



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2012/95

Date of Decision: 25/12/2012

FIRST SECTION

DECISION

President	:	Serruh KALELİ
Members	:	Burhan ÜSTÜN Nuri NECİPOĞLU Hicabi DURSUN Erdal TERCAN
Rapporteur	:	Salim KÜÇÜK
Applicant	:	Turkish Association of Pediatric Oncology Group
Counsel	:	Att. Tülay ÇELİKYÜREK

I. SUBJECT OF APPLICATION

1. The applicant asserts that the rights of its members are violated due to the regulations which are introduced with articles 10 and 12 of the Code dated 6/4/2011 and numbered 6225 and the sub-paragraph (ç) of paragraph four of provisional article 8 and additional article 14 which is added to the Code dated 11/4/1928 and numbered 1219.

II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on 4/10/2012. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the First Commission of the First Section that the examination of admissibility be conducted by the Section and the file be sent to the Section as per paragraph number (3) of article 33 of the Internal Regulation of the Constitutional Court as it was deemed necessary that a principle decision be made by the Section in order for the application to be concluded.

III. FACTS AND CASES

A. Facts

4. The relevant facts in the petition of application are as follows:

5. Through the decision dated 21/5/2009 and numbered 2009.10.1126 by the General Assembly of Higher Education on the identification of divisions, departments and units which constitute the medical schools, the sub-departments of pediatric hematology and pediatric oncology that are affiliated to the department of pediatric health and diseases are merged into a single sub-department under the name of "*pediatric hematology and oncology unit*".

6. The applicant has lodged a lawsuit against the Presidency of Higher Education Council with a request for the revocation of the said administrative act. The lawsuit that is heard in the file of the 8th Chamber of the Council of State numbered Merits 2009/6967 is pending as of the date of application.

7. Meanwhile, through the Regulation on Specialty Education in Medicine and Dentistry which is published in the Official Gazette dated 18/7/2009 and numbered 27292, the sub-departments of pediatric hematology and pediatric oncology that are affiliated to the department of pediatric health and diseases are merged into a single sub-department under the name of "*pediatric hematology and oncology*". In provisional article 11 of the Regulation, it is regulated that those who are receiving specialty minor education in pediatric hematology or pediatric oncology continue their said education under the name of pediatric hematology and oncology. Furthermore, the article also includes the rule that the specialty certificates of those who have received specialty certificates in these fields be changed as pediatric hematology and oncology in the case that they apply within six months following the publication of the Regulation.

8. The applicant has filed a lawsuit against the Prime Ministry and the Ministry of Health with a request for the revocation of the said Regulation. The lawsuit that is heard in the file of the 8th Chamber of the Council of State numbered Merits 2010/106 is also pending as of the date of application.

9. Later on, the major and connected minor programs for medical specialty and the periods of education thereof have been re-identified by amending article 10 of the Code numbered 6225 and some articles of the Code numbered 1219 and the apart minor programs of pediatric hematology and pediatric oncology are merged into one single minor program through schedule number 3 that is appended to the Code. With article 12 of the Code, it is regulated that the specialty certificates of those who have received their specialty certificates under the name of pediatric hematology or pediatric oncology be changed as "*pediatric hematology and oncology*" as per sub-paragraph (ç) of paragraph four of provisional article 8 that is appended to the Code numbered 1219, that those who are currently having specialty education in minor programs of pediatric hematology or pediatric oncology continue their education under the name of "*pediatric hematology and oncology*".

B. Relevant Law

10. Additional article 14 of the Code numbered 1219 and paragraph one of provisional article 8 thereof and sub-paragraph (ç) of paragraph four of the latter are as follows:

"ADDITIONAL ARTICLE 14 - Specialty major programs in medicine and their period of education are provided in the schedule numbered APPENDIX-1, specialty major programs in dentistry and their period of education are provided in the schedule numbered APPENDIX-2 and specialty minor programs in medicine, the major programs they are affiliated to and their period of education are provided in the schedule numbered APPENDIX-3. The periods of education that are provided in these schedules can be increased by one third by the Ministry of Health upon the decision of the Board of Medical Specialty.

...”

“PROVISIONAL ARTICLE 8 – The rights of those who completed specialty education, have started such education or have been allocated a specialty education quota in accordance

with the relevant legislation before the entry into force of additional article 14 of this Code shall be reserved.

...

ç) The specialty certificates of those who have received their specialty certificates under the name of Pediatric Hematology or Pediatric Oncology shall be changed as Pediatric Hematology and Oncology if they submit the documents of the research, practice and analytical studies they have conducted in these two fields and apply within three months following the date when this article enters into force and if these applications are deemed appropriate by the Board of Medical Specialty. Those who are currently having their specialty minor education in Pediatric Hematology or Pediatric Oncology shall continue their education under the name of Pediatric Hematology and Oncology.”

IV. EXAMINATION AND JUSTIFICATION

11. The individual application of the applicant dated 4/10/2012 and numbered 2012/95 was examined during the session held by the court on 25/12/2012 and the following were ordered and adjudged:

A. Claims of the applicant

12. Stating that the field of study of the discipline of pediatric oncology is very wide and the number of patients in this field is very high due to the fact that our country has a young population, that the disciplines of pediatric hematology and pediatric oncology do not have a common field of study apart from the disease of leukemia, that setting a total education duration of three years for two separate disciplines does not have a scientific basis, that it will not be possible to train and educate qualified specialists in this field and that the quality of service which is to be offered after merging these two disciplines that are distinct from each other will decrease, the applicant has asserted that the rights of its members which are defined in articles 10, 12, 27, 36, 40, 42, 48, 56, 125 and 138 are violated due to the legal regulation that is the subject matter of the application.

B. Evaluation

13. Clause three of article 148 of the Constitution is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force. In order to make an application, ordinary legal remedies must be exhausted."

14. Paragraph (1) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/11/2011 and numbered 6216 with the side heading of "Individual application right" is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."

15. Article 46 of the Code numbered 6216 with the side heading "Those who have the right to individual application" is as follows:

"(1) The individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation.

(2) Private law legal entities can make individual application only with the justification that only the rights of the legal person they are have been violated.

...”

16. In article 46 of the Code numbered 6216, it is regulated that the individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation.

17. Sentence two of paragraph number (2) of the same article includes the rule that private law legal entities can only lodge individual applications on the justification that their rights belonging to legal entity are violated.

18. In article 56 of the Turkish Civil Code dated 22/11/2001 and numbered 4721, association is defined as a group that has a legal entity which at least seven persons form by permanently joining their knowledge and works so as to realize a certain and shared objective apart from the sharing of earnings.

19. In article 4 of the Statute of the applicant Association, the main purpose of the association is defined as to support scientific, technological and professional advancements in terms of pediatric oncology and to protect the interests of the individuals in the society who receive services in this field of medicine by increasing the quality of treatment practices in pediatric oncology.

20. As per paragraph three of article 148 of the Constitution and paragraph number (1) of article 45 of the Code numbered 6216, real and legal persons who consider that, out of their fundamental rights and freedoms which are guaranteed by the Constitution, any that falls within the scope of the European Convention on Human Rights and the protocols thereof to which Turkey is a party has been violated by public power and who have civil rights have been granted the capacity of action in terms of individual application to the Constitutional Court. On the other hand, in paragraph number (2) of article 46 of the Code numbered 6216, it is stated that, as required by the nature of individual application, private law legal entities (associations, foundations, commercial partnerships and so on) can only lodge individual applications on the justification that their rights belonging to the legal entity are violated. Paragraph number (1) of the said article requires that current and personal rights must be directly violated in order to be able to lodge an individual application.

21. When the said provisions of the Constitution and the Code numbered 6216 are considered, either it is necessary for those who are going to lodge individual applications to have been directly affected due to the procedure, action or negligence of the public power that is the subject matter of the application or it is necessary to have a personal and private bond directly between the applicant and the victim.

22. On the other hand, they do not allow for asserting the contrariety, to the Constitution, of a regulation in relation to the remedy of individual application to the Constitutional Court in an abstract manner.

23. In the concrete incident, the legal regulation is towards the merging of "*pediatric hematology*" and "*pediatric oncology*" units and it has made a change in the statuses of real

persons who completed their specialty minor education in pediatric hematology or pediatric oncology or whose education continues as of the date when the Code is published. In this case, it cannot be stated that the legislative action in question constitutes an intervention in the rights that belong to the legal entity of the applicant association. The association, the purpose of which is to increase medical quality in the field of pediatric oncology, and which is not a victim of the legislative action that is the subject matter of the application that impacts only the statuses of its members, does not have the right to lodge an individual application against this action.

24. Due to the reasons explained, as it is understood that the applicant Society, which is a real person of private law, does not have the title of victim, it needs to be decided that the application is inadmissible due to *"the rejection of authority in terms of the person"* without examining the other conditions of admissibility.

V. JUDGMENT

It is **UNANIMOUSLY** decided on the date of 25/12/2012 that the application is **INADMISSIBLE** due to "the rejection of authority in terms of the person" and that the trial expenses be borne by the applicant.

President
Serruh KALELİ

Member
Burhan ÜSTÜN

Member
Nuri NECİPOĞLU

Member
Hicabi DURSUN

Member
Erdal TERCAN