REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2012/998

Date of Decision: 7/11/2013

FIRST SECTION

DECISION

President	: Serruh KALELİ
Members	: Mehmet ERTEN
	Zehra Ayla PERKTAŞ
	Erdal TERCAN
	Zühtü ARSLAN
Rapporteur	: Recep ÜNAL
Applicant	: Ramazan TOSUN
Counsel	: Att. Cavit ÇALIŞ

I. SUBJECT OF APPLICATON

1. The applicant has claimed that his constitutional rights have been violated upon the dismissal by the High Military Administrative Court (HMAC) of the case that he has lodged with the request that the transaction concerning his ex officio referral to retirement during the course of his service at the Turkish Armed Forces (TAF) as a specialist gendarme.

II. APPLICATION PROCESS

2. The application was directly lodged at the Constitutional Court on the date of 7/12/2012. The deficiencies detected as a result of the preliminary administrative examination of the petition and its annexes were made to be completed and it was determined that no deficiency preventing their submission to the Commission existed.

3. It was decided on 18/3/2013 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 paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. In the meeting that was held by the section on the date of 26/6/2013, it was decided as per sub-paragraph (b) of paragraph (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 thereof be sent to the Ministry of Justice for its opinion.

5. The Ministry presented its written opinion to the Constitutional Court on 28/8/2013.

6. The letter of opinion of the Ministry was notified to the applicant on the date of 14/9/2013 and the petition of response to the opinion of the Ministry was submitted by the applicant on the date of 16/9/2013.

III. FACTS AND CASES

A. Facts

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

8. The applicant graduated from the Specialist Gendarme School in 1994 and started his service at the TAF.

9. The Disciplinary Court of the 3rd Infantryman Training Brigade Command in Antalya has established in its decision dated 25/8/2000 and No. M.2000/109, D.2000/107 that the applicant committed the offense of "*insulting an inferior*" whereby it was ruled that he be sentenced to 25 days of room confinement.

10. Moreover, with the decision dated 13/3/2001 and No. M.2001/283, D.2001/71 of the Military Court of Isparta Mountain Commando School and Training Center it was ruled that the applicant who was proven guilty of 17 separate instances of the offense of "*battery and assault of an inferior*" be sentenced to 17 times of five days of imprisonment and that such imprisonment sentences be converted into money and postponed.

11. The disciplinary sentences of reprimand on the date of 3/1/1999, severe reprimand on the date of 1/10/1999, two days of internment on the day of 29/5/2000, three days of internment on the date of 22/8/2000, 1/25 pay cut on the date of 10/8/2000, severe reprimand on the date of 3/11/2000, 1/20 pay cut and warning on the date of 7/4/2005, notice on the date of 2/9/2005, warning on the date of 27/10/2006, and 2 days of room confinement have been imposed regarding the applicant.

12. Upon an anonymous information that was received by the Department of Anti-smuggling and Organized Crime Section at the Provincial Directorate of Security in Sinop, which notified that a certain individual was in possession of drugs, the law enforcers commenced surveillance at the place pointed out by the informant and an individual who fitted to the description of the informant, upon realizing the law enforcers, disposed of the plastic bag he was carrying in his hand in a garbage truck that was later stopped and the plastic bag was confiscated to find that it contained 1.8 kg of pieces of herbs that were used in the preparation of cannabis, and the identity check of the suspicious person revealed that he was a specialist sergeant who was posted at the Provincial Gendarmerie Regiment Command in Sinop and being a military personnel he was handed to the Garrison Command for prosecution transactions, and in his statement dated 9/1/2008, which was taken by military authorities, he said that the cannabis was left to him by the applicant who also served at the same unit and a third person and upon other statements taken, prosecution regarding the applicant commenced.

13. On the date of 14/1/2008, regarding the applicant, an efficiency document involving the conviction that "*His Continued Services in the Armed Forces is not Appropriate*" *was drawn up by* his senior efficiency officers as per sub-paragraphs (b), (c) and (e) of article 70 of the Specialist Gendarme Appointment and Efficiency Regulation, it was decided that the transaction of separation be carried out as per article 71 of the same regulation and the transaction of separation was completed on the date of 1/2/2008, upon the approval of the General Commander of the Gendarme. The transaction of separation was notified to the applicant on the date of 6/2/2008.

14. With the indictment dated 14/2/2008 and No. M.2008/133, D.2008/12 of the Office of the Chief Public Prosecutor in Sinop, a public action was filed at the Assize Court in Sinop on grounds that the applicant, on the date of 8/1/2008 and on antecedent dates, has committed the crimes of "*trade or provision of drugs and stimulants, night-time theft, accepting and giving bribes and denigration.*" By the Assize Court, the part of the adjudication file concerning the offenses of "*night-time theft and denigration*" that have been attributed to the applicant has been separated and recorded in the order of M.2008/30, the trial file specified was sent to the Criminal Court of First Instance of Sinop following the decision concerning lack of jurisdiction and trial was resumed regarding other crimes, over the old file.

15. With the petition dated 22/2/2008 that he wrote to the administration that established the transaction of separation, the applicant requested information and documents concerning the reasons for his separation from the TAF. The justifications for the separation were notified to the applicant with a letter of information, which bore no title with the signature, name, surname, rank and titles of "*(name and surname)/Gendarme Staff Colonel/Chief of Personnel*". The justifications for the separation as indicated in the letter are as follows:

> "…
>
> *a. As it was decided that the trials that have been concluded in relation to the offenses of 'Battery and Assault of an Inferior' (37 times) and 'Insulting an Inferior,' and the sentences of (3) warnings, (1) notice, (2) severe reprimands, 1/25 pay cut, 1/20 pay cut and the total of (5) days of internment and (2) days of room confinement that were ruled for (11) separate disciplinary offenses and trespasses that he has committed, and the prosecution that was ongoing as of the date of his dismissal due to the offense of 'Trade and Provision of Drugs and Stimulants' which are the grounds for the dismissal of your client and which are deemed to be of both the quality and quantity that prevents him from service at the TAF, in compliance with paragraphs (b, c and e) of article 70 of the Specialist Gendarme Appointment and Efficiency Regulation that apply to his circumstances, the transaction of dismissal from the TAF on grounds of Lack of Discipline and Moral Status, has been established regarding your client."*

16. The applicant filed an action at the HMAC on the date of 4/4/2008 with the request that such transaction of separation be revoked, requesting a stay of execution within the scope of this case and that a session be opened. The request for the stay of execution by the applicant was dismissed with the decision of the First Chamber of the HMAC dated 15/4/2008 and No. M.2008/1121, D.2008/484.

17. As a result of the trial, the Assize Court with its decision No. M.2008/27, D.2008/50 dated 30/5/2008 has ruled for the acquittal of the applicant of the offenses of "*trade or provision of drugs and stimulants, accepting and giving bribes*" *due to lack of evidence.* This decision was finalized on the date of 9/6/2008. The part of the justification of the decision, which is related to the applicant is as follows:

> "…
>
> *It was requested that the accused Ramazan be punished for the offences of trade of drugs, accepting bribes; the accused concerning his committal of the crimes that he is charged with ... it was understood that a case was filed against him for his statements at the investigation stage that he later has disacknowledged at the prosecution stage, that his name was on the*

warrants of apprehension regarding persons who are alleged to have accepted bribes for a sand deal, that it is not possible for a bribee to keep minutes as such and that regarding the trade of drugs, no drugs were seized on his person in any way, hence the lack of evidence regarding the allegations,

…"

18. Submitting the finalized decision of acquittal, the applicant, on the date of 20/6/2008, requested a stay of execution for a second time and this request was also dismissed by the First Chamber of the HMAC on the date of 1/7/2008.

19. The First Chamber of the HMAC has opened a session on the date of 17/3/2009.

20. On the other hand, as a result of the trial concerning the offenses of *'Night-time theft and denigration'* the Criminal Court of First Instance in Sinop has decided with its decision dated 19/4/2012 and No. M.2008/98, D.2012/191 for the acquittal of the applicant of the said offenses due to lack of evidence. The part of the justification of the decision, which is related to the applicant is as follows:

"…

According to the occurrence that has been accepted by our court as established, although a public case has been filed about the accused persons, Ramazan Tosun, ... for the offense of denigration; it has been decided that the accused ... and the witness ... be acquitted as a result of failure to obtain sufficient and credible evidence free from all sorts of doubt that they have committed the crimes with which they have been charged; considering the failure to support their statements in the trial file of the Assize Court of Sinop with the merits no. 2008/27 with hard evidence during the ... stages, regarding the entire scope of the file;

Although a public case has been filed about Ramazan Tosun, the accused, ... for the offense of theft; since it is understood that regarding the accused persons ... the minutes dated 20.12.2007, 08.06.2007, 16.10.2006, 29.06.2006, 17.06.2007, 29.06.2006 have been drawn up regarding their hauling of sand from the shore, and since it is understood that as the act is the one that necessitates a fine of administrative quality, the accused ... has been sentenced to a fine of administrative quality; since the legal aspects of the offense of stealing sand have not formed, it was necessary to decide that they be acquitted, each of them, of the charged offense ... "

21. The applicant submitted to the First Chamber of the HMAC the minutes of the hearing where the decision for acquittal of the Criminal Court of First Instance of Sinop was announced on the date of 26/4/2012 and the justified decision on the date of 8/6/2012.

22. The Chief Public Prosecutor appealed the decision of acquittal of the Criminal Court of First Instance on the date of 22/5/2012 against the accused with the justification that it was established that they committed the offense of denigration. The process of trial within this scope has not yet been concluded regarding the offense of denigration, with the appeal investigation ongoing.

23. At the end of trial the First Chamber of HMAC dismissed the applicant's request concerning the revocation of the transaction of separation by majority of votes with its decision dated 26/6/2012 and no M.2011/484, D.2012/759 and the decision was notified to the applicant on the date of 17/7/2012.

The justification of the decision is as follows:

"…

Although it is understood that a public case has been filed against the claimant as a result of offenses of 'trading drugs,' 'accepting bribe,' 'night-time theft' and 'denigration' and that it was decided that he be acquitted of all offenses at the end of the criminal trial that was conducted; yet the actions and three offenses he was acquitted from due to lack of evidence, which he was involved as a staff of the gendarme whereby he was in close contact with the public has to be separately examined from the standpoint of the transactions that are the subject of the case as well as from that of administrative law. When the justified judgments where decision of acquittal has been taken regarding transactions that are linked with the offenses concerned are examined, it is evaluated that the actions that the claimant was involved in are non-negligible, both qualitatively and quantitatively; that the claimant was involved in actions that are unacceptable, considering the witness statements and the claimant being a staff of the TAF and a law enforcer, that the possibility that the claimant who was involved in such acts to serve at the TAF no longer exists, that the discretionary authority as exercised by the defendant administration has been exercised within objective limits and it has been established that the transaction which is the subject of the trial has no dimensions that are contrary to the law.

…"

The justification for the dissenting vote of the decision is as follows:

"In article 70 of the ... Regulation it has been clearly indicated that in the establishment of the transaction of separation, his present rank and his lack of discipline in his previous rank have to be taken into consideration. It is seen that the claimant during his two previous ranks has been sentenced to the disciplinary penalties of two 'warnings,' one 'pay cut,' one 'notice' and 'two days of room confinement,' displaying no other lack of discipline other than the four separate offenses the trial of which are ongoing on the date of establishment of the transaction of separation. On the other hand, it is an undisputed fact that the transaction of separation that has been established regarding the claimant has been based on public trials that were later concluded in acquittal.

It is understood that the claimant, regarding his efficiency progress purports a 'good' degree of efficiency inclination and the negative convictions that have been stated for five efficiency periods are not of a dire quality. It is seen that the claimant who was awarded with 16 appreciations has been acquitted of four separate offenses that have been taken as the basis for the transaction of separation and has no convictions whatsoever.

Within this framework, being of the opinion that the transaction of separation that has been established about the claimant remains not in the confines of the principle of proportionality, that the balance between the public good and individual good could not be protected and the discretionary authority has not been exercised within objective borders, that the dismissal of the case was ruled upon interpreting the actions that he has been involved in because of offenses for which a decision of acquittal was taken signals in the direction of a matter that is legally debatable, and as I am of the conviction that a decision for the revocation of the transaction of separation has to be taken, I could not join in the respected decision of the majority that has formed contrariwise."

24. The applicant resorted to the remedy of correction on the date of 18/7/2012. During this process the opinion of the Office of the Chief Prosecutor's Office at the HMAC dated 13/9/2012 was notified to the applicant on the date of 25/9/2012.

25. The applicant submitted his statements in response to the opinion of the Office of the Chief Prosecutor to the First Chamber of the HMAC on the date of 26/9/2012.

26. With the decision of the First Chamber of the HMAC dated 19/10/2012 and no M.2012/1340, D.2012/1106 the request of the applicant for correction was dismissed and this decision was notified to the applicant on the date of 15/11/2012.

27. The applicant lodged an individual application to the Constitutional Court on 7/12/2012 within its due period.

B. Relevant Law

28. Article 70 of the Specialist Gendarme Appointment and Efficiency Regulation with the side heading of *'Procedures of separation because of lack of discipline and moral status'* is as follows:

> "*Regarding specialist gendarmes the continuation of the services at the Armed Forces of whom is deemed to be inappropriate, as a result of one of the reasons below and because of lack of discipline or their moral status, which is understood from one or more documents that belong to their present or previous ranks, the transaction of retirement is effectuated regardless of their duration of service:*
>
> *a. Display of discipline-perverting conduct, failure to self-improve despite warnings and punishments,*
>
> *b.* ***Failure to regulate his/her own conduct and attitudes to fit the requirements of the service despite warnings,***
>
> *c.* ***Excessive self-indulgence, drinking and gambling,***
>
> *d. Excessive inclination towards borrowing money and having grown the habit not to pay such debts in a way to tarnish the reputation of the Turkish Armed Forces, with the exception of obligatory cases such as alimony, road accidents, natural disasters, extraordinary economic fluctuations within the country beyond the foresight of the staff, sudden devaluations, health and treatment expenditures and suretyship and so on.*
>
> *e.* ***Displaying immoral conduct in a way to discredit the reputation of the Turkish Armed Forces.***
>
> *f. Those who are understood from their behavior and attitudes to have embraced illegal political, subversive, separatist, fundamentalist and ideological views and to have conducted or have involved in such acts.*

29. Article 71 of the Specialist Gendarme Appointment and Efficiency Regulation with the side heading of *'Preparation of a certificate of separation because of lack of discipline and moral status and the procedures to be followed '* is as follows:

> "*The certificate of separation to the effect of 'Continuation of Services at the Armed Forces is not Appropriate' regarding specialist gendarmes who will be subjected to the transaction of separation because of their lack of discipline and moral status shall only be prepared by the military efficiency superiors thereof. Such efficiency superiors who have prepared efficiency documents regarding specialist gendarmes as such, for the purposes of information, shall notify the first civil efficiency superior of the specialist gendarme with a confidential, private letter, immediately after the arrangement of the efficiency.*
>
> *There are no requirements as to the timing of the preparation of such certificate of separation as a result of lack of discipline and moral status and such a document can always be prepared. Other qualities with the exception of basic qualities cannot be marked. After they indicate in the section of the efficiency document that is allocated for basic qualities and the section of the last part that has been allocated to their convictions, on which grounds of lack*

of discipline or of moral status as in article 70 of the regulation they have established their final convictions, the efficiency superiors shall write down and undersign the conviction of 'Continuation of Services at the Armed Forces is Deemed Inappropriate' and attach the documents required thereto so as to ensure the writing-down of the convictions of all of the line superiors of efficiency without delay after which they shall send the document to the Personnel Division of the General Command of the Gendarme.

The efficiency superior who does not agree in such opinion regarding a specialist gendarme about whom a certificate of separation has been drawn up on grounds of lack of discipline and moral status shall write and undersign in the section allocated for his/her convictions, with the justification thereof, his/her conviction of 'I do not Agree with the Conviction that his/her Continuation of Service at the Armed Forces is Inappropriate' without marking the qualities except for basic qualities.

Such efficiency documents that are thus forwarded to the Personnel Division of the General Command of the Gendarme shall be examined by the respective sections, comparatively with other files and documents that are found at the headquarters and be referred to the commission under the chairmanship of the Chief of Staff, comprising of the chiefs of personnel, intelligence and operations, chiefs of staffing and promotion and the heads of sections they deem necessary, the directors of seniority, staff management sections and the legal counsel or the director of legal affairs. After this commission examines the compliance of the prepared efficiency certificate with the law and regulations and the sufficiency and validity of the documents attached thereto,and an evaluation is made. If need be, oral or written opinions of efficiency superiors shall be obtained; information or documents may be requested. Following the examination and evaluation that it has made, the commission submits the decision that it has taken to the approval of the General Commander of the Gendarme and transactions shall be carried out depending on the approval to be received. Those the retirement of whom is deemed appropriate by the General Commander of the Gendarme shall be immediately discharged. The efficiency of those the retirement of whom is not deemed appropriate shall be made into a protocol and put in their personal files and the posts thereof shall be changed. For those about whom the majority of convictions are in the form of 'Continuation of Service at the Armed Forces is not Appropriate' and for those the retirements of whom are not deemed to be appropriate by the General Commander of the Gendarme despite the majority or the entirety of the convictions about them being in the form of 'Continuation of Service at the Armed Forces is not Appropriate,' a normal efficiency shall be prepared by the efficiency line superiors of the post where they are appointed anew, within that efficiency year. The efficiencies of Specialist Gendarmes who are in such situation that have been drawn up to indicate that their 'Continuation of Services at the Armed Forces is not Appropriate' shall be converted into grades by the Personnel Division whereby the conviction 'Continuation of Services at the Armed Forces is not Appropriate' shall have (20) points and each of the convictions in disagreement with this judgment shall be given (60) points. The efficiency note of the gendarme who is in such a situation for the year concerned shall be the average of the grade point averages that have been established in both efficiency documents. The efficiency note for the year concerned of those regarding whom an efficiency document could not be drawn up due to the failure to satisfy the conditions specified in this Regulation shall be the note on the certificate of separation. Whether or not that gendarme gets a promotion for the year concerned on grounds of the efficiency note that has been found by way of the calculation of the efficiency note as explained above shall be determined by the Personnel Division.

Of the specialist gendarmes regarding whom the preparation of an efficiency of 'Continuation of Services at the Armed Forces is not Appropriate' is required due to the acts that have been specified in this article, regarding those for whom the forwarding of the existing documents to inferior ranks is deemed to be inconvenient, an efficiency document on the basis of such documents can be prepared at least by the Brigade/Regional/Division

Commander or the superior officer of a unit, headquarters and institution who is of an equivalent rank, and the General Commander of the Gendarme. For the efficiency documents that have thus been drawn up, definite transactions shall be made in the direction of the principles indicated above.

IV. EXAMINATION AND JUSTIFICATION

30. The individual application of the applicant dated 7/12/2012 and numbered 2012/998 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

31. The applicant who was ex officio referred to retirement while he served at the Turkish Armed Forces as a specialist gendarme has claimed that his right to a fair trial as guaranteed under article 36 of the Constitution has been violated when before the decision to dismiss the case concerning the revocation of this transaction, the written opinion that has been prepared by the Office of the Chief Prosecutor of HMAC was not notified to him, thus restricting his right of defense.

32. Moreover, the applicant has also claimed that his conviction to pay the fixed counsel fee in favor of the Ministry of Interior was contradictory to the Constitution. He has asserted that it is ensured in article 13 of the Constitution that the basic rights and freedoms can be limited only by law and in relation to the reasons specified in the respective article, and without interference in the essence thereof; that this limitation must be proportional, that article 36 of the Constitution falls well under article 13 whereby in article 36 there are no provisions regarding limitation and that within this framework such freedom cannot be limited even by law; moreover that, in paragraph one of article 91 of the Constitution that regulates the authority to make decrees in the force of law it is prescribed that the basic rights cannot be regulated by way of decrees in the force of law and that it would not be proportionate even if one would think otherwise and thus his freedom to claim rights has been violated.

33. Finally, the applicant, upon reference to the criminal case that has ended up in acquittal as justification, the justification of this decision and the witness statements within the scope of the file, has asserted that the presumption of innocence that is regulated in paragraph four of article 38 of the Constitution has been violated by the HMAC, who dismissed the action for annulment filed by him.

B. Evaluation

1. In Terms of Admissibility

a. Regarding the Complaint that the Opinion of the Office of the Chief Prosecutor has not been Notified

34. He has asserted that his right to defense was limited, hence his right to a fair trial was violated when he was not notified of the opinion that was prepared by the Office of the Chief Prosecutor at the HMAC before the decision to dismiss the action for annulment.

35. In the letter of opinion of the Ministry it is indicated that the principle of equality of arms is one of the elements of the right to a fair trial, that this principle means that the parties of a case be subjected to the same conditions regarding procedural rights and that parties have the opportunity to present their claims and defenses reasonably before the court

without any one of them being imposed upon a weaker position, and that this principle must be adhered to in civil and administrative cases of conflicts concerning civil rights and liabilities, in addition to penal cases. In the letter of opinion it was stated that in the previous *Miran v. Turkey* decision concerning this matter of the European Court of Human Rights (ECtHR) it was found that because of not notifying the parties of the opinion of the Chief Prosecutor of the HMAC who has carried out an independent examination of the file that s/he has later submitted to the court, the principles of equality of arms and adversarial trial had been violated; and in the individual application decision dated 16/5/2013 No. 2013/1134 of the Constitutional Court it was indicated that notification of the opinion of the Chief Prosecutor to the parties in order for them to examine it and providing them the opportunity to prepare their opposing views is a requirement of the right to a fair trial. Moreover, in the letter of opinion of the Ministry it was also stated that the ECtHR had decided that it was not possible to say that the applicant was bereaved of a procedural opportunity that would have affected the outcome of the trial as a result of the opinion of the Office of the Chief Prosecutor not being notified in advance during the first instance trial of the applicant in case that the applicant had not made any explanations as to which additional theses s/he would have propounded had the opinion of the Office of the Chief Prosecutor been notified to him during the first instance trial; that in the event which is the subject of the application, the applicant had not made any explanations as to which additional theses s/he would have propounded had the opinion of the Chief Prosecutor been notified to him during the first instance trial, whereby the claims of violation of rights of the applicant concerning the principle of equality of arms and adversarial trial have to be considered within this scope.

36. In his petition of response, the applicant informed that in line with the case laws of the ECtHR, non-notification of the claimant of the opinion of the Office of the Chief Prosecutor in the HMAC case gives rise to the outcome whereby paragraph (1) of article 6 of the European Convention on Human Rights (the Convention) is violated, hence revealing the nature of the decisions of the ECtHR of the rightfulness of his claims.

37. 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 that the parties of a case are subjected to the same conditions regarding procedural rights and that parties have the opportunity to present their claims and defenses reasonably before the court without any one of them being imposed upon a weaker position. This principle shall also prevail in cases of administrative quality whereby the notification of the opinion of the Office of the Chief Prosecutor in advance to the parties and the submission thereof for their perusal and that they are provided with the opportunity to prepare their opposing views is a requirement of the principle of equality of arms, and hence the right to a fair trial. The ECtHR has too, decided that the fact that the opinion of the Office of the Chief Prosecutor at the HMAC has not been notified to the parties in advance is a violation of article 6 of the Convention (*Miran v. Turkey*, App.No: 43980/04, 21/4/2009). Considering this, the law maker has made a legal amendment and with article 60 of the Code No. 6318 dated 22/5/2012, which was published in the Official Gazette No. 28312 dated 3/6/2012, it has added a rule to article 47 of the Code No. 1602 that enables the notification of the parties of the opinion of the Office of the Chief Prosecutor by the Secretariat General and the parties to notify the Court, in writing, of their responses within seven days starting from such notification (App. No: 2013/1134, 16/5/2013, § 32-36).

38. In the incident which is the subject of the application, the applicant on the date of 18/7/2012 recoursed to the remedy of correction against the decision of the HMAC for the dismissal of the case. The Office of the Chief Prosecutor at the HMAC, against such request,

has informed its opinion with the letter dated 3/9/2012. The opinion of the Office of the Chief Prosecutor is as follows:

> *"… in line with the legal conditions applicable on the date when the claimant has filed his case; considering that he would have been under no obligation to pay the counsel's fee in the event that he was found not-right in the case that he had filed against the MoND; it was evaluated that the application to him, of the arrangements that have been introduced with the DIFL No. 659 dated 02.11.2011 during the course of his case were not possible. In this regard, the dismissal of the action for annulment on its merits and the ruling concerning the counsel's fee in favor of the defendant administration is against the law.*
>
> *... however, it is deemed that since the ruling for the counsel's fee in favor of the defendant administration is against the law, it has to be decided that the request of correction be ACCEPTED from this aspect.*

39. As is seen, the opinion of the Office of the Chief Prosecutor on taking a decision regarding the acceptance of the request concerning the correction in relation to the counsel's fee and which is also partially in favor of the applicant was notified to the applicant on the date of 25/9/2012 and the applicant submitted his statements in response to the opinion of the Office of the Chief Prosecutor to the First Chamber of the HMAC on the date of 26/9/2012. Within this framework, the procedural lack that is claimed to have risen upon the non-notification of the opinion of the Office of the Chief Prosecutor in the first instance trial has been remedied at the correction examination stage that was carried out by the same chamber. Moreover, it is understood that such opinion of the Office of the Chief Prosecutor is congruous with the opinion delivered during the first instance trial, that no additional thesis has been put forth against the applicant. 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 in relation to this and submit them to the court.

40. Moreover, the applicant has made no explanations what so ever regarding additional theses or evidences that he could not declare before the court and which are of the quality to have affected the outcome had he been notified of the opinion of the Office of the Chief Prosecutor at the first instance stage.

41. Within the scope of the explanations above, it cannot be said that the procedural lack, which is the subject of the application is in violation of the principle of equality of arms since the applicant has by no means been bereaved of a procedural opportunity that could have affected the outcome of the trial as a result of the opinion of the Office of the Chief Prosecutor not being notified beforehand, during the first instance trial.

42. For reasons explained, as it is understood that the principles of equality of arms and adversarial trial have not been violated within the scope of the HMAC trial, which is the subject of the application, it has to be decided that the application is inadmissible since it is *'clearly devoid of basis'* regarding the complaint that the opinion of the Office of the Chief Prosecutor has not been notified.

b. Regarding the Complaint Concerning the Ruling of a Fixed Counsel's Fee to the Detriment of the Applicant

43. The applicant has propounded that his freedom to claim rights that is prescribed in article 36 of the Constitution was violated upon the ruling of the counsel's fee against him with reliance upon an arrangement that became effective after the filing of the case.

44. In the opinion of the ministry it was stated that the right to access to courts which means the right to litigate at courts in judicial matters shall also cover the right to go to the court, that, according to the case law of the ECtHR the right to access to the court is not an absolute right, that it can be subjected to some limitations yet notwithstanding the latter, such limitations shall not attain a degree to damage the essence of the person's right to access to justice. Moreover, it was also stated that such limitations regarding the right to access to court would only be accepted to be in compliance with paragraph (1) of article 6 when they have a legitimate purpose and especially when there is a reasonable relation of proportionality between the end that is aspired for and the means that has been used. It was stated that within this framework the ECtHR has decided that the principle that is applied in civil proceedings and that is coined as the *'loser pays'* rule in the decisions of the ECtHR would not contradict article 6 of the Convention per se, since it diverted prospective litigators to bring excessive requests before the court in line with the arrangements concerning the ruling of coverage of the court expenditures, for or against depending on the value won or lost by one of the parties during proceedings. Nevertheless, it was reminded that the amount of expense calculated in the light of the special conditions of a certain case was an important factor in determining whether or not the person's right to access to court was prevented. It was stated that the ECtHR, in some applications that have been made against Turkey, has decided that trial costs which are calculated with a consideration for the specific conditions of the case and in line with the procedure of proportionality were against the Convention; however, that in the incident which is the subject of the application the counsel's fee, which is considered to be included in trial costs was not calculated as per the principle of proportionality but over the principle of a fixed price and by taking into consideration the amounts that have been determined in the Minimum Attorneys' Fee Tariff (AAÜT), and that such amount, when compared with other fixed figures in the AAÜT, was observed to be congruous with them and moreover, that the fact that the Decree in the Force of Code Regarding the Delivery of Legal Services in Public Administrations within the Scope of the General Budget and in Administrations with Special Budgets dated 26/9/2011 and no. 659 (DIFC No. 659), which serves as the basis for the counsel's fee that was ruled entered into force during the course of the case and that this was assessed previously by the Constitutional Court in the individual application decision No. 2013/1134 who decided that the claim concerning thereto was clearly devoid of basis, and yet another issue worth attending to here was that the applicant acted with the belief that a counsel's fee against him would not be ruled even if his case would be dismissed as he filed the case, that such regulation that became effective during the course of the case increased the risk the applicant already took on by litigating, that there was a possibility that the applicant would not consider paying such a counsel's fee had this regulation, which entered into force during the course of the case been in force as he litigated, and that within this framework, this arrangement, which entered into force at a later stage charges the applicant with the liability to pay a counsel's fee even if the event that the case would, even in part, end up in his detriment even though he had no such liability at the outset of the litigation.

45. In his petition of response, the applicant has indicated that the DIFC No. 659 that is the grounds of the counsel's fee, which has been ruled against him has entered into force on the date of 2/11/2011 whereas the case at the HMAC was filed on the date of 4/4/2008, that the counsel's fee has to be considered in line with the rules that are applicable on the date of the litigation and that under such circumstances, the ruling of the counsel's fee against him is contradictory with the principles of the state of law and proportionality and the freedom to claim rights, which have been arranged in the Constitution.

46. With the DIFC No. 659 that became effective upon its publication of the date of 2/11/2011 the ruling of a counsel's fee in favor of the administration in the event of dismissal of the case was regulated. 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 it impossible or extremely difficult to litigate. Considering that on the date of the litigation the fee would be unforeseeable as to in whose favor or to whose detriment it would be during the trial phase, hence it is impossible to accept such fee as a cost that has to be envisaged, that the cost liability that is brought about is a procedural rule and that there are no provisions to prevent its implementation during trial stages; it cannot be accepted that the counsel's fee, which has been determined as fixed constitutes an intervention in the right to access to court since in the charging of the applicant the case of whom is dismissed with a counsel's fee no practices that are against the law or arbitrary are identified. (App. No: 2013/1134, 16/5/2013, § 24; App. No: 2013/1613, 2/10/2013, § 38-40).

47. For reasons explained, it must be decided that the application concerning the ruling of a fixed counsel's fee against the applicant is inadmissible for being *'clearly devoid of basis'* without the application being examined regarding other admissibility criteria, since it is explicit and understood as such that there are no interventions in the freedom to claim rights.

Zühtü ARSLAN did not agree with this opinion.

c. Regarding the Complaint that the Presumption of Innocence was Violated

48. The applicant, upon reference to the criminal procedure that has ended up in acquittal, the justification of this decision and the witness statements within the scope of the file as justification, has claimed that the presumption of innocence that is regulated in paragraph four of article 38 of the Constitution has been violated by the HMAC which dismissed the action for annulment filed by him.

49. The Ministry has not provided any opinion what so ever regarding the admissibility of this part of the application.

50. This complaint of the applicant is not clearly devoid of basis. Regarding such complaint it should be decided that the application where no other reason is deemed to exist to require a decision on its inadmissibility is admissible.

2. In Terms of Merits

51. The applicant has claimed that the HMAC that dismissed the action for annulment that he has filed has violated the presumption of innocence, which has been regulated in paragraph four of article 38 of the Constitution and paragraph (2) of article 6 of the Convention by making reference to offenses regarding which an acquittal was returned, the justification of such decision and to witness statements as justification.

52. In the opinion letter of the ministry it was stated that the presumption of innocence means that the court or the members of the court trying the accused does not act with the presumption that the accused has committed the crime with which he is charged, that the presumption of innocence would be violated if a decision relating to a person who is charged with any offense, which requires punishment, reflects any views concerning the guiltiness thereof before that person's guilt is proven according to the law. In the opinion letter of the ministry it was also emphasized that the presumption of innocence is not a security regarding only the procedure in criminal cases, that it has a wider scope, that no representative of the state nor any institution thereof shall pronounce a person as guilty before the guilt thereof has been established by a court. It was stated in the opinion letter of the ministry that after a decision of acquittal delivered in a criminal case, legal responsibility of the individual can be determined in a case of compensation, which has been filed with reliance upon the same incidents and that requires a burden of proof which is less severe and however that, the civil court, in a case that is based on the same material incidents with a previously filed criminal case has to act in accordance with the decision of acquittal that has been taken as a result of the criminal case. In the ministry's evaluation concerning the present case, it was stated that the HMAC, in its decision which is the subject of the application, has reviewed the material incidents that have been decided upon in the criminal trial regarding the issue of referral to retirement that requires a lower standard of proof, that it has not questioned the decision of acquittal and that it has benefited as evidence from the statements, which have been taken before the criminal judge and which are valid until established otherwise.

53. The applicant, in his petition of response, has indicated that although the outcome of the criminal trial was expected as the trial of the case at HMAC was ongoing it was decided that the case be dismissed despite the defendant being acquitted of the offense for which he was tried, and that this is contradictory to paragraph four of article 38 of the Constitution, that the resolution concerning acquittal was not taken into consideration in his favor, and the witness statements in the criminal case were accepted as evidence against him.

54. In the justification of the decision taken by the HMAC as a result of the trial of the case of revocation concerning the transaction of separation, the claim that the presumption of innocence was violated by the inclusion of trials that resulted in the decision of acquittal regarding the applicant, the qualities and quantities of offenses within this scope and witness statements.

55. First of all it would be beneficial to remember that the individual application examination is an examination that is limited to the identification of violations regarding constitutional rights and freedoms and elimination of the outcomes thereof, and that it does not offer a legal examination opportunity as is the case in the examination of remedy whereby the decision is reviewed with all its aspects as per the rule *'In individual application, examination cannot be done on matters that need to be taken into account in the legal remedy'* in paragraph four of article 148 of the Constitution (App. No: 2012/1027, 12/2/2013, § 26). Within this framework, the issue concerning whether the decision taken by the HMAC as a result of the trial concerning the action for annulment filed by the applicant is legal or not remains outside of the scope of

the examination of individual applications as long as it does not concern constitutional rights and freedoms. Within the scope of these explanations the material application has to be examined within the confines of whether or not the constitutional guarantee concerning the presumption of innocence was violated in the justification of the decision of the HMAC.

56. In the examination of an individual application, the common field of protection of the Constitution and 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, 26/3/2013, § 18).

57. The presumption of innocence which is the subject of the applicant's claim of violation is arranged in paragraph four of article 38 of the Constitution and paragraph (2) of article 6 of the Convention.

58. Paragraph four of article 38 of the Constitution is as follows:

"*No one can be deemed guilty until the guiltiness thereof is established by a court order*"

59. Paragraph (2) of article 6 of the Convention is as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

60. The presumption of innocence guarantees that the person is not accepted as guilty without a final court decision that s/he has committed a crime. As a result thereof, individual's innocence is *'essential'* and the burden of proof of guilt shall rest with the claimant and nobody can be charged with the liability to prove his/her innocence. Moreover, nobody can be considered as guilty neither by trial authorities nor by public authorities until their guilt is established upon a decision of the court and no one can be treated as guilty (App. No. 2012/665, 13/6/2013, § 26).

61. Within this framework, as a rule, the presumption of innocence is a principle, which covers persons who have been charged with an offense and regarding whom a decision of conviction has not yet been given. Then, regarding persons for whom the criminal charge has turned into a conviction and the guiltiness of whom has been established, the claim of presumption of innocence no longer has a valid footing as long as they no longer have the status of *'persons who are charged with an offense.'* However, in cases where in the end it is established that s/he has not committed the crime with which s/he was charged or when it cannot be ascertained for sure that s/he has committed such crime and a decision of acquittal is taken regarding the accused, it shall be accepted that the presumption of innocence about the person prevails. Because in such cases, within the meaning of paragraph 4 of article 38 of the Constitution and paragraph (2) of article 6 of the Convention the guilt of the person has not been established, hence s/he cannot be considered as guilty for this reason.

62. Since the presumption of innocence is valid in trials where a decision is made regarding the crime charged, cases that are considered within the framework of the "*conflicts regarding the civil rights and liabilities thereof*" which has been stated in article 6 of the Convention are, as a rule, outside of the area of application of the presumption of innocence. However, the administrative justice office in the establishment of the present case which is the subject of conflict in the administrative case shall act in compliance with the decision of acquittal as ruled previously by the criminal court that has handled the same material case (for similar decisions of the ECtHR see. *X v.*

Austria, App. No: 9295/81, 6/10/1982, k.k.; *C v. United Kingdom*, App. No: 11882/85, 7/10/1987, sd.). This rule, as long as the decision of acquittal that is taken about the person is not questioned, does not prevent that the person is imposed sanctions upon within the framework of disciplinary responsibility (For similar decisions of the ECtHR see. *Ringvold v. Norway*, App. No: 34964/97, 11/2/2003, § 38)

63. Within this framework, in administrative conflicts that are outside of the criminal case but that are ongoing as a result of acts that are the subject of the criminal case, even though a decision of acquittal is taken regarding the individual, reliance upon incidents that are within the scope of the claim which is included in the trial process that serves as the basis of such decision and thus questioning the decision of acquittal contradicts with the presumption of innocence. In return, as it serves as the basis for the solution of the administrative conflict, mentioning of the phenomenon that the person has been tried, even though s/he has been acquitted or of the decision in relation thereto shall not suffice to be able to make reference that the person has been treated as guilty and that the presumption of innocence has been violated. For this, the justification of the decision has to be taken into consideration as a whole and the final decision has to be examined as to whether or not it is grounded on the acts that the person has exclusively been tried for and acquitted of (App. No: 2012/665, 13/6/2013, § 29).

64. On the other hand it would be beneficial to remember that the Criminal and the Code of Criminal Procedure and the Disciplinary Code are disciplines that are subject to different rules and principles. Accordingly, the behavior of a public official, in addition to fitting into the definition of the offense, might also necessitate a disciplinary responsibility. In such cases, the criminal procedure and the disciplinary investigation shall be conducted separately and the ruling of the criminal court is not directly binding for the disciplinary offices apart from the rulings that the person has not committed the act that s/he has been charged with that arise at the end of the criminal procedure (App. No: 2012/665, 13/6/2013, § 30). However, evaluations as to the not-guiltiness of the person which contradicts the decision of acquittal as ruled about the person have to be refrained from, even though such are based on lack of evidence in evaluations that are made within such scope.

65. In the examination of the incident which is the subject of the application, in the administrations reply in response to the applicant's question as to why he was subjected to the transaction of separation the expressions "… *that his prosecution concerning the offense of ... is ongoing since the date when he was discharged, this is of the quality and quantity to prevent his service at the TAF...*" have been used. Considering the military requirements of discipline, it cannot be said that the presumption of innocence definitely requires that one waits until the finalization of criminal cases so as for the disciplinary law to be applied. Unless a trial which implies or accepts the guiltiness of the individual is present, it can be considered to suffice when only an investigation has been launched so as to commence disciplinary transactions or to impose disciplinary sanctions. Hence, the expressions in the reply of the administration which made reference to the investigations that have been launched about the person concerned cannot be said to violate the presumption of innocence.

66. Although it understood from the justification section of the decision of the HMAC, wherein the compliance with the law of the transaction of separation is inspected, expressions "*that a public case has been filed against the claimant as a result of offenses of 'trading drugs,' 'accepting bribe,' 'night-time theft' and 'denigration' and that it was decided at the end of his criminal trial that he acquits from all offenses; yet his acquittal from three offenses due to lack of evidence, those which he has been involved as a staff of the gendarme whereby he was in close contact with the public has*

to be separately examined from the standpoint of the transactions that are the subject of the trial as well as from that of administrative law. When the ***justified judgments where decision of acquittal has been taken regarding transactions that are linked with the offenses concerned are examined****, it is evaluated that the* ***actions that the claimant was involved in*** *are non-negligible, both qualitatively and quantitatively; that the actions the claimant has been involved in are unacceptable,* ***considering the witness statements*** *and the claimant being a staff of the TAF and a law enforcer, that the possibility that the claimant who has been* ***involved in such acts*** *serves at the TAF no longer exists, that the discretionary authority as exercised by the defendant administration has been exercised within objective limits and that the transaction which is the subject of the trial has no dimensions that are contrary to the law has been established as the outcome"* have been used.

67. As it is seen, in the justification of the decision of the HMAC, trials that have been carried out regarding the applicant, which have ended up in acquittal and the justifications of such decisions of acquittal, the witness statements within this scope and the qualities as well as quantities of the offenses that concern the trial have been relied upon, and expressions acknowledging that the applicant has committed the acts of which he acquitted have been used. During the evaluation of the disciplinary status of the applicant, it was accepted that he was involved in acts that are the subject of the decisions of acquittal and his status of non-discipline was based on such acceptance. Within this framework, it is seen from the expressions that are found in the justification of the decision which is the subject of the application that the belief that the applicant the guiltiness of whom was not established by the decision of the court concerned has committed these acts and that he is guilty thereof is being reflected. Thus, the Court in reaching the outcome that the transaction of separation of the administration is in compliance with the law, has not assessed the disciplinary status of the applicant according to the principles of disciplinary law, separately from the criminal trial, and to the contrary, it has made its ruling by reliance upon the justification of the decision of acquittal of the criminal court and the acceptance that the applicant has committed the acts for which he was tried. The expressions that the court has employed in its justification cannot be said to be in congruity with the principle of respect for the presumption of innocence.

68. Within the framework of the explanations above, it has to be decided that the presumption of innocence that is under the guarantee of paragraph four of article 38 of the Constitution has been violated for in the justification of the decision of the HMAC the criminal trial which has ended up in acquittal of the applicant was referred to and as it is understood that the belief that the applicant the guiltiness of whom had not been established by the decision of the court has committed the acts that constitute the subject of the trial and the belief that he is guilty is being reflected.

3. Regarding Article 50 of the Code No: 6216

69. Article 50 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 "*Rulings*" is as follows:

> *"(1) At the end of the examination on merits, it shall be decided that the right of the applicant has been violated or has not been violated. In the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged. However, legitimacy cannot be reviewed, no decision with the quality of an administrative act and action can be delivered.*
>
> *(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to*

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

…"

70. As the violation determined in the case which is the subject matter of the application arises from the decision of the court and as there is legal benefit in the holding of a retrial, it should be decided that the file be sent to the relevant court in order to carry out a retrial for the removal of the violation and its consequences in accordance with paragraphs (1) and (2) of the Code numbered 6216.

71. It should be decided that the trial expenses of 2,812.50 TRY in total composed of the fee of 172.50 and the counsel's fee of 2,640.00 TRY 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;

A. UNANIMOUSLY that the application concerning the violation of the freedom to claim rights which is guaranteed by article 36 of the Constitution because the opinion of the Office of the Chief Prosecutor was not notified is INADMISSIBLE for being ''*clearly devoid of basis,*''

B. WITH THE MAJORITY OF VOTES and with the dissenting vote of Zühtü ARSLAN that the application concerning the violation of the freedom to claim rights which is guaranteed by article 36 of the Constitution because the opinion of the Office of the Chief Prosecutor was not notified is INADMISSIBLE for being '*clearly devoid of basis,*'

C. UNANIMOUSLY that the application concerning the violation of presumption of innocence, which is guaranteed under article 38 of the Constitution is ADMISSIBLE,

D. UNANIMOUSLY that presumption of innocence, which is guaranteed under article 38 of the Constitution HAS BEEN VIOLATED,

E. UNANIMOUSLY, that the file be SENT to the relevant 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,

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

G. 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,

On the date of 7/11/2013.

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 is contradictory to the principle of proportionality and also in violation of his freedom to claim rights, yet 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 justification of the dissenting vote in the decision with the application date of 2/10/2013 and 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. Thus, the approach of the Constitutional Court and the European Court of Human Rights regarding this matter is as such. (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.No: 28249/95, D.D.: 19.6.2001, § 60; *Apostol v. Georgia*, 40765/02, 28.11.2006, § 59; *Minister/Turkey*, App.No: 50939/99, D.D: 12.6.2007, § 70, 73; *Mehmet and Suna Yiğit v. Turkey*, App.No: 52658/99, D.D.: 17.7.2007; *Stankov v. Bulgaria*, App.No: 68490/01, D.D.: 12.7.2007, § 54, 67; *Klauz v. Croatia*, App.No: 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, is especially important regarding cases that are heard in administrative justice. That any and all acts and transactions of the administration are open for judicial review is *sine qua non* for a state of law. Hence, article 125 of the Constitution has regulated such important aspect of the state of law whereby articles 40 and 129 have prescribed that the damages arising from unrightful transactions of the state be covered by the state. Such guarantees provided for the individual against the administration are a natural outcome of the inequality in the relation between the individual and the state. The Constitution has envisaged the mechanisms required by the individual in seeking his/her rights by way of judicial remedy against the administration which exercises public power.

The disproportionate counsel's fee has the potential to render such mechanisms and the guarantees they ensure, ineffective. 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 present application, the majority of our Court has reached the outcome that, in charging the applicant with the liability to pay the counsel's fee with reference to previous decisions where the test of proportionality was not run, is no intervention in the right to access to court. However, a test of proportionality had to be run with a consideration for issues such as what the fixed counsel's fee of 2.400 TRY which has been ruled in detriment of the applicant means under the circumstances of our country, the monthly income of the applicant, his overall economic status, in brief, his payment power and the special conditions of the case. A sum which can reach three times the monthly minimum wage cannot be said to constitute no interventions in the right to access to court at first glance, without being subjected to any examination.

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. And whether or not such intervention has led to any violations can be determined after a proportionality examination which shall be carried out with a consideration for the circumstances of the material application. Without such examination, it cannot be said or presumed that the intervention concerned is proportionate.

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