



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

**SECOND SECTION**

**DECISION**

Application No: 2012/791

Date of Decision: 7/11/2013

## SECOND SECTION

### DECISION

<b>President</b>	:	Alparslan ALTAN
<b>Members</b>	:	Serdar ÖZGÜLDÜR Osman Alifeyyaz PAKSÜT Recep KÖMÜRCÜ M. Emin KUZ
<b>Rapporteur</b>	:	Recep ÜNAL
<b>Applicant</b>	:	Özkan ŞEN
<b>Counsel</b>	:	Att. Adem DEMİR

#### I. SUBJECT OF APPLICATION

1. The applicant alleged that as a result of the full remedy action he filed regarding the relevant administration due to the fact that he had been injured as a result of a mine explosion that occurred during his military service, the counsel's fee was determined based on the amount of dismissed material and moral compensation, that the regulation pertaining to this was in violation of the Constitution and he requested its annulment and that the compensation amount, which was ruled upon, be reassessed.

#### II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on 26/11/2012. As a result of the preliminary administrative examination of the petition and the annexes thereof, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

3. It was decided on 8/3/2013 by the First Commission of the Second Section that the admissibility examination of the application be carried out by the Section, that the file be sent to the Section as per paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. Pursuant to the interim decision of the Second Section dated 20/5/2013, it was decided as per subparagraph (b) of clause (1) of article 28 of the Internal Regulation of the Constitutional Court that the examination on admissibility and merits be conducted jointly and that a copy be sent to the Ministry of Justice (the Ministry) for its opinion.

5. The facts and cases which are the subject matter of the application were notified to the Ministry on 22/5/2013. The Ministry presented its written opinion to the Constitutional Court on 22/7/2013.

6. The opinion letter of the Ministry was notified to the applicant on 29/7/2013. The applicant submitted his petition including his answers to the opinion of the Ministry on 6/8/2013.

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

#### **A. Incidents**

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

8. While fulfilling his military service at Osmaniye Province Hasanbeyli Subprovince Gendarmerie Command as a Gendarmerie Private, the applicant was injured as a result of the detonation of remote controlled explosives placed on the road by members of the separatist terrorist organization on 27/7/2010 while the military vehicle, of which he was the driver, was passing by.

9. Following the first intervention that was made as a result of the injury he suffered, the applicant underwent “*debridement-grafting*” surgery at Gülhane Military Medical Academy (GATA) due to the loss of soft tissue in both of his arms and he was granted a total of 4,5 months of “*sick leave*” at various durations.

10. At the end of the last sick leave period, 10x6 cm of hyperpigmented graft tissue with irregular borders in the mid 1/3 section of the dorsal plane of the right forearm and 20x10 cm of hyperpigmented vital graft tissue with irregular borders in the proximal 1/2 section of the volar plane of the right forearm were determined and a preliminary report was drafted by the mentioned hospital to the effect that he was “*fit for military service*” and it was determined that he had 135 days of work and labor loss. The applicant objected to this report and a report to the effect that he was fit for military service was drafted after his examination was carried out at Istanbul Gümüşsuyu Military Hospital.

11. As per the decision of the Gendarmerie General Command Pecuniary Compensation Commission dated 18/4/2011 and numbered 2011/82 and article 3 of the Code Regarding Pecuniary Compensation and Allocation of Salary dated 3/11/1980 and numbered 2330, it was decided that 11.771,20 TL in compensation be paid to the applicant due to his loss of 135 days of work and labor.

12. The applicant filed a full remedy action at the High Military Administrative Court (HMAC) against the Ministry of Interior for the compensation of the material and moral damages he incurred due to the incident that took place, he requested 200.000,00 TL material compensation, 100.000,00 TL moral compensation from the defendant administration and legal aid.

13. With the decision of the Chamber on Duty of the HMAC dated 10/8/2011 and numbered M.2011/140 it was decided that the applicant's request for legal aid be accepted as per article 56 of the Code of High Military Administrative Court dated 4/7/1972 and numbered 1602 and article 465 of the abolished Code of Civil Procedure dated 18/6/1927 and numbered 1086.

14. The Second Chamber of the HMAC, which heard the case, decided that an expert examination be conducted in order for the material damage of the applicant to be determined. In the report of the expert dated 12/4/2012, it was indicated that the material damage of the applicant was 5.311,00 TL.

15. With the petition dated 20/4/2012 that he submitted to the Second Chamber of the HMAC, the applicant indicated that he waived 180.000,00 TL of his material compensation request of 200.000,00 TL. The relevant part of the petition is as follows:

“ ...

*Our mentioned request for correction is not because we are unjustified in the case; in order for the client not to suffer any damage by means of taking into account the rules of amendment as of the date on which the case was filed ... that we were obliged to make a request for an amount including the amount that has been waived, therefore ... that a judgment be passed on the counsel's fee in favor of the defendant administration in line with the waived amount of compensation;*

...”

16. The Second Chamber of the HMAC decided with its decision dated 16/5/2012 and numbered M.2011/1166, D. 2012/539 that in line with the medical report and the expert report 5.311,00 TL material and 20.000,00 TL moral compensation be paid to the applicant along with its legal interest of 9% to be calculated from the date of 27/7/2010 until the date of payment and that the compensation requests pertaining to surplus be dismissed; that, in addition, the waiver request of the applicant not be taken into consideration due to the fact that it has no effect and that as per articles 6 and 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 (DIFC numbered 659), which entered into force on 26/9/2011 after having been published in the Official Gazette dated 2/11/2011, the counsel's fee of 18.531,34 TL calculated based on the amounts of requested compensation that were dismissed be collected from the applicant and paid to the defendant administration.

17. The applicant seized the correction remedy against this decision and the request of the applicant was dismissed with the decision of the Second Chamber of the HMAC dated 17/10/2012 and numbered M.2012/576, D.2012/924. The legal remedies were thus exhausted, the mentioned decision of dismissal was notified to the applicant on 5/11/2012.

18. The applicant lodged an individual application to the Constitutional Court on 26/11/2012 within its due period.

## **B. Relevant Law**

19. Article 14 of the DIFC numbered 659 with the side heading “*Nature of representation in cases and ruling on counsel's fee and distribution thereof*” is as follows:

*“ (1) For proceedings and hearings carried out by administrators 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.*

*(2) Counsel's fees that are adjudged in favor of administrations and collected shall be gathered in an escrow account at the headquarter organization of the administration to which the legal department is answerable and paid to the personnel serving at the legal department of the administration within the framework of the following procedures and boundaries.*

*a) Of the counsel's fee; 55% shall be paid to the administrator of the legal department, legal advisor, director of procedure and attorney who pursued the case and execution file, 40% (...) shall be paid in equal parts to the administrator of the legal department, legal advisor, director of procedure and attorneys, on the condition of having actually served for more than six months within the year during which the distribution is carried out.*

*b) The annual amount of counsel's fee to be paid cannot exceed twelve times the monthly gross amount that will be obtained by multiplying the (10.000) indicative figure for administrators of legal departments, legal advisors, directors of procedure and attorneys with the coefficient that is applied to civil servants' salaries.*

*c) The amount remaining after the distribution to be made shall be paid to administrators of legal departments, legal advisors, directors of procedure and attorneys who serve at the legal department and do not reach the amounts under subparagraph (b). The amounts remaining after this distribution shall be recorded as revenue in the budget of the relevant administration at the end of the third budget year.*

*(3) The payments to be made to attorneys whose services have been procured shall be outside the scope of this article.”*

20. The sentence that was added to article 1 of the Code Regarding Amendments In Various Codes Within the Framework of Human Rights and the Freedom of Expression dated 11/4/2013 and numbered 6459 and paragraph four of article 46 of the Code numbered 1602 is as follows:

*“However, as for the full remedy actions, the amount specified in the plaint may be increased for once only irrespective of the period or other rules of procedure until the final decision is made on condition that the fee is paid and the petition on increasing the amount shall be notified to the opposite party for response within thirty days.”*

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

21. The individual application of the applicant dated 26/11/2012 and numbered 2012/931 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**

22. The applicant alleged that an insufficient amount of compensation was ruled upon at the end of the case he filed for the compensation of the material and moral damages he incurred as a result of the terrorist act, that undocumented treatment expenses, the damage pertaining to his bodily integrity, his labor loss of 135 days, the loss of strength that occurred as a result of the surgery, the troubles and suffering experienced by himself and his relatives during the treatment and other moral damages were not taken into consideration in the calculation of the compensation that was ruled upon and that therefore this decision of the HMAC was unlawful and requested that it be reassessed.

23. On the other hand, the applicant alleged that he was obliged to keep his compensation requests high in order not to suffer any losses of his rights given the fact that it was impossible to determine the amount of damage until the date on which the case was filed by indicating that the amendment facility that is part of the civil procedure system is not envisaged for the military administrative trial procedure, that he requested legal aid during the trial process since his material situation was not good and that this request was accepted, that however, he was sentenced to pay the counsel's fee of 18.531,34 TL that was calculated in

relative fashion based on the dismissed amount by means of relying on a regulation that was not in effect at the time when the case was filed, that in this manner almost the entirety of the material and moral compensation that was ruled upon in his favor was given back to the administration in the form of the counsel's fee, that paragraph (1) of article 14 of the DIFC numbered 659, which is the basis for this, was in violation of articles 36 and 125 of the Constitution, that it prevented the exercise of the “*freedom to claim rights*” stipulated in the Constitution and requested the annulment of the mentioned rule.

## **B. Evaluation**

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

#### **a. Claim that the Freedom to Claim Rights Was Violated**

24. The applicant indicated that he filed the case at a time when there was no provision to the effect that a relative counsel's fee would be ruled upon to the party that is proven to be wrong and that the amendment facility did not exist in administrative justice in that period and alleged that he determined the amount of compensation, that is the subject of the case, according to the circumstances of that period while filing the case, that he was sentenced to pay the counsel's fee in a manner that he had not foreseen as a result of the regulation contained within the DIFC numbered 659 that came into effect while the case was still ongoing, that this situation restricted his freedom to claim rights. This claim of the applicant will be examined within the framework of the right to access to court, which is an element of the right to a fair trial.

25. In its opinion letter, the Ministry did not make any assessment as to the admissibility of this aspect of the application.

26. According to the provisions of paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code numbered 6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the Convention and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to examine the merits of an application, which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18).

27. 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 is not regulated within the Constitution, the scope and content of this right needs to be determined within the framework of article 6 of the Convention with the side heading “*Right to a fair trial*” (App. No: 2012/1049, 26/3/2013, § 22).

28. 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.”*

29. Paragraph (1) of article 6 titled “*Right to a fair trial*” of the Convention is as follows:

*“1. 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. ...”*

30. The compensation for personal damages of military individuals arising from the acts and actions of the military administration falls within the scope of the concept of “*civil rights and obligations*” stipulated under article 6 of the Convention, there is no doubt regarding the fact that these kinds of disputes fall within the field of protection of the right to a fair trial regulated in the Constitution and the Convention.

31. It should be decided that this part of the application, which is not openly devoid of grounds and where no other reason that will require making a decision of inadmissibility is found, is admissible.

**b. Claim that the Compensation Amount is not Fair**

32. The applicant alleged that the decision of the HMAC was unlawful due to the fact that the undocumented transport, food and accommodation expenses, the damages pertaining to his bodily integrity, the loss of strength that he suffered as a result of permanent disability and the sufferings and sorrow he was subjected to as a result of the incident were not taken into consideration in determining the amount of compensation that was ruled upon in his favor and requested it to be reassessed.

33. In the opinion letter of the Ministry, it was indicated that the differences between local courts in evaluating cases or the law cannot be made into the subject of an individual application unless the rights and freedoms guaranteed by the Constitution and the European Convention on Human Rights (the Convention) are violated, that it is stipulated in paragraph four of article 148 of the Constitution and paragraph (6) of article 49 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 that matters which need to be taken into consideration during the legal remedy shall not be examined in examinations pertaining to an individual application, and in paragraph (2) of article 48 of the Code numbered 6216 that the Court can rule on the inadmissibility of applications which are clearly devoid of grounds, that even though whether or not the compensation amounts are in compliance with the due procedure and fair can be discussed, this subject is within the venue of courts of first instance and that therefore the complaint to this end cannot be the subject of an individual application.

34. In his bill of answer, the applicant did not make any statement against the opinion of the Ministry, which pertains to this aspect of the application and is conveyed above, he stated that he did not accept the matters that are to his detriment throughout the opinion of the Ministry.

35. The applicant alleged in his application petition that the compensation amounts ruled upon by the HMAC did not compensate his material and moral damages and that therefore these were unlawful and requested that these be reassessed by the Constitutional Court. This complaint of the applicant will be examined within the framework of the right to the protection of bodily integrity guaranteed under article 17 of the Constitution.

36. According to the provisions of paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code numbered 6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the

Convention and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to examine the merits of an application, which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18).

37. The common field of protection pertaining to the concrete application needs to be determined within the framework of article 17 of the Constitution and article 8 of the Convention.

38. Paragraph one and two of Article 17 of the Constitution with the side heading "*Inviolability and material and spiritual existence of the individual*" are as follows:

*“Everyone has the right to life and the right to protect and improve their material and spiritual existence.*

*Except for medical necessity and the cases specified in code, the bodily integrity of the individual is inviolable; the individual cannot be subjected to scientific and medical experiments without his/her consent.”*

39. Paragraph (1) of Article 8 of the Constitution with the side heading "*Right to respect for private and family life*" is as follows:

*“1. Everyone has the right to respect for his private and family life, his home and his correspondence.”*

40. The integrity of the individual's material and moral existence are guaranteed against the interventions of both individuals equipped with public authorities and private individuals through the mentioned provisions of the Constitution and the Convention. Within this framework, the state has the liability to prevent interventions that target the material and moral existence of individuals who live in its area of sovereignty and under its control, to conduct the necessary investigation and prosecution regarding those interventions that could not be prevented, to determine and punish the perpetrators and to effectively compensate the resulting damages either itself or to have those necessary compensate them when necessary. In circumstances where an effective compensation cannot be assured regarding damages that arise from an intervention to the bodily integrity of individuals and where, within this framework, the state does not fulfill its liability to protect, which stems from article 17 of the Constitution, it cannot be claimed that the bodily integrity of the individual is protected.

41. Within this framework, the claim of the applicant, who was injured as a result of a terrorist act during his military service, to the effect that an adequate and fair compensation was not granted to himself, falls within the scope of the common field of protection of article 17 of the Constitution and article 8 of the Convention.

42. On the other hand, it is stipulated under paragraph (2) of article 48 of the Code numbered 6216 that the Constitutional Court can rule on the inadmissibility of individual applications that are clearly devoid of grounds.

43. In the concrete incident, as per article 3 of the Code numbered 2330, a compensation of 11.771,20 TL was paid to the applicant who was injured as a result of the explosion of a mine that had been planted alongside a road and suffered a loss of work force of 135 days as a result.

44. The applicant, who did not consider the compensation paid to himself to be sufficient, requested that his material and moral damages that had not been covered be compensated by filing a full remedy action at the HMAC against the administration. The Second Chamber of the HMAC, which examined the case of the applicant, ruled on the partial acceptance of the applicant's compensation request and decided that a material compensation of 5.311,00 TL and a moral compensation of 20.000,00 TL be paid. The relevant parts of the decision are as follows:

*“ ... it is understood that (4) people including the plaintiff were injured as a result of the explosion of the remote controlled mine that was planted by members of the separatist terrorist organization, that the applicant, who was transferred to Osmaniye State Hospital, was then transferred to GATA, that following his examination he was discharged with a sick leave of 45 days starting from 17.08.2010, that a report to the effect that the plaintiff was 'A/25 F.10 Fit for Military Service' was issued with the report dated 22.12.2010 and numbered ... issued by GATA after the treatments, that it was decided with the decision dated 18.04.2011 and numbered 2011/82 delivered by the the Gendarmerie General Command Pecuniary Compensation Commission that 'the incident that occurred fell within the scope of the ... Code numbered 2330 and 11.771,20 TL in pecuniary compensation be paid to the plaintiff in exchange for (135) days of loss of work force, that he applied to the defendant administration and requested compensation with the dated petition, that however this case was filed at the HMAC within its due period on 29.07.2011 upon the fact that this request was not answered within 60 days and thus implicitly rejected.*

*As per the principles of administrative law and article 125 of the Constitution of the Republic of Turkey, the administration is liable to compensate the damages that stem from its own acts and actions. Thus, the responsibility of the administration is accepted as a Constitutional principle. The principles according to which the responsibility of the administration shall be determined is not indicated in the Constitution, the resolution of this matter is left to doctrine and decisions of the judiciary. Today the responsibility of the administration is based on the principles of service negligence or absolute liability. Whether it is based on the principle of service negligence or absolute liability, in order for the administration to be held responsible for compensation, the conditions of the act or action that cause the damage being attributable to the administration, the existence of a direct causality relation between the damaging result and the act or action, the action leading to the damage constituting a service negligence or being suitable for the implementation of the principle of absolute liability need to occur together. The lack of one of these conditions in a material case absolves the compensation responsibility of the administration. Therefore, if there is no damage or the damage that has occurred did not stem from the administrative act or action or if a causality relation cannot be established between the damage and the administrative act or action, the compensation responsibility of the administration cannot be referred to.*

*In the incident that is the subject of the case, it has been concluded and the opinion has been formed that the plaintiff was injured as a result of the explosion of a mine, that although it is not possible to refer to a service negligence that can be attributed to the defendant administration, due to the fact that the incident occurred during duty and that there is a direct causality relation between the service that was being carried out and the damaging result that occurred, the damage of the plaintiff need to be compensated as per the principle of absolute liability given the fact that it would be in line with the rules of justice, equality and fairness to spread the damage that has occurred to the society and not leave it on the damaged.*

*With the medical report of GATA Command, where the plaintiff was referred to by our Board in order for the degree of disability to which he was subjected to be determined, dated*

24.01.2012 and numbered ..., it was stated that the plaintiff had a 4% loss of the earning capacity in the profession.

*In the expert report dated 12 April 2011 that was drafted by the expert that was ex officio selected to calculate the material damage of the plaintiff and submitted to our Court, it was indicated that the plaintiff Özkan ŞEN had right to 5.311,00 TL in material compensation after the deduction of the pecuniary compensation.*

...

*Moreover, it was adjudged that material compensation of an appropriate amount be paid to the plaintiff Özkan ŞEN by taking into account the manner in which the incident took place, the military service status of the plaintiff, the purchasing power of money and the legal interest that will be applied in order to be able to compensate, albeit partially, for the pain and suffering he experienced and will continue to experience during his lifetime as a result of the incident.*

...”

45. As it is observed, the material damage of the applicant was calculated via an expert by taking into account the medical reports that were drafted regarding the applicant, the loss of work force, the degree of disability, the pecuniary compensation payment that was made based on the relevant Code, the amount of minimum wage and other factors and the moral damage was determined and the corresponding compensation was ruled upon by the Court, it is seen that there is no clear disproportion between the determined compensation amounts and the conditions of the case and the damages incurred by the applicant. As a result, since no arbitrariness was determined in the decision of the HMAC, the Constitutional Court cannot intervene in the discretionary authority of the Court in terms of the determination of the compensation amounts.

46. For the explained reasons, since it is understood that there is no intervention to the applicant's constitutional right guaranteed under article 17 of the Constitution, it should be decided that the application to the effect that the compensation amount is not fair is inadmissible due to it being “clearly devoid of basis” without examining it in terms of the other admissibility conditions.

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

47. The applicant indicated that he filed the case at a time when there was no amendment facility and no provision to the effect that a relative counsel's fee would be ruled upon to the party that is proven to be wrong and alleged that he determined the amount of compensation, that is the subject of the case, according to the circumstances of that period while filing the case, that he was sentenced to pay the counsel's fee in a manner that he had not foreseen as a result of the regulation contained within the DIFC numbered 659 that came into effect while the case was still ongoing, that this situation restricted his freedom to claim rights.

48. In its opinion letter, the Ministry stated first of all that the right to access to court could be subjected to a number of restrictions under certain conditions, that whether or not these restrictions are proportionate should be determined according to how reasonable the trial expenses are, the applicant's ability to pay, the special details of the case and the phase of the case in which the responsibility is attributed. Secondly, it was stated that the fact that the entire responsibility in terms of covering the trial expenses was attributed to the applicant amounted to the violation of the state's positive liability to guarantee the rights within the

scope of a fair trial, that however, since the “*loser pays*” rule discourages potential plaintiffs from bringing forward excessive requests before the court, the European Court of Human Rights (ECtHR) indicated that this situation could be a restriction that thwarts the right to access to court, yet such a regulation alone would not contradict paragraph (1) of article 6 of the Convention. Finally it was indicated that according to the ECtHR the procedural sanction applied for the simple procedural misdemeanor unjustly reduced the amount of compensation he received as a result of the bad treatment that he received, that this situation was seen as a restriction that damages the essence of the applicant's right to access to court, that in the assessment whether or not the DIFC numbered 659 constituted an intervention to the right to access to court in the resolution of the incident that is the subject of the application, if it constitutes an intervention, whether or not it is proportional and whether or not it brings an excessive burden on the individual and the claims of the applicant to the effect that the action that is the subject of the complaint violated his freedom to claim rights, it was necessary for the Constitutional Court to take into consideration the matters indicated above as well.

49. In his bill of answer dated 5/8/2013, the applicant repeated his opinions in the application petition and stated that he did not accept the aspects of the Ministry's opinion that are to his detriment.

50. The fact that almost the entirety of the compensation amount that was ruled upon in favor of the applicant was decided to be charged from the applicant in the form of relative counsel's fee and that in this manner the applicant's application to the court and the ruling on compensation in favor at the end of the case significantly lost its meaning constitute the essence of the violation claim.

51. Although the right to access to court is not explicitly covered under article 6 of the Convention, which regulates the right to a fair trial, it should be accepted that it also includes the right to access to court within the framework of the expression under paragraph (1) of the article “*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... by an... tribunal established by law*” and due to the nature of the right.

52. The right to access to court means the ability to take a dispute before a court and to request the conclusion of the dispute in an effective manner. Restrictions which prevent a person from applying to a court or render a court decision meaningless or in other words, make the court order considerably ineffective can violate the right to access to court.

53. Foreseeing the liability for the parties to pay the counsel's fee depending on the success at the end of the case also constitutes a restriction regarding the right to access to court within this framework. In order for this kind of a restriction to be considered legitimate, a reasonable balance must be observed between the public benefit and the right of the individual. In the incident that is the subject of the application, it is foreseen with the DIFC numbered 659, which was published and entered into force on 2/11/2011, that cases to which the administration is a party are to be pursued by permanent legal advisors and lawyers serving within the administration, it is regulated that the counsel's fee will be ruled upon in favor of the administration in the event that the case is dismissed. Certain liabilities can be envisaged for the applicants in order to reduce the number of cases by preventing unnecessary applications and thus concluding disputes within a reasonable period of time without keeping the courts busy in vain. Determining the scope of these liabilities falls within the discretionary authority of public authorities. It cannot be stated that the right to access to

court is violated unless the envisaged liabilities render in impossible or extremely difficult to file a case. Therefore, the counsel's fee to be charged upon the applicant in the event that he loses the case should be considered within this framework (App. No: 2013/1613, 2/10/2013, § 38 - 39).

54. On the other hand, the possibility or the phenomenon that applicants who bring a legal dispute to the attention of the court are sentenced to pay the counsel's fee calculated based on the dismissed amount that is the subject of the case to the opposing party bears the risk of preventing them from applying to the court or make it meaningless for them to apply to the court within the framework of certain case conditions. Within this framework, the reasonableness and proportionality of the expenses within the framework of the special circumstances of the case constitute the minimum limit of the right to access to court.

55. As of the date of 29/7/2011, on which the applicant filed a full remedy (compensation) action, there is no provision within the Code numbered 1602 that envisages the subsequent changing of the amount that is the subject of the request as indicated in the petition via amendment or the payment of relative counsel's fee based on the dismissed amount by the plaintiff, who is proven to be wrong as a result of the case, in favor of the defendant administration.

56. The amount of receivable compensation is a phenomenon that can be determined within the discretionary authority of the court after expert examination and similar research. Due to this feature of the compensation facility, it is not possible to exactly know or foresee the amount of compensation to which one is entitled before the case is filed. Since as per the Code numbered 1602 it is not possible to overcome this uncertainty that is faced during the phase of filing the case through the subsequent correction (amendment) of the request amount prior to 2/11/2011, there is no other option for plaintiffs, who do not want to suffer any losses of their rights, than to keep the amounts pertaining to their compensation requests high.

57. With the petition dated 29/7/2011 that he drafted, the applicant filed a full remedy action against the administration and requested 200.000,00 TL in material compensation and 100.000,00 TL in moral compensation. The regulation under article 14 of the DIFC numbered 659 pertaining to the payment of counsel's fee to the detriment of the plaintiff who is proven to be wrong and in favor of the defendant administration in cases before the HMCAC, entered into force on 2/11/2011 and the HMCAC, which took this regulation into consideration, ruled on a total of 25.311,00 TL in compensation in favor of the applicant and then decided that a counsel's fee of 18.531,34 TL be paid to the defendant administration based on the compensation requests pertaining to the dismissed surplus. As it is seen, the applicant was able to receive only 6.779,66 TL of the 25.311,00 TL of compensation to which he became entitled. For this reason, there is no doubt that this decision of the HMCAC pertaining to compensation did not yield an effective result, that the applicant was deprived of a significant portion of his receivable compensation and that this situation constituted an intervention to the applicant's right to access to court.

58. Even though no reason for restriction is envisaged under article 36 of the Constitution with a view to the freedom to claim rights, it cannot be stated that this is an absolute right, which cannot be restricted in any way. It is acknowledged that even rights for which no special reason for restriction is envisaged have certain limits stemming from their nature. Moreover, even though no reason for restriction is included in the article that regulates the right, it can be possible to restrict these rights by relying on rules that are covered under other articles of the Constitution. It is clear that a number of regulations pertaining to the scope and utilization conditions of the right to file cases are the rules that demonstrate the

limits stemming from the nature of the freedom to claim rights and determine the norm area of the right. However, these limitations cannot be in violation of the assurances contained within article 13 of the Constitution (CC, M.2010/83, D.2012/169, D.D. 1/11/2012). Even though the regime pertaining to the limitation of the right to a fair trial is not regulated under article 6 of the Convention, which is the basis for the right to access to court, the ECtHR acknowledges that this does not mean that the right to access to court cannot be restricted under any circumstances, that, due to the nature of the right, it is inevitable for the state to carry out certain restrictions and regulations. However, these restrictions need to be of a quality not to bear prejudice to the essence of the right, based on a legitimate purpose and the means that is used need to be proportionate to the purpose of restriction, burdens that are hard to bear should not be imposed to the detriment of the individual in such a manner as to disrupt the fair balance that is tried to be struck between the requirements of public benefit and the rights of the individual (See *Ashingdane v. United Kingdom*, App. No: 8225/78, 28/5/1985, § 57).

59. Article 13 of the Constitution with the side heading of "*Restriction of fundamental rights and freedoms*" is as follows:

*“Fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant articles of the Constitution and by code without prejudice to their essence. These restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality.”*

60. With article 14 of the DIFC numbered 659 it is regulated that for proceedings and hearings carried out by administrators 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. During this period, individuals who filed cases as per the legal situation prior to the regulation were faced with the obligation to pay a relative counsel's fee based on the amount that was the subject of the dismissed case. Although it was possible prior to the regulation in question to rule upon a relative counsel's fee based on the dismissed part under certain circumstances in full remedy actions lodged to the HMA, with the mentioned regulation, ruling upon counsel's fee in favor of the administration with a view to each lost case became the rule.

61. Even though regulations pertaining to ruling upon court expenses in favor or to the detriment of one of the parties based on the amount that is won or lost according to the degree of success in the trial constitute an intervention to the right to access to court, proportionate interventions aiming to discipline requests that are excessive, forced or lacking seriousness can be considered to be legitimate.

62. However, as it is expressed above, these restrictions need to be of a quality not to bear prejudice to the essence of the right, based on a legitimate purpose and the means that is used need to be proportionate to the purpose of restriction, burdens that are hard to bear should not be imposed to the detriment of the individual in such a manner as to disrupt the fair balance that is tried to be struck between the requirements of public benefit and the rights of the individual.

63. The relevant parts of the general justification of the DIFC numbered 659 are as follows:

“... ”

*The principles that the disputes to which the administrations are a party; be resolved in a fair and equitable fashion by evaluating the rights and interests of the parties in an equal and balanced manner, that the cases to which the administrations are a party; be pursued by permanent legal advisors and lawyers serving within the administrations within the means that are available, in compliance with economy in procedure, that in the pursuit of cases, assistance be provided to the lawful, fair, speedy delivery of court decisions with the least possible expense are introduced.*

... ”

*It is envisaged that the waste of time and stationery that stem from the pursuit of judicial cases to which public administrations that are within the scope of the general budget under a different administration will be prevented, that the required coordination and cooperation will be better ensured as a result of the pursuit of cases by officials within each administration as a rule, that efficiency will be increased through specialization in the pursuit of cases based on the subject.*

*...Within this framework; the possibility is provided to public administrations within the scope of the general budget and administrations with private budgets to pursue their own cases and execution actions through legal counselors and lawyers that they will employ. It is allowed for certain administrations to receive attorneyship service from each other and moreover, the administrations are allowed to purchase services from freelance lawyers and attorney partnerships in case and execution actions.*

...”

64. The justification of article 14 of the DIFC numbered 659 is as follows:

*“With the article, a regulation to the effect that counsel's fee be ruled upon in favor of the administration in the event that the proceeding is concluded in favor of the administrations following all sorts of cases and execution proceedings is introduced. With the regulation that is introduced; it is envisaged that the counsel's fee be ruled upon in the event that cases are concluded in favor of the administrations regardless of whether or not the administrations pursue their cases and execution proceedings via lawyers, and thus the situation that is to the detriment of administrations which do not pursue their cases through lawyers and that is not in harmony with the equality of the parties is removed. In addition, the procedure pertaining to the distribution of the collected counsel's fees is also re-regulated and clarified with the article.”*

65. It cannot be stated that the indicated regulation does not have a legitimate purpose when its purpose, which aims to ensure effectiveness in legal services and specialization as well as the fulfillment of public benefit as expressed in the justifications reported above, is taken into consideration. Within this framework, foreseeing the liability of paying a certain ratio of the dismissed part of the subject of request to the opposing party as counsel's fee alone cannot be qualified as an intervention that violates the right to access to court.

66. However, when the circumstances of the concrete incident are considered as a whole, taking into consideration that a decision of legal aid was delivered in favor of the applicant due to his unfavorable material circumstances, that moreover he kept his request

high at the time when the case was filed due to the unavailability of the amendment facility in order not to suffer any losses of his rights, that even though he waived his requests pertaining to the surplus after the completion of the expert reports this was not accepted by the court and that he was forced to pay approximately 3/4 of the compensation to which he became entitled to the defendant administration in the form of counsel's fee and that the action for compensation that had been filed thus became meaningless for the applicant, it cannot be stated that the intervention that was made was proportionate.

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

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

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

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

69. In the incident that is the subject of the application, since there is no legal benefit in resorting to a retrial with a view to removing the consequences of the determined violation, it should be decided that 8.000,00 TL in moral compensation be paid by discretion to the applicant in exchange for his moral damages, which cannot be compensated with the mere determination of the violation.

70. It should be decided 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 and determined in accordance with the documents in the file be paid to the applicant.

## **V. JUDGMENT**

In the light of the reasons explained, it was decided **UNANIMOUSLY** on 7/11/2013;

**A.** That the application to the effect that the amount of compensation was not fair is **INADMISSIBLE** due to it being "*clearly devoid of basis*",

**B.** That the application to the effect that the right to access to court within the framework of the freedom to claim rights guaranteed under Article 36 of the Constitution was violated is **ADMISSIBLE**,

**C.** That the right to access to court within the framework of the freedom to claim rights guaranteed under Article 36 of the Constitution was violated was **VIOLATED**,

**D.** That 8.000,00 TL in moral **COMPENSATION BE PAID** to the applicant due to the intervention to his right to access to court,

**E.** 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,

**F.** That the payments be made within four months from the date of application of the applicants to the State Treasury following the notification of the judgment; if there happens to be a delay in payment, legal interest be accrued for the period elapsing from the date when this duration ends until the date of payment,

President  
Alparslan ALTAN

Member  
Serdar ÖZGÜLDÜR

Member  
Osman Alifeyyaz PAKSÜT

Member  
Recep KÖMÜRCÜ

Member  
M. Emin KUZ