



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

**FIRST SECTION**

DECISION

Application Number: 2013/19

Date of Decision: 7/3/2014

**FIRST SECTION**

## DECISION

**President** : Serruh KALELİ  
**Members** : Burhan ÜSTÜN  
Nuri NECİPOĞLU  
Hicabi DURSUN  
Erdal TERCAN  
**Rapporteur** : Cüneyt DURMAZ  
**Applicants** : Fatih BİROL  
Remziye BİROL  
**Counsel** : Att. Sait TANRIVERDİ

### I. SUBJECT OF APPLICATON

1. The applicants asserted that the right to life and the right to a fair trial regulated in the Constitution were violated by stating that their son committed suicide as a result of the negligence of the administration while he was fulfilling his military service, that no result was able to have been obtained from the criminal investigation carried out as regards the incident, that the action for material and moral compensation they had filed against the administration was dismissed, filed a request for material and moral compensation.

### II. APPLICATION PROCESS

2. The application was lodged by the counsel of the applicants through the 33rd Criminal Court of Peace of Istanbul on 17/12/2012. In the preliminary examination carried out in terms of administrative aspects, it has been determined that there is no situation to prevent the submission of the application to the Commission.

3. It was decided by the First Commission of the First Section that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. In the session held by the Section on 20/5/2013, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application were notified to the Ministry of Justice on 21/5/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 18/7/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicants on 22/7/2013, but the applicants did not make any declaration against the opinion of the Ministry.

### **III. FACTS AND CASES**

#### **A. Facts**

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

8. The son of the applicants Murat BIROL started his military service on 26/5/2010, joined the 2nd Tank Company Command of the Tank Battalion of the 1st Mechanized Infantry Brigade of Agri Dogubayazit as a tank private on 13/8/2010 following the completion of his recruit training.

9. After he joined his unit, routine introduction procedures applied to all soldiers were also applied to him. In this context, a social risk scanning questionnaire was conducted for Murat BIROL, he did not mention any health problem in this questionnaire. Moreover, he stated that he did not have a suicidal tendency and that there was nobody who committed suicide in his family.

10. The General and Special Instructions on Tower Sentry and all general and special instructions in relation to the course of action in his unit were notified to Murat BIROL. During the special interview made with him, what kind of action should be performed during his military service was also explained.

11. In the leader counseling card arranged as a result of the one-to-one interview with Murat BIROL, it was written that he declared that he did not have any psychological and familial problem.

12. After Murat BIROL started his duty in his new unit in this way, according to his medical examination book, he went to the infirmary on 3/9/2010 because of his introduction procedures, he was sent to his unit after normal physical examination was performed on him.

13. He ended his life by firing his own gun while he kept watch at approximately 22.45 on 19/9/2010, which is 36 days after he joined his unit.

#### **1. The Process of Criminal Investigation**

14. Upon the self-shooting of Murat BIROL, the matter was notified to the Military Prosecutor's Office at approximately 23.15. An investigation was initiated by the Military Prosecutor's Office *ex officio*, due to the fact that the crime scene was distant to the prosecutor's office and a situation where a delay would be problematic was encountered, an instruction letter was written by the Military Prosecutor's Office to the Chief Public Prosecutor's Office of Agri/Dogubayazit in order for the corpse examination and autopsy procedures of the deceased to be performed, for the crime scene investigation to be carried out and for the other matters which would be observed *ex officio* to be performed so as to ensure that the evidence do not get lost.

15. In accordance with the instruction in question, a Public Prosecutor who was working at the Chief Public Prosecutor's Office of Dogubayazit and other officials accompanying him/her arrived at the crime scene at approximately 23.40 on the same day and examined the crime scene on the same day. Photography and camera recording procedures were performed by the crime scene investigation team, the sketch of the crime scene was drawn, the rifle found in the crime scene and the magazine that belonged to this rifle and the cartridge case, helmet, assault vest, a deformed cartridge bullet found beside the deceased were taken under protection and the examination was finalized.

16. After the crime scene investigation was performed, Dogubayazit State Hospital was reached in order for the corpse examination and autopsy procedures of the deceased to be performed. After the identification of the deceased was performed, the Corpse Examination and Autopsy Procedure dated 20/9/2010 and numbered 2010/3186 SR was initiated. Following the corpse examination procedure, it was decided that the corpse be sent to Istanbul Forensic Medicine Institution in order for his classical autopsy procedure to be performed so as determine the definitive cause of death in accordance with the opinion of the expert doctor.

17. Upon the instruction of the Military Prosecutor's Office, a search was conducted in the locker and bed of the deceased under the supervision of the Public Prosecutor of Dogubayazit and in the examination performed within this scope, no finding with the quality of a stimulant or narcotic substance was encountered. The troop personal file of the deceased was also seized.

18. Within the scope of the conducted investigation, the mother and father of the deceased were appealed by the Military Prosecutor's Office for their statements and the statements of all personnel in relation to the incident were taken.

19. Following the incident, an Administrative Investigation Report was prepared.

20. The Detailed Autopsy Report dated 21/12/2010 and numbered 2010/65232/2906 was arranged by the Presidency of Istanbul Forensic Medicine Institution. Given the information and findings obtained from the autopsy and examinations, it is understood that:

- a. According to the report of the Chemistry Specialty Department, there was no alcohol in blood, the soporific, narcotic substances scanned in blood and urine were not present, the substances scanned as a result of the systematic toxicological analysis performed in the entrails and stomach were not present,
- b. According to the report of the Biology Specialty Department, no sperm cell was observed in the microscopic examination of the smear prepared from the anal swab sample which was reported to have belonged to Murat BIROL, the anal swab sample did not contain semen,
- c. The cartridge bullet of one fire arm hit the body of the person, it had a quality of being independently fatal,
- d. The entrance hole of the cartridge bullet of the firearm was skin, according to the subcutaneous findings, the shot was fired from the adjacent shooting range,

- e. No cartridge bullet could be obtained from the corpse,
- f. The death of the person occurred as a result of cranial fractures and cerebral hemorrhage and cerebral tissue damage associated with the injury from the cartridge bullet of a firearm.

21. According to the report of the Directorate of Criminal Police Laboratory of Erzurum dated 21/10/2010 and numbered 2010/1743 BLS., it was found out that the shot was fired from a G-3 brand rifle.

22. According to the Expertise Report of the Directorate of Criminal Police Laboratory of Erzurum dated 4/10/2010 and numbered KMY. 2010/1294, it was clearly found out that the deceased Murat BIROL shot himself with his own gun.

23. According to the report of the Police Department of Body Mark Generation Laboratory of the Branch Office of Crime Scene Investigation and Identification of the Governor's Office of Erzurum dated 4/10/2010 and numbered 2010/371, it was stated that no trace which was suitable for classification and identification could be found as a result of the investigation carried out in order to detect traces on the infantry rifle and the magazine.

24. The statements of the applicants Fatih BIROL and Remziye BIROL were taken in their capacity as victim. The applicant Fatih BIROL, who is the father of the deceased, stated that his son's condition was good during his military service and that he did not have any problem, that he did not know why his son had shot himself. The applicant Remziye BIROL, who is the mother of the deceased, stated that her son did not have any psychological problem or distress, that her son called her two hours before he died, that he did not talk about any of his distresses during this call, that her son hung up the phone by saying "see you again".

25. I.D. who served as the Chief Doctor of the Brigade at the time of the incident was heard as a witness. In his/her statement, I.D. stated that s/he arrived at the crime scene within a short period of time after the occurrence of the incident, that s/he did not detect any suspicious situation in the initial examination, that s/he thought that the deceased had ended his life by firing a single shot through his own gun.

26. O.G. who served as a technician master sergeant in the Tank Communications Company was heard as a witness. In his/her statement, O.G. stated that his/her duty was to control the sentry post, that the deceased's friend with whom he kept watch brought the sentry book and had it signed when s/he was about to go up to the sentry tower numbered 12 on which the deceased kept watch for control at approximately 22.40 on the day of incident, that s/he did not go up during that time, that s/he heard a very loud noise while s/he was checking and signing the sentry book, that s/he first thought that this noise stemmed from the fall of a metal sheet from the roof, that only after a short while it was understood that the sentry private had committed suicide.

27. The private T.Y. with whom he kept watch at the moment at which the incident occurred was heard as a witness. In his statement, T.Y. stated that he had a sentry duty with the deceased in the sentry booth numbered 12 located in the barrack between 22:00 and 24:00 on the day of incident, that when they went to the loading-reloading station prior to the sentry, the patrol corporal asked the deceased whether he had any problem or psychological distress, that he told him that he could tell him about his problems, if any, that the deceased stated that

he did not have any problems, that the deceased asked the patrol corporal "*If I aim at the forehead of an enemy, does he die when I pull the trigger?*", that the patrol corporal said "*of course, he dies*", that the patrol corporal left after he brought them to the sentry post, that then they both performed their sentry activities and he talked to the deceased, that upon seeing that the patrol vehicle was approaching towards the sentry booth after a certain period of time, he went down in order to make the patrol commander sign the sentry book, that he heard a noise which was similar to the noise caused by the fall of a metal sheet when the patrol commander was about to sign the book, that then they realized that the incident in question occurred, that as far as he knew, the deceased was a naive, well-intentioned and and introverted person, that during and before the sentry, he did not mention to him in any way that he would shoot himself.

28. The statement of T.A. who served as a Tank Corporal on the day of incident was taken. In his statement, T.A. stated that he brought the deceased and his sentry mate to the sentry post as he was the patrol corporal on the day of incident, that the deceased was a little absentminded and reflective while going to the sentry post, that he asked him whether he had a problem or not and stated that he could tell him if he had a problem, that the deceased told him that he did not have any problem, that then they performed loading-reloading and returned back together, that at that time the deceased asked him "*let us assume that I face an enemy, does he die if I shoot him in the head?*", that he said "*No he does not die in that way, he dies if you shoot him on his hand*" by laughing and in a humorous way, that upon this the deceased asked the same question once again, that he said of course he dies, that they reached the sentry booth by talking in this way and that he left thereafter, that as far as he knew, the deceased was a good person, that he had a character which could be easily deceived as he had a naive and well-intentioned personality, that again as far as he knew, he did not have a girlfriend.

29. Y.S. who was a close friend of Murat BIROL was heard as a witness. In his statement, Y.S. stated that as far as he knew, the deceased was not excessively introverted, that he mentioned to him about his familial problems, that however he did not have any statement and behavior as regards the act of shooting himself, that he performed his military service in a normal way, that he tried to fulfill the orders that his commanders gave, that however he could not completely fulfill the given orders as he was naive, mild and well-intentioned due to his character, that he did not have any problem with his friends and commanders. Murat BIROL's other friends whose statements were taken also made similar statements.

30. By considering all these matters, the Military Prosecutor's Office decided that there was no ground for prosecution through its decision dated 23/2/2011 and numbered M.2011/171, D.2011/20 on the ground that Murat BIROL committed suicide as a result of a psychological depression that he experienced due to the problems which stemmed from his own inner world and which he did not reveal.

31. The decision on no ground for prosecution (DNGP) was notified to the applicants on 8/3/2011, the remedy of objection was not resorted to by the applicants against the decision in question.

## **2. The Process of Action for Compensation Filed before the High Military Administrative Court (HMAC)**

32. The applicants applied to the Ministry of National Defense on 27/4/2011 in order for their material and moral damages to be compensated on the ground that the decision on no ground for prosecution was wrong, contradictory and deficient, that the administration had gross service negligence as regards the incident of death.

33. Upon the fact that the Ministry of National Defense did not respond to the aforementioned request within 60 days, an action for compensation with a request for legal aid was filed by the counsel of the applicants against the Ministry of National Defense (Administration) via a petition dated 30/6/2011. The applicants requested a compensation of 600.000 TL in total including a material compensation of 300.000 TL and a moral compensation of 300.000 TL.

34. The request of the counsel of the applicants for legal aid was accepted via the decision of the Second Chamber of HMAC dated 5/10/2011 and numbered M.2011/1204.

35. The Chief Prosecutor's Office of HMAC presented an opinion as to the effect that the amount to be determined via an expert in accordance with the principle of strict liability be paid as material compensation together with its legal interest, that the amount to be appraised in a way that would eliminate the resulting grief and sadness of theirs be paid as moral compensation together with its legal interest.

36. The Second Chamber of HMAC, in its decision dated 28/3/2012 and numbered M.2011/1204, D.2012/349, decided on the dismissal of the action as the requests of the applicants for material and moral compensation were devoid of legal basis on the ground "... *that the deceased experienced an instantaneous psychological depression due to the effect of some problems which were not reflected on the outer world and which resulted from his inner world and that he ended his life by firing the gun that he held with the intention of committing suicide during sentry and that the death occurred in this way, that in this case, no causal relation which required the service negligence or strict liability of the defendant administration could be established as regards the suicide of the deceased...* ".

37. As the action was tried with legal aid, the decision of the Second Chamber of HMAC dated 5/10/2011 and numbered M.2011/1204 was lifted. In this context, the Second Chamber of HMAC decided that the postal fee of 20.00 TL, the fee of application and writ of 66.40 TL as well as a counsel's fee of 22.850.00 TL in total calculated over the dismissed amounts of material and spiritual compensation be received from the applicants and given to the defendant administration.

38. The request for correction of the decision filed by the applicants against the aforementioned decision was dismissed by the same Chamber of HMAC through its decision

dated 7/11/2012 and numbered M.2012/992, D.2012/992. This decision was notified to the counsel of the applicants on 20/11/2012.

39. The applicants lodged an individual application on 17/12/2012 within due time following the notification of the decision of HMAc to them.

## **B. Relevant Law**

40. Article 107 of the Code on the Establishment and Trial Procedure of Military Courts dated 25/10/1963 and numbered 353 with the side heading of "*Objection to a decision on no ground for prosecution*" is as follows:

*"A decision on no ground for prosecution issued by a military prosecutor shall be notified to the commander of the troop or the chief of the military institution under whose organization a military court has been established and to the suspect and the person damaged by the crime.*

*The commander of the troop or the chief of the military institution under whose organization the military court has been established or the person damaged by the crime can object against this decision before the military court which is nearest, in terms of place, to the military court under whose organization the military prosecutor who has issued the decision is present within fifteen days following the notification of the decision to them. If there is hesitation over the determination of the nearest military court, this matter shall be resolved by the Ministry of National Defense. The events and evidence which will justify the filing of a public case shall be indicated in the request for objection.*

41. Article 43 of the Code of the High Military Administrative Court dated 4/7/1972 and numbered 1602 with the heading of "*Directly filing a full remedy action*" is as follows:

*Those whose rights are violated due to administrative actions, prior to filing a case before the High Military Administrative Court, need to request the fulfillment of their rights by applying to the competent authority upon the written notification of these actions or within one year following the date on which they become aware of them in another way and, in any case, within five years following the date of action. In the event that these requests are partly or fully dismissed, within sixty days following the date of notification of the action on this subject, and if no response was provided, within sixty days following the date on which this period expires, they can file a full remedy action.*

*In the event that the full remedy action which is filed before judicial authorities not having jurisdiction is dismissed in terms of jurisdiction, the condition of applying to the administration prescribed in paragraph one shall not be sought for the cases which are filed before the High Military Administrative Court later on."*

42. Article 48 of the Code numbered 1602 is as follows:

*"Examination in Chambers and the Board of Chambers shall be carried out over the documents.*

*In the actions for annulments and the full remedy actions whose amount exceeds two hundred thousand liras, a hearing shall be held upon the request of one of the parties.*

*A hearing can be requested in case petitions and response statements.*

*Chambers and the Board of Chambers can also decide of their own accord on the holding of a hearing notwithstanding the aforementioned records.*

*Summons shall be sent to the parties at least thirty days before the date of hearing."*

43. Article 74 of the Turkish Code of Obligations dated 11/1/2011 and numbered 6098 which regulates the relation of obligation relations arising from tort actions with the Criminal Law is as follows:

*"As the judge decides on whether or not there is the fault of the damaging party, on whether or not the latter has a discerning power, s/he shall neither be bound by the provisions on responsibility of the criminal law nor shall s/he be bound by the acquittal decision as ruled by the criminal judge. Similarly, the decision of the criminal judge concerning the evaluation of the fault and establishment of the damage shall not be binding on the judge of civil court."*

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

44. The individual application of the applicant dated 17/12/2012 and numbered 2013/19 was examined during the session held by the court on 7/3/2014 and the following were ordered and adjudged:

##### **A. Claims of the Applicants**

45. The applicants asserted that the right to life and the right to a fair trial guaranteed under articles 17 and 36 of the Constitution were violated by stating that their son was assigned with military services that required advanced skills without considering his personality and nature, that giving their son a gun and making him stand sentry had a quality of being a gross service negligence of the administration, that the decision of the prosecutor's office on no ground for prosecution was contradictory in itself, that as the witnesses who were heard at the stage of prosecution were persons who were performing their military service and were within the chain of order and command, their statements were not complete and objective, that for this reason, while HMAC needed to issue a decision by hearing the witnesses again and holding a hearing, it dismissed the case only by referring to the decision of the Military Prosecutor's Office on no ground for prosecution, that they experienced a significant spiritual depression due to the death of the deceased who was their only child and that they became devoid of his material support as well and filed a request for compensation.

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

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

**a. The Claim As to the Effect that Article 17 of the Constitution has been Violated**

**i. Claims as Regards the Process of Criminal Investigation**

46. The applicants asserted that the decision of DNGP of the Military Prosecutor's Office as regards the criminal investigation conducted in the incident which is the subject of the application was contradictory, that in the decision in question, both stating that a test was applied to the deceased and that there was no reason for him to commit suicide and arriving at the conclusion that their son committed suicide as a result of an "*instantaneous*" psychological condition revealed this contradiction, that moreover, the witness statements taken within the scope of the investigation were not complete and objective as these witness were within the military chain of order and command at the time.

47. In the opinion of the Ministry in relation to the claims of the applicants as to the effect that article 17 of the Constitution was violated, it was stated that while evaluating complaints as regards the right to life in terms of admissibility, prior to resorting to the remedy of individual application, an obligation was imposed on individuals to have exhausted "*all of administrative and judicial remedies prescribed in the code*" for the act, action or negligence which they asserted to have caused a violation, that however the applicants did not resort to the remedy of objection against the decision of the Military Prosecutor's Office dated 23/2/2012 and numbered M.2011/171, D.2011/20 and that the decision became final in this way, that the ECtHR ruled that, in cases where the applicant was involved in the criminal investigation as a party and objected against the judgment of non-prosecution delivered by the prosecutor, the applicant pursued an appropriate and sufficient remedy and the case filed before the administrative court needed to be considered as an additional remedy, that all these matters needed to be considered while conducting an evaluation of admissibility.

48. The last sentence of paragraph three of article 148 of the Constitution is as follows:

*"In order to make an application, it is conditional that ordinary legal remedies be exhausted."*

49. Paragraph (2) of article 45 of the Code numbered 6216 is as follows:

*"All of the administrative and judicial application remedies that have been prescribed in the code regarding the act, the action or the negligence that is alleged to have caused the violation must be exhausted before making an individual application."*

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

51. In accordance with the secondary quality of individual application, an applicant needs to primarily convey his/her claims as to the effect that fundamental rights and freedoms have been violated to the administrative authorities and the courts of instance of venue in a duly manner, to submit the information and evidence that s/he has about this subject to these authorities and to pay required attention to pursuing his/her case and application in this process as well. The claims as regards the violation of fundamental rights and freedoms which

are not asserted and pursued before ordinary review mechanisms in this way cannot be made the subject of an individual application before the Constitutional Court.

52. In the incident which is the subject of the application, the remedy of objection was not resorted to by the applicants against the decision of the Military Prosecutor's Office dated 23/2/2011 and numbered M.2011/171, D. 2011/20.

53. As it is understood that the applicants did not resort to the legal remedy prescribed in article 107 of the Code numbered 353 against the decision of DNGP delivered as a result of the criminal investigation, it cannot be said that legal remedies have been exhausted in terms of the complaints included in this part in relation to the criminal investigation.

54. Due to the reasons explained, as it is understood that the claim as to the effect that fundamental rights and freedoms were violated was made the subject of an individual application without the legal remedies recognized before the courts of instance of venue having been exhausted, it should be decided that the part of the application in relation to the conducted criminal investigation is inadmissible due to "*the non-exhaustion of legal remedies*".

#### **ii. The Claim that the Measures Required for the Protection of Life were not Taken**

55. In the application, it is seen that the claims as to the effect that article 17 of the Constitution was violated as the measures required for the protection of the life of Murat Birol who committed suicide were not taken is not clearly devoid of basis in accordance with article 48 of the Code numbered 6216. As no other reason for inadmissibility was observed, it should be decided that this part of the application is admissible.

#### **b. The Claims that the Right to a Fair Trial Enshrined in Article 36 of the Constitution was Violated in Relation to the Process of Full Remedy Action Tried Before HMAc**

56. The applicants assert that in the action for material and moral compensation they filed against the administration due to the fact that their son committed suicide during military service, the court issued a decision without conducting an effective prosecution, that while it needed to issue a decision by achieving the material fact by hearing the witnesses, it dismissed the case only based on the decision of DNGP of the Military Prosecutor's Office, that their right to a fair trial was violated by mentioning that no hearing was held in the full remedy action tried before HMAc as an evidence to the effect that the action was ineffective.

57. In the opinion of the Ministry, it was stated that the complaints of the applicants in this part were examined by the ECtHR in similar applications within the scope of article 2 of the Convention, that the acceptance and evaluation of evidence primarily fell within the jurisdiction of national courts, that while deciding whether a trial was fair as a whole, whether the rights of defense were respected or not needed to be taken into consideration, that while an administrative justice or civil judge decides on the responsibility of the perpetrator of an action, s/he is not bound by the evaluations as regards the criminal law, that in similar cases, a criminal investigation was initiated *ex officio* on the date on which the relatives of the applicants died and that it was completed with an administrative investigation, that in cases where it reached to the conclusion that the conducted investigations allowed for the

determination of the causes of death in a certain manner, it decided that there was no negligence which had a quality that would show any effect on the depth and seriousness of the cases and investigation conducted on the death of the private, that they could not be accused by claiming that these were insufficient or contradictory.

58. While making an evaluation on the obligation to take the measures required for the protection of life that the state holds in relation to the right to life, evaluations have been made in a way to also cover the claims that the applicants asserted as regards the process of trial held by HMAC in this part and due to the fact that the conclusion has been reached that the claims of the applicants are clearly devoid of basis, except for the claim that the "*freedom to claim rights*" was violated due to the fact that no hearing was held before HMAC, it has not been deemed necessary to reevaluate the similar claims that the applicants considered and asserted within the scope of the aforementioned right in relation to article 36 of the Constitution.

59. The claim of the applicants as to the effect that the right to a fair trial was violated due to the fact that no hearing was held was previously examined by the Constitutional Court in similar applications and evaluated together with the principle of holding a trial in public and with hearing regulated in article 141 of the Constitution. The aim of the principle of publicity of trial is to open the functioning of judicial mechanism to public scrutiny and to guarantee the transparency of trial activity and to prevent arbitrariness in trial. However, it does not mean that it is obligatory to conduct all types of trial with hearing in a certain way. Exempting some trials from hearing and conclusion thereof without holding a hearing for the purposes such as economy in procedure and the reduction of workload on the condition that the principles of fair trial are complied with do not constitute the violation of constitutional rights (App. No: 2013/664, 17/9/2013).

60. In article 48 of the Code numbered 1602 with the heading "*Hearing*", it is adjudged that the examination before Chambers and the Board of Chambers will be conducted over the documents, that a hearing will be held upon the request of one of the parties in actions for annulments and full remedy actions whose amount exceeds two hundred thousand liras, that the request for hearing can be filed in a case petition and response statements, that Chambers and the Board of Chambers can decide of their own account on the holding of a hearing notwithstanding the aforementioned records.

61. In the concrete incident, it is seen that an action for compensation was filed by the counsel of the applicants against the administration before HMAC through a petition dated 26/10/2011, that however there was no request for the holding of a hearing in the petition in question. In the individual application petition lodged to the Constitutional Court, there is no information as to the effect that a hearing was requested in accordance with article 48 of the Code numbered 1602 or no claim as to the effect that the 2nd Chamber of HMAC did not meet the request for a hearing although such a request was filed.

62. It is seen that the applicants were able to assert their claims in the process of trial conducted before HMAC, that HMAC, in its decision that it issued on the case of the applicants, ruled on the dismissal of the case by explaining why the claims of the applicants were not taken into account based on the obtained evidence including the claims which the applicants asserted in the capacity of a complainant within the scope of the investigation conducted by the Military Prosecutor's Office. In the evidence of this information, in the

process of administrative trial in which trial was adjudged to be conducted over the documents and the holding of a hearing was attributed to the request or the discretion of the court, it cannot be mentioned that the trial which was concluded after the claims and defenses of the parties were taken in writing and the evidence obtained during the previous criminal investigation was taken into account resulted in the violation of the right to a fair trial because it was conducted over the file.

63. Due to the reasons explained, it should be decided that this part of the application is inadmissible due to the fact that "*it is clearly devoid of basis*" as it is clear that there is no violation.

## **2. Examination in Terms of Merits**

64. The applicants asserted that the positive liability for the protection of life enshrined in article 17 of the Constitution was violated by stating that their son Murat BIROL did not have the capability of fulfilling his military service because he was naive, well-intentioned and had a personality that could be easily deceived, that the incident of death occurred due to the fact that their son was given a gun and made to stand sentry without considering his personal situation, that the administration did not show necessary sensitivity in protecting the right to life.

65. In the opinion of the Ministry, while evaluating the complaints as to the effect that article 17 of the Constitution was violated, the decisions of the European Court of Human Rights (ECtHR) on the subject were included after it was stated that the ECtHR interpreted the liability of the state to protect life in a way that would cover the protection of an individual who was under custody, detention or in conscription against suicide. In the decisions of the ECtHR on this subject, it was stated that the failure to take reasonable measures although the state knew or was supposed to know that an individual constituted a risk for himself/herself could bring about a responsibility for it, that the legal and administrative framework created in order to protect life needed to be fulfilled in a way that would ensure that practical measures which would protect those who fulfill their military service against the dangers to which they were exposed in relation to military service be taken and that appropriate procedures which would allow for the determination of deficiencies and the mistakes made by superiors at various levels be fulfilled, that nevertheless it was necessary not to ignore the principle of "*unpredictability*" of human behaviors in the determination of the scope of the positive liabilities that the state needed to fulfill in the incidents of suicide.

66. In the opinion of the Ministry, finally, these evaluations were made as regards the concrete incident: In the current application, first of all, two issues need to be made clear.

These are, by considering the principle of "*unpredictability*" of human behaviors, the determination of whether the officials predicted the risk of suicide or not or at least whether it was necessary for them to predict or not, and if they predicted or needed to predict, whether they took necessary measures or not. In the current application, it has been considered that Murat BIROL was recruited on 26/5/2010, that he joined his new unit, the 2nd Tank Company Command of the Tank Battalion of the 1st Mechanized Infantry Brigade of Agri Dogubayazit on 13/8/2010 after he completed his recruit training, that it was understood that he committed suicide with his sentry gun during sentry on 19/9/2010 after a short period of time following his joining his unit, that it was deemed appropriate to determine whether or not the military authorities knew whether Murat BIROL really had the risk of committing suicide or not as regards the liability of Murat BIROL to protect his own life against himself and, in the event that this risk was present, whether or not they did everything expected from them in order to prevent it, that in this respect, when the evidence obtained in the criminal investigation file was taken into account, according to the Ministry, no element indicated that the son of the applicants experienced mental disorders which could draw him to suicide before joining the army, that the incident of suicide occurred after a short period of time following his joining the unit, that the private exhibited completely normal behaviors until the date of incident, that he did not mention about any of his problems to his superiors or friends.

67. The applicants did not make any declaration against the opinion of the Ministry on the merits of the application.

68. Article 17 of the Constitution with the heading of "*Inviolability and material and spiritual existence of the individual*" is as follows:

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

69. The right to life and the right to protect and improve his/her material and spiritual existence of an individual are among the rights which are closely tied, inalienable and indispensable and the state has positive and negative liabilities about this subject. The state, as a negative liability, has the liability not to terminate the life of any individual within its scope of authority intentionally and in contrary to the law and, besides that, as a positive liability, has the liability to protect the right to life of all individuals within its scope of authority against the risks arising out of the actions of public institutions, other individuals and the individual himself/herself (App. No: 2012/752, 17/9/2013, § 50-51).

70. According to the basic approach that the Constitutional Court has embraced in terms of the positive liabilities which the state has within the scope of the right to life, in the incidents of death which occur under the conditions which can require the responsibility of the state, article 17 of the Constitution imposes the state the duty of taking effective administrative and judicial measures which will ensure that the legal and administrative framework that is formed in this matter is duly applied in order to protect the individuals whose life is in danger and that the violations as regards this right are stopped and punished by making use of all available facilities. This liability is valid for all types of activities, be it public or not, in which the right to life can be in danger (App. No: 2012/752, 17/9/2013, § 52).

71. In this context, the state also has the liability to take necessary measures in order to protect life against the risks arising out of the actions of an individual himself/herself in some special conditions. In order for this liability, which is also valid for conscription, to occur, it is necessary to determine whether or not military authorities know or need to know that there is a real risk of an individual under their control killing himself/herself and, if such a situation is present, to examine whether or not they have done everything expected from them within the framework of reasonable measures and within the scope of the authorities that they carry in order to eliminate this risk. However, by taking into consideration of the preference of the action to be performed or the activity to be carried out by evaluating, in particular, the unpredictability of human behaviors, priorities and resources; positive liability should not be interpreted in a way that will create extreme burden on officials. In this framework, in an examination to be performed by the Constitutional Court, it is necessary to put forth whether a fault which exceeds a simple negligence or evaluation mistake can be attributed to military officials or not (App. No: 2013/841, 23/1/2014, § 74).

72. There need to be legal and administrative regulations which protect life in compliance with the level of risk that occurs in connection with the nature of some actions and activities which are carried out within the liability of military service and with human element. As the state has made the military service obligatory, it should show considerable diligence, in particular, as regards the use of arms and ensure that privates with psychological problems are treated and that appropriate measures are taken for them. In the legal and administrative regulations which are made, the practical measures which ensure that soldiers who are facing dangers that are present in the nature of military life are effectively protected and the procedures which will ensure that the faults and mistakes that can be made by officials within the chain of order and command are determined need to be prescribed. In this context, subjecting individuals to appropriate inspections during recruitment and the performance of necessary inspection and interventions before and during military service are of great importance (App. No: 2013/841, 23/1/2014, §§ 75–76).

73. The protection of the right to life also requires the conduction of an effective and appropriate official investigation in an independent and impartial way in the event that a recruited soldier dies in a "*suspicious*" way while he is under the control of military authorities. In this way, it can be ensured that the aforementioned legal and administrative framework is applied in an effective manner. An examination and investigation which is carried out to this end need to have a quality that will primarily ensure that how the incidents have exactly occurred and secondly ensure that those responsible are determined and, if deemed necessary, punished. The procedures which are carried out in this respect should go beyond the stage of preliminary investigation and the entire process including the stage of trial should respond to the requirements of article 17. Thus, the courts of instance should never leave the attacks which are made against the right to life, material and spiritual existence of victims unpunished (App. No: 2013/841, 23/1/2014, § 77).

74. In the current application, it is understood from the findings which the applicants asserted as regards the death in question or which were obtained within the scope of the conducted administrative and criminal investigation that the death of the son of the applicants occurred as a result of suicide. The applicants also state that the death occurred as a result of suicide and in the incident which is the subject of the application, there is no fact which requires being "*suspicious*" of a contrary situation.

75. In terms of the incident which is the subject of the application, it is necessary to determine whether or not the state had a liability to protect the life of Murat BIROL against his own action within the aforementioned principles. In this context, it is primarily necessary to put forth whether or not the military officials knew or needed to know the risk of Murat BIROL of committing suicide and, if this is the case, to put forth whether or not they took necessary measures within the scope of their authorities.

76. Although there is no information with regard to the health check performed before military service in the incident which is the subject of the application, it is understood from the interviews and questionnaires which were performed during military service that Murat BIROL did not state that he had any problem. The applicants also state that their son did not have any physical and psychological problem when he submitted himself for military service, that only his general character constituted a quality which would not let him fulfill military missions which required active and advanced skills.

77. The applicants asserted that the fact that, in the statement of the tank corporal T.A. (§ 28) who served in the same unit, the deceased asked the question to him "*let us assume that I face an enemy, does he die if I shoot him in the head?*" and repeated his question and also, the fact that, the witness Y.S., in his statement (§ 29), stated, in a similar way to what all other witnesses expressed, that the deceased could not precisely fulfill the given orders as he was naive, mild and well-intentioned due to his character constituted the evidence as to the effect that their son could not perform the military service which required an advanced level of skills, that their son experienced depression and committed suicide as a result of the practices of the military personnel who humiliated, despised him and put pressure on him without taking into account his personality.

78. As the Constitutional Court has accepted as a general principle in another application as regards this subject, it cannot be concluded that the administration needs to predict the acts of suicide which occur only in connection with the fact that a soldier has intense concerns due to the responsibilities laid on him without a sign which has a cautionary quality as to the effect that he can commit the act of suicide and to take necessary measures (App. No: 2013/841, 23/1/2014, § 80). Similarly, it cannot be stated that psychological problems which do not allow for diagnosis and do not occur at a level that will require psychological treatment need to be realized by the administration as to the effect that individuals can commit the act of suicide and, beyond that, there needs to be a suspicion that the relevant person can have a tendency towards this issue based on his personal and familial history or it needs to be seen through the words and behaviors of the relevant person in a concrete and clear manner that he can have an act on this issue. A contrary evaluation will create an extreme burden on officials due to the unpredictability of human behaviors (§ 64).

79. As can be understood from the statement of the applicants and the witness statements, it is not possible to consider that the deceased who is understood to have had a calm temperament, to have been naive, well-intentioned and to have had an introvert personality created a warning which needed to be realized by the military officials as to the effect that he could commit suicide just because of this situation of his.

80. When the evidence obtained within the scope of the criminal investigation as a whole and the statements of all witnesses and complainants in particular are taken into account, it is seen that no case or fact which occurred before he was recruited and after he commenced his military service till the moment of incident created any sign with the quality of a warning as to the effect that the deceased could commit suicide or revealed that he had psychological distresses. As a matter of fact, one of the applicants, Fatih Birol, who is the father of the deceased, stated in his statement taken by the Military Prosecutor's Office that his son was not a kind of person who would commit suicide in general, that his condition was good and he did not have any problem during the military service and that he did not have any familial problem either; similarly, the applicant Remziye BIROL, who is the mother of the deceased, stated that her son called her two hours before he died, that he did not talk about any of his distresses during this call, that her son closed the phone by saying see you again.

81. Other witnesses who were heard by the Military Prosecutor's Office also stated that the deceased did not have any word and behavior which aroused suspicion as to the effect that he could commit suicide. It cannot be stated that the fact that the son of the applicants asked questions such as "*Let us assume that I am on watch. I face an enemy; does he die if I shoot him in the head?*" and repeated these questions as asserted by them as the evidence that he could not perform military services which required an advanced level of skills by itself constituted a fact which was clear and cautionary in a way that would put forth that he had psychological problems which would draw him to suicide.

82. The applicants also asserted that their son went through depression and committed suicide as a result of the practices of the military personnel who humiliated, despised him and put pressure on him without considering his personality. Just as there was no condition of pressure or no depression that the deceased expressed to the applicants or made them feel in a way in their statements which were taken within the scope of the investigation in this respect, there is no declaration in this direction in the statements which were taken from the army friends and commanders of the deceased either. This matter which the applicants also asserted in the full remedy action that they filed before HMAC was evaluated by HMAC and these explanations were included with regard to the claims:

*"In his application to the administration with a request for material and moral compensation and his subsequent case petitions, the counsel of the plaintiffs claimed as follows; "... the deceased did not have a character which can be assigned in services which require active and advanced skills due to his personality and temperament. He only had a personality, temperament and psychology which could perform military service in support services. The commanders who did not take this character into account gave to the deceased the duties which he could not perform and bear, the deceased committed suicide as a result of the depression which he went through due to the fact that he was subjected to various pressures from his superiors and friends and he was teased as a result of the fact that he had difficulty in fulfilling these duties and failed to perform them in a complete manner..." and asserted that the statement of the witness Yunus SANCARUOGLU as to the effect that "... he tried to fulfill the order that the commanders gave, but he could not fulfill the given orders in a complete manner as he was naive and well-intentioned due to his character ..." confirmed this.*

*However, while the aforementioned witness did not make any declaration as to the effect that the deceased was humiliated or teased and pressurized by his commanders or friends in any way, he also stated that the deceased was on good terms with his commanders or friends, that they did not have any hostility between them and he got on well with them, that he performed his military services and that he did not have any negative aspect which could require suicide. On the other hand, it was understood that the statements of other witnesses that were appealed as regards the incident were also in this direction and that thus there was no concrete evidence as to the effect that the deceased was humiliated or teased or pressurized by his commanders or friends in any way. Moreover, as it was understood that the deceased who joined the aforementioned unit approximately one month before the incident according to the information in the file was not given a certain duty (active duty or support service), that he fulfilled the orders given by the Company C. who arranged the GCC card about him, that according to his impressions, he was not introverted but well-intentioned and mild, and he was a person whose speeches were consistent, that he did not have problems such as leave and so on and that a suspicious situation of his was not determined either, the claims of the counsel of the plaintiff as to the effect that the deceased was given duties which he could not perform and bear, that he had difficulty in fulfilling these duties and he could not perform them in a complete manner, that as a result of this, he was subjected to various pressures of his superiors and friends and he was teased were not taken into consideration"*

83. As specified in the reasoned decision of HMAC, there is no evidence which will reveal that the deceased was given heavy duties, that he was pressurized, that he was teased and that as a result of these, he committed suicide. For the Constitutional Court, there is no aspect which will require divergence from this inference that HMAC made.

84. For the Constitutional Court, in cases where a criminal investigation is initiated *ex officio* on the date on which the relatives of applicants die and it is completed with an administrative investigation, there is no doubt that administrative and judicial authorities want to enlighten the course of incidents in the evidence of the current data, it is concluded that the conducted investigations allow for the determination of the causes of death in a certain manner, on the condition that there is no deficiency with a quality that will have an impact on the depth and seriousness of the investigation and cases conducted on the death of soldiers, it cannot be asserted that the conducted investigations and issued decisions are insufficient or contradictory (App. No: 2013/841, 23/1/2014, § 95).

85. In the incident which is the subject of the application, it is seen that the criminal investigation which was conducted *ex officio* was highly comprehensive, that it was concluded within a reasonable period of time, that all evidence which would allow for the determination of how the incident occurred was collected including the taking of the statements of all relevant persons in the capacity of witness and complainant and the collection of other technical information and that the applicants could be involved in the

process of investigation in a way which would ensure the clarity of the investigation and which they could protect their legitimate interests.

86. When all these matters are taken into account, it is not possible to reach to the conclusion that the military authorities knew or needed to know the risk of committing suicide for the deceased who did not have any considerable psychological distress in his life prior to the military service and exhibited normal behaviors in line with his general character until the moment of incident, that therefore making him stand sentry with a gun was a gross service negligence in the words of the applicants and created a causal relation between his suicide and the negligence of the administration.

87. Due to the reasons explained, it should be decided that the right to life guaranteed in Article 17 of the Constitution was not violated.

## V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 7/3/2014;

### A. That the application

1. Is **INADMISSIBLE** in terms of the claims that the right to a fair trial was violated due to the fact that no hearing was held before HMAC as it "*is clearly devoid of basis*",

2. Is **INADMISSIBLE** in terms of the claims as regards the process of criminal investigation within the scope of the right to life as "*legal remedies have not been exhausted*",

3. That the claims as to the effect that the right to life was violated by not taking the measures required for the protection of life are **ADMISSIBLE**,

### B. That the right to life enshrined in Article 17 of the Constitution **WAS NOT VIOLATED**,

### C. That the trial expenses be charged on the applicants.

President  
Serruh KALELİ

Member  
Burhan ÜSTÜN

Member  
Nuri NECİPOĞLU

Member  
Hicabi DURSUN

Member  
Erdal TERCAN