:

"*In assignments of officers and non-commissioned officers for the first time and during their service period:*

a) Those that are located within the boundaries of the same municipality or within the same garrison, shall be obliged to join the duty they have been assigned to within 24 hours following their acknowledgment of the order of assignment, within working hours of the day when the service starts if this period coincides with a day of official holiday,

b) In assignments outside the municipal boundaries or to another garrison, they shall be obliged to join the duty they have been assigned to within 15 days except for the travel period indicated in the special code pertaining to their travel allowances.

An action shall be carried out as per the special codes regarding those who do not join their duties within these periods without an excuse.

(Additional: 29/7/1983 - 2870/9 art.) In assignments that are fulfilled by means of changing places, the fact that the personnel is on leave or sick leave shall not thwart notification. However, the periods under sub-paragraphs (a) and (b) shall commence at the end of the leave or sick leave period."

21. 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 the 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 by chiefs of legal departments, directors of procedure, legal advisors and lawyers in the capacity of attorneys of administrations in judicial and administrative cases including those that are subject to the arbitration procedure and at execution offices, 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."

IV. EXAMINATION AND JUSTIFICATION

22. The individual application of the applicant dated 16/11/2012 and numbered 2012/660 was examined during the session held by the court on 7/11/2013 and the following were ordered and adjudged:

A. Claims of the Applicant

23. The applicant alleged that his right to a fair trial defined under article 36 of the Constitution was violated by indicating that in the case he filed with the request that his assignment realized while his treatment was still ongoing be annulled, a decision was delivered to dismiss the case due to statue of limitations despite the fact that the period for filing the case started from the notification of the action to himself and that he had filed the case within its due period, that the information that was presented by the defendant administration and was classified was not notified to himself, that the opinion of the chief prosecutor and the rapporteur was not notified to himself when his case was dismissed and that the fact that counsel's fee was ruled upon as per the provisions of the DIFC numbered 659 was in violation of the Constitution.

B. Evaluation

1. In Terms of Admissibility

a. Competence In Terms of Subject

24. It should first be determined whether or not the application falls within the jurisdiction of the Constitutional Court in terms of its subject. In the examination of an individual application, the common field of protection of the Constitution and the European Convention on Human Rights (the Convention) is taken as the basis for determining whether a claim of violation falls into the jurisdiction of the Constitutional Court in terms of subject or not (App. No: 2012/1049, § 18, 26/3/2013).

25. Paragraph one of article 36 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."*

26. In paragraph one of article 36 of the Constitution, it is stated that 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. Since the scope of the right to a “fair trial” stipulated in the article is not explicitly regulated in the Constitution, the scope and content of this right need to be determined within the framework of article 6 of the Convention with the side heading “Right to a fair trial”.

27. Paragraph (1) of article 6 with the side heading of *"Right to a fair trial"* of the Convention is as follows:

> *In the determination of 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 code. …*”

28. The European Court of Human Rights (ECtHR) accepts in principle that disputes pertaining to civil servants can be dealt with within the scope of the right to a fair trial. However, it considers the matter separately regarding the state and those civil servants who are affiliated with it with a special bond of confidence and loyalty (military, police and so on). Within this framework, the following two conditions need to have been fulfilled together in order for disputes between civil servants and the state to be excluded from the scope of the right to a fair trial. First, the state needs to not have granted the right to apply to a court in its domestic law with regard to the dispute in question. Secondly, this deprivation needs to be justified with objective reasons pertaining to the interest of the state. In other words, the state needs to demonstrate explicitly that the subject of the dispute pertains to the execution of the public force and a bond of loyalty and confidence that is specifically directed at the state (See *Vilho Eskelinen v. Finland*, App. No: 63235/00, 19/4/2007, § 62). Indeed, the ECtHR examined a dispute where the national authorities granted the right to apply to a court, the applicant was military and where the trial took place at a military court within the scope of the right to a fair trial(See *Pridatchenko and Others v. Russia*, B. No: 2191/03, 3104/03, 16094/03, 24486/03, 21/6/2007, § 47).

29. Therefore, claims of violation pertaining to the dispute that is the subject of the application, which falls within the common field of protection of the Constitution and the Convention fall within the jurisdiction of the Constitutional Court in terms of the subject.

30. Due to the fact that the other matters that have been made the subject of complaint in the application bear different qualities in terms of other admissibility criteria, the examination pertaining to each complaint needs to be conducted separately.

b. Claim Pertaining to the Violation of the Right to Access to Court due to Dismissal of the Case as a Result of Statue of Limitations

31. It is seen that the part of the application to the effect that article 36 of the Constitution was violated as a result of the decision to dismiss the case on grounds of statue of limitation despite the fact that the applicant had filed his case within its due period starting from the notification of the action of assignment to the applicant is not clearly devoid of grounds in accordance with article 48 of the Code numbered 6216. As no other reason for inadmissibility has been observed, it must be decided that this part of the application is of an admissible nature.

c. Claim That Confidential Documents Were Not Submitted

32. The applicant alleges that the confidential information submitted as an annex by the defendant administration were not notified to himself and that his right to a fair trial was thus violated.

33. One of the elements of the right to a fair trial is the principle of the equality of arms. The principle of the equality of arms means the subjection of the parties to a case to the same conditions in terms of procedural rights and the fact that one of the parties has the opportunity of stating its claims and defenses before a court in a reasonable way without it being put at a weaker position than the other one. This principle needs to be abided by in civil cases pertaining to civil rights and liabilities and in administrative cases in addition to criminal cases. (App. No: 2013/1134, 16/5/2013, § 32).

34. It is understood that in the decision that was delivered as a result of the trial that is the subject of the application it was decided to return a confidential envelope in addition to

dismissing the case due to it not having been filed within its due period, that this decision was not a decision that was delivered as a result of a discussion of the merits of the case, that the reasoned decision did not contain clear information to the effect that the documents contained within the envelope stated to be confidential were evaluated by the court and that they constituted the grounds for the decision.

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

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

36. Paragraph (2) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 with the side heading of *"Individual application right"* is as follows:

"*All administrative and judicial remedies stipulated in the code in relation to the act, action or neglect, which is claimed to have caused the violation, must be exhausted before the individual application is lodged.*"

37. In accordance with the aforementioned provisions of the Constitution and the Code, an individual application to the Constitutional Court is *"a legal remedy with a secondary quality"* and, prior to resorting to this remedy, as a rule, ordinary legal remedies must be exhausted.

38. The respect to fundamental rights and freedoms is a principle which all of the organs of the state must abide by, and in the event of behavior that is non-compliant with this principle, the administrative instances and courts of instance that have venue must be applied to against the resulting violation.

39. Due to the secondary nature of the individual application, the applicant needs to primarily convey the claims that his fundamental rights and freedoms were violated to the administrative and judicial authorities of venue in accordance with the due procedure, to submit the information and evidence that he has about this subject to these instances within due period, at the same time, to pay required attention to following his case and application in this process. The claims as regards the violation of fundamental rights and freedoms which are not asserted and pursued before ordinary review mechanisms in this way cannot be made the subject of an individual application before the Constitutional Court (App. No: 2012/1049, 16/4/2013, § 32).

40. In the incident that is the subject of the application, when the request for correction (§16) filed by the applicant on 9/7/2012 is examined, it is seen that the applicant does not bring forward any claim to the effect that the confidential information submitted by the defendant administration was not notified to himself or that this information was taken as the basis for the judgment.

41. As it is understood that the individual application was lodged without the claims of violation regarding this part of the application being brought forward by the applicant in the legal remedies envisaged for the administrative action, which is the subject of the violation claim, it must be decided that the claims regarding this part are inadmissible due to the fact that "*the remedies were not exhausted*" without them being examined in terms of other conditions of admissibility.

d. Claim That The Opinion Of The Chief Prosecutor And The Rapporteur Were Not Notified

42. The applicant also alleges that the written opinion of the Office of Chief Prosecutor and the opinion of the rapporteur were not notified to himself prior to the decision by the HMAC on the dismissal of the case and that his right to a fair trial was thus violated.

43. The ECtHR has decided that the principles of the equality of arms and adversarial trial were violated as a result of the failure to notify the opinion of the Chief Prosecutor of the HMAC, who submitted his opinion to the court after having conducted an independent examination pertaining to the file, to the parties in advance (See *Miran v. Turkey*, App. No: 43980/04, 21/4/2009). Therefore, notifying the opinion of the Office of Chief Prosecutor to the parties in advance and submitting it to their examination and providing them with the opportunity to prepare their own counter opinions is a requirement of the right to a fair trial (App. No: 2013/1134, 16/5/2013, § 33).

44. Within this framework, the lawmaker carried out a legal amendment and through article 60 of the Code dated 22/5/2012 and numbered 6318 published in the Official Gazette dated 3/6/2012 and numbered 28312 it added a rule to article 47 of the Code numbered 1602 that allows the notification of the opinion of the Office of Chief Prosecutor to the parties via the Secretariat General and the parties to submit their responses to the Court in writing within seven days starting from the notification (App. No: 2013/1134, 16/5/2013, § 34).

45. The duty and position of the rapporteur judge during the trial process does not have the same quality as the prosecution authority. While rapporteur judges examine cases that are referred to them under the supervision of the court or president of chamber and prepare draft decisions and minutes, prosecutors serve under the chief prosecutor of the court. Rapporteur judges generally do not conduct investigations, they declare their opinions orally or in writing regarding a case the investigation of which has already been completed. Although it thus becomes possible for them to bring forward opinions that can influence court members, they fulfill this duty on behalf of the president of the court or president of the chamber (For the decision of the ECtHR in the same vein see *Meral v. Turkey*, App. No: 33446/02, 27/11//2007, § 40-42).

46. It cannot be understood from the examination of the file that the opinion of the Office of Chief Prosecutor and the Rapporteur were notified to the parties in advance during the first instance trial. The opinions of the Office of Chief Prosecutor and the Rapporteur were not included in the decision of the First Chamber of the HMAC to dismiss the case on the grounds of statue of limitation. In his petition with the request of correction dated 9/7/2012, the applicant did not allege that the opinion of the Office of Chief Prosecutor and the Rapporteur was not notified to himself. It is seen that the opinion of the Office of Chief Prosecutor received during the correction examination was notified to the applicant and that the applicant provided a response to these opinions. Therefore, the applicant became aware of the opinion of the Office of Public Prosecutor at the correction phase even though it had not been notified at the first instance trial phase and he found the opportunity to prepare his opinions against this and submit them to the court.

47. On the other hand, the applicant did not provide any explanation as to what additional theses he would have brought forward that he could not express before the court had the opinion of the office of chief prosecutor and the rapporteur been notified during the first instance trial. Moreover, it is also seen that the HMAC did not rely on the opinion of the Office of Chief Prosecutor and the rapporteur when delivering its decision. For this reason, it

cannot be stated that the applicant was deprived of a procedural means that would impact the outcome of the trial as a result of the failure to notify in advance the opinion of the Office of Chief Prosecutor and the rapporteur during the first instance trial. As a result, it is understood that the principle of the equality of arms was not violated in the concrete incident.

48. For the explained reasons, since it is understood that there is no clear violation in terms of the principles of the equality of arms and adversarial trial in the decisions of the HMAC, it must be decided that this part of the application is inadmissible due to the fact that it is *"clearly devoid of grounds"*.

e. Claim That Ruling On Counsel's Fee By Relying On The Provisions Of The DIFC Numbered 659 Is In Violation Of The Constitution

49. The applicant finally alleged that the regulation introduced with regard to the counsel's fee restricted his freedom to claim rights, that the fact that fundamental rights were regulated with the DIFC numbered 659 was in violation of the Constitution, that this regulation was in violation of the principle of proportionality.

50. The claims of violation that were brought forward with regard to the same subject with the same justifications were examined in the decision dated 2/10/2013 and numbered App. No: 2013/1613. In the decision in question, it was primarily stated that in the case that is the subject of the application, counsel's fee in favor of the administration was ruled upon based on the regulation introduced with the DIFC numbered 659, that therefore it was understood that the provisions envisaged by this regulatory administrative action were applied to the case, that the concrete application also needed to be assessed from this point of view. It was then decided in the decision that the violation claim was inadmissible by stating that the counsel's fee was a trial expense, that as a rule these kinds of expenses would constitute an intervention to the right to access to court, that however, certain liabilities could be envisaged for the applicants with a view to reducing the number of cases by preventing unnecessary applications and concluding disputes within a reasonable period without unnecessarily occupying the courts, that it was within the discretionary authority of public authorities to determine the scope of these liabilities, that it cannot be stated that the right to access to court would be violated unless the envisaged liabilities render it impossible or extremely difficult to file a case, that therefore the counsel's fee to be charged on the applicant in the event that he lost the case needed to be considered within this framework, that when the concrete application was examined in line with these principles, the fact that the applicant was rendered liable to pay counsel's fee in favor of the administration as a result of the dismissal of his case could not be claimed to involve an intervention to the right to access to court (App. No: 2013/1613, 2/10/2013, § 35-41).

51. For the explained reasons, it must be decided that this part of the application, which does not have a different aspect from the application referred to above, is inadmissible due to the fact that it is "*clearly devoid of basis*". Zühtü ARSLAN did not participate in this opinion.

2. Examination in Terms of Merits

52. The applicant alleged that his rights stipulated under article 36 of the Constitution were violated by stating that in the case he filed with the request that his assignment, which was carried out while his treatment was still on-going, be annulled, it was decided to dismiss the case due to statue of limitations despite the fact that the period to file the case started from the notification of the action to himself and that he filed his case within its due period.

53. In the opinion of the Ministry, when the complaints to the effect that article 36 of the Constitution was violated were examined, the principles adopted by the ECtHR in the subject of the right to a fair trial were referred to, it was stated that the periods for filing cases served important and legitimate purposes such as preventing situations of injustice that can occur as a result of courts being requested to deliver decisions regarding incidents that occurred in the distant past by relying on evidence that is incomplete and has lost its reliability due to the principle of legal security and time that has elapsed, that these periods aimed to serve justice and especially to guarantee respect to legal security.

54. The applicant did not agree with the statements included in the opinion of the Ministry on the merits of the application to the effect that the information contained within the confidential documents was not taken as basis for the judgment, he alleged on the contrary that the case was dismissed from a period point of view by relying on the information contained within the confidential documents that were not conveyed to his part.

55. 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."*

56. Article 40 of the Constitution with the side heading of *"Protection of fundamental rights and freedoms"* is as follows:

> "*Anyone whose rights and freedoms vested by the Constitution are violated has the right to ask for being granted the opportunity to apply to an authorized body without any delay.*
>
> *(Additional paragraph: 3.10.2001-4709/16 art.) The State is obliged to indicate in its proceedings the legal remedies and authorities the relevant individuals should apply and the time frames for these.*
>
> *Damages incurred by any individual through unfair treatment by public officials are compensated for by the State as per the law. The State reserves the right of recourse to the relevant official having responsibility.*"

57. Paragraph (1) of article 6 with the side heading of *"Right to a fair trial"* of the Convention is as follows:

> *In the determination of 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. …*"

58. In line with the fundamental approach adopted by the Constitutional Court with regard to individual applications, as a rule, proving the incidents that are contained within the case that is the subject of the individual application, the interpretation and implementation of legal rules, the admissibility and evaluation of evidence during the trial and whether or not a solution brought by courts of first instance to an individual dispute is fair from a merit point of view are not subjected to assessment during the individual application examination. As long as the rights and freedoms stipulated in the Constitution are not violated and unless they contain any obvious arbitrariness, material and legal mistakes in decisions of courts of instance cannot be handled in the examination of an individual application. In this framework,

unless a clear and evident discretionary mistake is present in the evaluation of the evidence by the courts of instance, the Constitutional Court cannot intervene in this discretion (App. No: 2012/1027, 12/2/2013, § 26).

59. Nevertheless, the right to access to trial is one of the fundamental elements of the right to a fair trial. Practices that can render it extremely difficult or impossible to access the court can violate the right to access to court. The fact that certain periods are envisaged for filing a case or resorting to legal remedies are a requirement of the principle of legal certainty and do not constitute a violation of the right to access to court unless they are so short as to render it impossible to file a case. Nevertheless, it must be accepted that the right to access to court has been violated if individuals have not been able to exercise their rights to file a case or to resort to legal remedies as a result of the envisaged period conditions having been clearly mistakenly implemented in violation of the law or miscalculated (App. No: 2013/1718, 2/10/2013, § 27).

60. It is stipulated under paragraph two of article 40 of the Constitution that the State must indicate in its actions what legal remedies and instances individuals shall resort to and the periods thereof.

61. It is clearly adjudged under paragraph three of article 125 of the Constitution that the periods in cases to be filed against administrative actions shall begin starting from the date of written notification.

62. The lawmaker thus adjudged with paragraph one of article 40 of the Code numbered 1602 that the period to file a case at the HMAC in all sorts of actions shall be sixty days starting from the date of written notification in circumstances where no separate period is provided in the codes.

63. It is adjudged under article 120 of the Code numbered 926 that in assignments of officers and non-commissioned officers that are conducted by means of changing places, the fact that the personnel is on leave or sick leave would not hinder the notification of the assignment action, that however, the periods accepted for them to join their assigned duties would begin at the end of the leave or sick leave period.

64. The applicant complains about the interpretation and implementation of the provisions pertaining to the period to file a case. Despite the fact that the action that is the subject of the case was notified to the applicant in writing on 21/3/2012, it is seen that the HMAC considered the date of 17/9/2010, when it considers the assignment action to be learnt by the applicant (when the September 2010 assignments were announced), as the date on which the period to file the case began to elapse.

65. As the courts implement procedural rules, they must refrain from strict formalism that would impair the fairness of the case on the one hand and from excessive flexibility that would result in the abolition of procedural conditions that are stipulated by law on the other (For a decision of the ECtHR in the same vein see *Walchli v. France,* App. No. 35787/03, § 29).

66. The periods to file administrative cases have been regulated with codes with a view to prevent administrative actions from constantly being under the threat of a case being filed and ensuring that the public service is conducted in a rapid and efficient manner; as per article 125 of the Constitution and various procedural codes, the commencement of these periods are rendered conditional on written notification.

67. The main objective of regulating the principle of written notification as a constitutional rule is to protect the rights and interests of individuals against administrative actions through judicial remedy; and to place the exercise of the right to file a case under constitutional guarantee to this end. In other words, the written notification especially comes into play in the exercise of the right of individuals to file cases against administrative actions that violate their interests (Council of State 10. Chamber, M. 2010/7934, D. 2010/6948, 28/9/2010).

68. The right to access to court would be violated in the event that procedural rules become a kind of obstacle in terms of the cases of individuals being heard by a competent court rather than serving the fulfillment of justice as a result of ensuring legal security and properly conducting the trial (For the decision of the ECtHR in the same vein see *Efstathiou and Others v Greece*, App. No: 36998/02, § 24).

69. Even though it was explained in detail in the decision of the HMAC to dismiss the case on period grounds that the applicant had learned about the assignment action in various ways (although the applicant alleges the contrary), it is clearly adjudged in article 40 of the Code numbered 1602 that the period for filing cases against administrative actions is sixty days starting from the notification of the action and it is stipulated under article 120 of the Code numbered 926 that the periods pertaining to the obligation to join the duty would start at the end of leave or sick leave period even though the notification pertaining to the assignment action is received while on leave or sick leave. The applicant did not join his new place of duty due to the fact that he was considered to be on leave during the assignment action and until the date of application through continuous health reports.

70. Given the fact that the exercise of the right to access to court is rendered conditional on the period stipulated in the code with a view to administrative actions and that this period is rendered conditional on written notification, that the HMAC considered the period to file the case pertaining to the assignment action, which was not legally notified to the applicant and thus did not bear the liability to fulfill for the applicant, as the date on which the applicant learned about the assignment action by ignoring the clear rule that is the subject of the dispute and that it decided to dismiss the case with the justification that it had not been filed within its due period prevented the court from examining the merits of the applicant's claims pertaining to the administrative action.

71. A legal regulation needs to contain enough certainty so that individuals can organize their behavior accordingly and the individual needs to be able to predict, if necessary by means of seeking legal assistance, to a reasonable degree the results that would occur in the field regulated by this code as a result of a certain action. The predictability does not have to be at an absolute scale. Even though the clarity of the code is a desirable situation, it can sometimes result in excessive rigidity as well. However, the law needs to be adaptable to changes that arise. Many codes contain, quite naturally, formulas that are open to interpretation, the interpretation and implementation of which depend on the practical reality (For a decision of the ECtHR in the same vein see *Kayasu v Turkey*, App. No: 64119/00 and 76292/01, § 83).

72. In the incident that is the subject of the application, there is a clear legal provision pertaining to the commencement of the period to file the case. The ordinary meaning to be attributed to this provision is clear and the applicant expects to be treated according to this. However, the court of instance attributed an extraordinary meaning to the clear legal provision and conducted its practice according to this. That there is an established case law in favor of this practice was neither specified in the decision of the court of instance, nor was it

brought forward in the opinion of the Ministry. Therefore, according to the available documents, there is no circumstance that would require the applicant to expect that he would be treated differently than the clear legal provision when filing the case (even though he benefits from legal assistance). Therefore, the interpretation of the court of instance is unpredictable in nature.

73. As a result, the case that the applicant filed within its due period according to the ordinary meaning that can be attributed to the clear legal provision was dismissed as a result of the court of instance interpreting the clear legal provision in an extraordinary and fairly flexible way and in an unpredictable manner within the circumstances of this application and the right to access to court was violated.

74. For the explained reasons, it must be decided that the applicant's right to access to court, which is one of the fundamental elements of the right to a fair trial, was violated as a result of the extraordinary interpretation of the clear procedural rules pertaining to the period to file cases in an unpredictable manner.

V. IMPLEMENTATION OF ARTICLE 50 OF THE CODE NUMBERED 6216

75. Paragraph (2) of article 50 of the Code numbered 6216 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."*

76. Taking into account the fact that the decision to dismiss the case due to statue of limitations violated the right to access to court in the incident that is the subject of the application, as per paragraph (2) of article 50 of the Code numbered 6216, it must be decided that a copy of the decision be sent to the High Military Administrative Court in order to conduct a retrial with a view to eliminating the violation and the consequences thereof.

77. The applicant requested 1.403 TL material and 10.000 TL moral compensation for the damages he incurred due to the assignment action in the event that it is concluded that there is no legal benefit in conducting a retrial. It must be decided that the compensation requests be rejected since the determined violation stemmed from a court decision and the file needs to be sent to the relevant court for a retrial to be conducted with a view to eliminating the violation and the consequences thereof.

78. The applicant requested the collection of the counsel's fee and trial expenses from the defendant. It must be decided that the trial expenses made by the applicant be paid to the applicant.

VI. JUDGMENT

In the light of the reasons explained, it is decided on 7/11/2013;

A. UNANIMOUSLY that the complaints of the applicant to the effect that his right to a fair trial was violated by means of deciding on the dismissal of the case on statue of limitation grounds are ADMISSIBLE,

B. BY MAJORITY OF VOTES and the dissenting vote of Zühtü ARSLAN that the claim of the applicant pertaining to the counsel's fee is INADMISSIBLE,

C. UNANIMOUSLY that the other complaints of the applicant pertaining to the right to a fair trial were INADMISSIBLE,

D. UNANIMOUSLY that the right to access to court within the framework of article 36 of the Constitution was VIOLATED,

E. UNANIMOUSLY that the requests of the applicants pertaining to compensation be DISMISSED,

F. UNANIMOUSLY that the trial expenses of 2,812.50 TL in total composed of the fee of 172.50 and the counsel's fee of 2,640.00 TL which were made by the applicant be PAID TO THE APPLICANT,

G. UNANIMOUSLY that the payment be made within four months as of the date of application by the applicant to the State Treasury 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.

H. UNANIMOUSLY that a copy of the decision be sent to the High Military Administrative Court in order to carry out a retrial for the violation and the consequences thereof to be removed in accordance with paragraphs (1) and (2) of article 50 of the Code numbered 6216,

President	Member	Member
Serruh KALELİ	Mehmet ERTEN	Zehra Ayla PERKTAŞ

Member	Member
Erdal TERCAN	Zühtü ARSLAN

JUSTIFICATION OF DISSENTING VOTE

In addition to other matters, the applicant alleged that the fact that counsel's fee was ruled upon in favor of the administration at the end of the trial violated his freedom to claim rights, the majority of our Court, however, decided that the claim to this end was "clearly devoid of basis".

As it is explained in detail in the dissenting vote justification in the decision with the date of 2/10/2013 and the application number of 2013/1613 of the First Section of our Court, trial expenses such as the counsel's fee should not bring a heavy economic burden on the individual in such a way as to impair the essence of the right to access to court, they should be proportional. Indeed, the approaches of the Constitutional Court and the European Court of Human Rights to the matter are also in this vein. (See M.2011/54, D. 2011/142, D.D: 20.10.2011; M.2011/64, 2012/168, D.D: 1.11.2012; App. No: 2012/791, 7/11/2013, § 66; *Kreuz v Poland* (no.1), App.N: 28249/95, D.D: 19.6.2001, § 60; *Apostol v Georgia*, 40765/02, 28.11.2006, § 59; *Bakan v Turkey*, App.N: 50939/99, D.D: 12.6.2007, § 70, 73; *Mehmet and Suna Yiğit v Turkey*, App.N: 52658/99, D.D: 17.7.2007; *Stankov v Bulgaria*, App.N: 68490/01, D.D: 12.7.2007, § 54, 67; *Klauz v Croatia*, App.N: 28963/10, D.D: 18.7.2013, § 97.)

Examining whether or not the envisaged counsel's fee constitutes a heavy economic burden on the applicant, in other words, carrying out the proportionality test is especially important with a view to cases that are heard in administrative justice. Indeed, a disproportional counsel's fee has the potential of rendering dysfunctional the constitutional guarantees granted to the individual in the face of the administration that wields public power. The high amount of counsel's fee can make it harder for individuals to claim their rights against the potential arbitrary actions of the administration, create a deterrent impact especially on individuals with a weak ability to pay in terms of filing a case and thus render them defenseless against the administration.

In the concrete application, the majority of our Court did not evaluate whether or not the fixed counsel's fee of 1.200 TL ruled upon to the detriment of the applicant was proportional to the envisaged purpose, but instead concluded that there was not an intervention to the right to access to court by means of referring to the decision with the application number 2013/1613 in which the proportionality test was not conducted.

Ruling on the counsel's fee to the detriment of the applicant is an intervention to the right to access to court under all circumstances. Whether or not this intervention led to a violation can be determined as a result of a proportionality examination that would be conducted by taking into account such matters as the envisaged amount, the monthly income of the applicant, his general economic status, briefly, his ability to pay and the special circumstances of the case.

With these justifications, I do not agree with the majority decision to the effect that the counsel's fee that was ruled upon to the detriment of the applicant without conducting a proportionality test did not amount to an intervention to the right to access to court and that the application is "clearly devoid of basis".

Member
Zühtü ARSLAN