



**REPUBLIC OF TURKEY**

**CONSTITUTIONAL COURT**

**FIRST SECTION**

DECISION

Application No: 2013/4439

Date of Decision: 6/3/2014

## FIRST SECTION

### DECISION

**President** : Serruh KALELİ

**Members** : Burhan ÜSTÜN

Nuri NECİPOĞLU

Hicabi DURSUN

Erdal TERCAN

**Rapporteur** : Şebnem NEBİOĞLU ÖNER

**Applicant** : Gülsim GENÇ

**Counsel** : Att. Ayten ÜNAL

### SUBJECT OF APPLICATION

The applicant alleged that as a result of the practice carried out as per article 187 of the Turkish Civil Code numbered 4721, which prevents a married woman from utilizing her maiden name on its own, her rights defined under articles 10, 12, 17 and 90 of the Constitution were violated, and requested the determination of the violation and the compensation of the damage she incurred.

### APPLICATION PROCESS

The application was lodged on 17/6/2013 via the 4th Civil Court of First Instance of Istanbul. In the preliminary examination in terms of administrative aspects, it has been determined that there is no situation to prevent the submission of the application to the Commission.

It was decided by the First Commission of the First Section to send the file to the Section in order for its admissibility examination to be carried out by the Section.

In the session held by the Section on 7/11/2013, it was decided that the examination of admissibility and merits of the application be carried out together.

The facts and cases, which are the subject matter of the application, and a copy of the application were sent to the Ministry of Justice. In the correspondence of the Ministry of Justice dated 7/1/2014, it was indicated that no opinion would be submitted with reference to the decision of the Constitutional Court with the application date of 19/12/2013 and number of 2013/2187.

### FACTS AND CASES

#### Facts

The relevant facts, which are determined from the application petition and the trial file that is the subject of the application, are summarized as follows:

The applicant, who is a biochemistry expert, filed a case with the request of changing her surname, which was changed into “*Genç*” due to marriage, back to “*Dolgun*”, the surname which she possessed prior to getting married.

It was adjudged to dismiss the case with the decision of the 9th Family Court of İzmir dated 5/5/2011 and numbered M.2011/140, D.2011/389.

The request for appeal brought forward by the applicant was rejected by the decision of the 2nd Civil Chamber of the Supreme Court of Appeals dated 17/12/2012 and numbered M.2011/13342, D.2012/30687 and the decision of the court of first instance was approved.

The request for correction of decision brought forward by the applicant was rejected by the decision of the 2nd Civil Chamber of the Supreme Court of Appeals dated 11/4/2013 and numbered M.2013/5562, D.2013/10319 and the decision of rejection was notified to the counsel of the applicant on 17/5/2013.

### **Relevant Law**

Article 187 of the Turkish Civil Code dated 22/11/2001 and numbered 4721 with the side heading of “*Woman's surname*” is as follows:

*“Upon marriage, the woman takes on the surname of her husband; however, she can use her previous surname before that of her husband with a written application that she makes to the marriage registry officer or, after that, to the civil registry administration. The woman who had been using two surnames previously can benefit from this right only for one family name.”*

### **EXAMINATION AND JUSTIFICATION**

The individual application of the applicant dated 17/6/2013 and numbered 2013/4439 was examined during the session held by the court on 6/3/2014 and the following were ordered and adjudged:

#### **Claims of the Applicant**

The applicant alleged that her rights defined under articles 10, 12, 17 and 90 of the Constitution were violated by indicating that she has been serving as a biochemistry expert in the public and private sector for long years, that her surname, which used to be “*Dolgun*” prior to getting married, was changed to “*Genç*” due to marriage, that she had forged her person and identity in her education and working life until the date she got married with the surname “*Dolgun*” and that the case she filed with the request of using her former surname for this reason was dismissed.

#### **Evaluation**

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

As a result of the examination of the application, it must be decided that the application, which is not clearly devoid of justification and where no other reason is deemed to exist to

require a decision on its inadmissibility, is admissible.

## 2. Examination on Merits

The applicant alleged that her right defined under article 17 of the Constitution was violated due to the practice that was carried out based on article 187 of the Code numbered 4721 which prevents married women from using solely their surnames prior to marriage.

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

The right of name, which is the subject of the applicant's violation claim, is regulated in article 17 of the Constitution and article 8 of the Convention.

Paragraph one of Article 17 of the Constitution with the side heading "*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."*

Article 8 of the Constitution with the side heading "*Right to respect for private and family life*" is as follows:

*"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

*(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

The concept of "*private life*", which is mentioned under the subcategory of the right to respect for private life, is interpreted quite broadly by the European Court of Human Rights (ECtHR) and they especially refrain from providing an exhaustive definition pertaining to this concept.

It is very important that the individual's individuality, that is, the qualities that set an individual apart from others and make him/her an individual are legally acknowledged and that these elements are guaranteed. Even though the concept of "*freely developing one's personality*" is included in various international human rights documents, it is seen that this concept is not explicitly pointed out within the framework of the Convention.

This being said, it is understood that in the case law of the inspection organs of the Convention, the concept of "*the individual developing and fulfilling his/her personality*" is

taken as the basis in determining the scope of the right to respect for private life. In the evidence of the fact that the right to the protection of private life cannot be reduced to only the right to confidentiality, numerous rights that are compatible with the free development of personality are assessed within the scope of this right. Within this framework, the right of name, which is very important in terms of establishing relations with the outside world, is interpreted by the inspection organs of the Convention to be within the area of guarantee of the article in such a way as to include the first name and surname.

Even though the ECtHR indicates that article 8 of the Convention does not include a clear provision with regard to the matter of name and surname, it acknowledges that since it is a tool that is used in determining the individual's identity and family ties, it is of relevance to the right to respect for private and family life, which includes establishing relations with others up to a certain degree, and that the fact that the society and the State takes interest in the matter of regulating names as a matter of public law does not alienate this element away from the concepts of private and family life. Within this framework, it is understood that surname, which is seen to have been made the subject of ECtHR case law within the scope of changing surname as well as the surname of the child and woman, is within the area of protection of article 8 of the Convention. According to the ECtHR, the surname is important in terms of the individuals being able to establish relationships that are social, cultural or of other types with other people in their private and family lives, in addition to the professional context, and it assumes the function of introducing them to the outside world (*Burghartz v. Switzerland*, App.No. 16213/90, 22/2/1994, § 24; *Stjerna v. Finland*, App.No. 18131/91, 25/11/1994, § 37; *Niemietz v. Germany*, App.No. 13710/88, 16/12/1992, § 29).

Under paragraph one of article 17 of the Constitution, it is indicated that everyone has the right to protect and improve their material and spiritual existence, and the right to protect and improve material and spiritual existence included in this regulation corresponds to the right to physical and mental integrity guaranteed under the right to respect for private life within the framework of article 8 of the Constitution and the right of the individual to realize himself/herself and to take decisions pertaining to himself/herself. It is clear that the surname, which identifies with the life of the individual, becomes an inseparable element of his/her personality, is one of the important differentiating factors in determining his/her identity as an individual and a personality right that is inalienable, indispensable and closely tied to the individual, is within the framework of the individual's spiritual existence.

In addition to the right to identity information such as gender, birth registry and information pertaining to family ties as well as the right to request changes and corrections to be made in these, the right of name is also considered by the Constitutional Court within the scope of article 17 of the Constitution (App. No. 2013/2187, 19/12/2013, § 30; CC, M.2011/34, D.2012/48, D.D.30/3/2012; CC, M.2009/85, D.2011/49, D.D.10/3/2011).

It is seen that the practice in the form of the competent administrative and judicial instances not allowing the applicant within the framework of the trial that is the subject of the application to use only her surname prior to getting married affected the validity of the qualities of the surname of being inalienable, nontransferable and tied closely to the individual, which is one of the most important factors in determining the individual's identity, with a view to the surname of woman, it is clear that the indicated practice is an intervention towards the right to protect and improve spiritual existence, which is defined under article 17 of the Constitution.

Even though no reason for restriction is envisaged under article 17 of the Constitution with a view to the right to protect and improve spiritual existence, it cannot be stated that this is an absolute right, which cannot be restricted in any way. It is acknowledged that even rights for

which no special reason for restriction is envisaged have certain limits stemming from their nature. Moreover, even though no reason for restriction is included in the article that regulates the right, it can be possible to restrict these rights by relying on rules that are covered under other articles of the Constitution. At this point the guarantee criteria included under article 13 of the Constitution bear functional quality.

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

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

The indicated provision of the Constitution is of fundamental importance in terms of restricting rights and freedoms and the regime of guarantees, and it indicates by taking into account which criteria the lawmaker can restrict all the rights and freedoms contained within the Constitution. Since it is compulsory to implement the rules of the Constitution together and by taking into account the general rules of law within the framework of the principle of holism of the Constitution, it is clear that all guarantee criteria contained within the indicated regulation, notably the condition of restricting with law, also need to be observed in determining the scope of the right covered under article 17 of the Constitution (App. No. 2013/2187, 19/12/2013, § 35).

The criterion of restricting rights and freedoms with law has an important place in constitutional law. When there is an intervention to a right or freedom, the first matter that needs to be determined is whether or not there is a legal provision that authorizes the intervention, that is, a legal foundation of the intervention.

Also in accordance with the wording of the Convention and the case law of the ECtHR, the legitimacy of an intervention to be made within Article 8 of the Convention is made conditional on the fact that the said intervention be made as per the *law and in the event that it is determined that the intervention does not have the element of lawfulness, it is concluded that the intervention is in violation of the relevant article without examining the other guarantee criteria stipulated in paragraph (2) of Article 8 of the Convention (See Fadeyeva v. Russia, App. No. 55723/00, 9/6/2005, § 95; Bykov v. Russia, App. No. 4378/02, 10/3/2009, § 82).*

In order to accept that an intervention made within the framework of article 17 of the Constitution fulfills the condition of lawfulness, it is compulsory for the intervention to have a legal basis.

In the incident that is the subject of the application, it is understood that the request of the applicant to use her surname prior to marriage was rejected by the court of first instance by indicating that the Code numbered 4721 does not contain a provision whereby a married woman can use solely her surname prior to marriage without the surname of her husband.

Paragraph five of Article 90 of the Constitution with the side heading "*Ratification of international agreements*" is as follows:

*"International agreements which are duly put into effect have the power of law. It is not*

*possible to apply to the Constitutional Court with the claim that such agreements are contrary to the Constitution. (Additional phrase: 7/5/2004-5170/7 art.) In the case of conflicts which may arise due to the fact that international agreements on fundamental rights and freedoms which are duly put into effect and the codes include different provisions on the same matter, the provisions of the international agreement will prevail.”*

With the indicated regulation, it is indicated that the regulations contained within international agreements on fundamental rights and freedoms, which are duly put into effect, have the power of law, and with the last sentence added to the paragraph with the amendment made on 7/5/2004, a kind of hierarchy is established in our law between codes and international agreements on fundamental rights and freedoms and it is adjudged that the agreements will be prioritized in the event that there is a dispute between them. As per this regulation, in the event that there is a clash between an international agreement on fundamental rights and freedoms and a provision of a code, the provision of the agreement must be implemented with priority. In this case, implementors, notably judicial instances, who are in a position to implement a provision of an international agreement on fundamental rights and freedoms and a provision of a code, which clash with each other, to an incident at hand, have the liability to implement the agreement by ignoring the code.

As per the indicated regulation, by providing an area of direct implementation to the provisions of the Convention, which is among the fundamental documents of international human rights law and was also accepted and ratified by Turkey, the Convention became directly implementable in domestic law.

Whereas article 8 of the Convention expresses respect for private and family life, article 14 prohibits gender-based discrimination. In numerous decisions of the ECtHR where it accepts the obligation of a married woman to use the surname of her husband as intervention to private life by considering the surname of an individual to be within the framework of private life, applications pertaining to surname were examined within the framework of the principle of “*protection of private and family life*” contained within article 8 of the Convention and it was concluded that the fact that the usage by the woman of solely her surname prior to marriage after getting married was not allowed by national instances was in violation of article 14, which prohibits discrimination, in connection with article 8 of the Convention, which envisages the confidentiality of private life (*Ünal Tekeli v. Turkey*, App.No. 29865/96, 16/11/2004; *Leventoğlu Abdulkadiroğlu v. Turkey*, App.No. 7971/07, 28/5/2013; *Tuncer Güneş v. Turkey*, App.No. 26268/08, 3/10/2013; *Tanbay Tüten v. Turkey*, App. No. 38249/09, 10/12/2013).

Matters pertaining to equality between genders and gender-based discrimination are also featured in a number of other international law documents regarding human rights. It is regulated under paragraph 4 of article 23 of the International Covenant on Civil and Political Rights of the United Nations, which Turkey ratified on 4/6/2003, that state parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution; and under subparagraph (g) of paragraph (1) of article 16 of the Convention on the Elimination of All Forms of Discrimination against Women that state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, specifically on the basis of equality of men and women, the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

As per paragraph five of article 90 of the Constitution, the conventions are part of our legal system, and they have the quality of being implemented just like codes. Again according to the same paragraph, in the event that there is a dispute in implementation between a

provision of a code and the provisions of an agreement on fundamental rights and freedoms, it is compulsory to accept the provisions of the agreement as the basis. This rule is a rule of implicit abolition, and it removes the capacity of being implemented of the provisions of codes, which clash with provisions of agreements on fundamental rights and freedoms (App. No. 2013/2187, 19/12/2013, § 45).

It is understood that the decision, which was delivered within the framework of the trial that is the subject of the application, was delivered by relying on article 187 of the Code numbered 4721. However, in light of the above mentioned observations, it is seen that the relevant provision of the Code clashes with the provisions of the Convention in question. In this case, it is concluded that the courts of instance, which resolve the dispute, must take into account the provisions of international conventions that need to be applied as per article 90 of the Constitution with a view to the dispute that is the subject of the application, by not taking article 187 of the Code numbered 4721, which clashes with the ECHR and other international human rights agreements, as the basis for their decisions (App. No. 2013/2187, 19/12/2013, § 46).

With regard to the concrete application, it is understood that the objections of the applicant as to the point that the international agreements on fundamental rights and freedoms are to be implemented with priority compared to the provisions of codes and that within this framework the Convention and the case law of the ECtHR should be taken into consideration when resolving the dispute were not taken into account and discussed by judicial instances.

Due to the fact that the provisions of international conventions, which envisage the married man and woman to have equal rights in terms of their surnames after marriage, and regulations of domestic law, which envisage the obligation of the married woman to use the surname of her husband, contain different provisions regarding the same matter, it is concluded that the provisions of the relevant convention are the legal rule that need to be taken as the basis with regard to the concrete dispute, and it is understood that the intervention to the right of name of the applicant, which is guaranteed within the scope of her spiritual existence, does not fulfill the condition of lawfulness.

Within the framework of this observation that is made, it was not deemed necessary to separately assess whether or not other guarantee criteria were observed in relation to the intervention in question.

For the indicated reasons, it should be decided that the applicant's right to protect and improve spiritual existence guaranteed by Article 17 of the Constitution was violated.

As it was concluded that the applicant's right to protect and improve spiritual existence guaranteed by Article 17 of the Constitution was violated due to the fact that the condition of lawfulness of intervention was not fulfilled, it was not deemed necessary to separately assess her claims that articles 10, 12 and 90 of the Constitution were violated.

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

The applicant requested that compensation be ruled upon.

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

*"If the determined violation arises out of a court decision, the file shall be sent to the relevant*

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

As it was determined in the current application that Article 17 of the Constitution was violated due to the fact that the condition of lawfulness of intervention was not fulfilled, it should be decided that the file be sent to the relevant Court in order to remove the violation and the consequences thereof.

Even though a request for compensation was made by the applicant, as it was understood that the fact that a decision was delivered to send the file to the relevant Court for retrial constituted sufficient compensation with a view to the claim of violation of the applicant, it should be decided that the request of compensation by the applicant be dismissed .

It should be decided that the trial expenses of 1,698.35 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL, which were made by the applicant and determined in accordance with the documents in the file, be paid to the applicant.

### **JUDGMENT**

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 6/3/2014;

That the claim of the applicant as to the fact that Article 17 of the Constitution was violated is **ADMISSIBLE** ,

That her right to protect and improve spiritual existence guaranteed under Article 17 of the Constitution **WAS VIOLATED**,

That the file be sent to the relevant Court to carry out a retrial in order for the violation and the consequences thereof to be removed

That the request of the applicant regarding compensation be **DISMISSED** ,

That the trial expenses of 1,698.35 TL in total composed of the fee of 198.35 and the counsel's fee of 1,500.00 TL, which were made by the applicant be **PAID TO THE APPLICANT** ,

That the payments be made within four months as of the date of application by the applicant to the State Treasury following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment.

President  
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