REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

DECISION

Application No: 2013/6428

Date of Decision: 26/6/2014

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SECOND SECTION

DECISION

President	:	Alparslan ALTAN
Members	:	Serdar ÖZGÜLDÜR
		Osman Alifeyyaz PAKSÜT
		Recep KÖMÜRCÜ
		M. Emin KUZ
Rapporteur	:	Bahadır YALÇINÖZ
Applicant	:	Bülent KARATAŞ
Counsel	:	Att. Kürşat KARACABEY

I. SUBJECT OF APPLICATON

1. The applicant, in the case that he has lodged concerning his appointment in the garrison in Van while he served as the Commander of the Gendarme in the Yeşilli district of the province of Mardin, has claimed that his right to fair trial was violated and requested material and spiritual compensation.

II. APPLICATION PROCESS

2. The application was directly lodged at the Constitutional Court on 23/8/2013. In the preliminary examination that was carried out in administrative terms, it has been determined that there is no circumstance to prevent the submission of the application to the Commission.

3. It was decided by the First Commission of the Second Section that the examination of admissibility be conducted by the Section and the file be sent to the Section as it was deemed necessary that a decision of principle by the Section be delivered in order for the application to be concluded.

4. The Section, in the session held on the date of 4/12/2013, 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 6/12/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 6/1/2014.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 10/1/2014. The applicant submitted to the Constitutional Court his statements on the contrary on the date of 14/1/2014.

III. FACTS AND CASES

A. Facts

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

8. The applicant, while he served as the commander of the gendarme in the district of Yeşilli in the province of Mardin, has reported to the regional commander on the date of 22/8/2012 that two officers under him have gotten into a dispute.

9. An investigation commission by the regional commander has been set up on the date of 23/8/2012.

10. At the end of the investigation carried out by the investigation commission, the applicant has been warned with the transaction of the regional commander dated 3/9/2012 for not duly intervening as the disciplinary superior although he knew the unrest between the spouses of the two officers under his command which was ongoing for a long time and although he has declared that he has witnessed certain things (the visits of a civilian vehicle during the day/night to the gendarmerie command post and the persons who thus came declaring that one of the officers under his command was his elder brother, the same officer borrowing money from civilians and so on).

11. Then, the transaction dated 14/9/2012 was carried out and the applicant was appointed to the garrison in Van for not intervening in due time as the disciplinary superior although he knew about the tension between the spouses of the two officers under himself and about the entry and egress of civilians in the condominium area for a long time and as disputes arose between the other families in the condominium and his own.

12. The applicant filed a case at the First Chamber of the High Military Administrative Court (HMAC) on 26/9/2012 with the request that the transaction of appointment be annulled.

13. While the case was in progress, on the date of 29/11/2012 the counsel of the applicant has requested from the First Chamber of the HMAC that the confidential and non-confidential evidence that have been delivered, as annexes to the defense, by the General Command of the Gendarmerie be examined.

14. The First Chamber of the HMAC, on the date of 27/12/2012, has ruled that there is no grounds for making a decision regarding such request and that the case file be returned to the General Secretariat of the HMAC that is authorized to make a ruling about the request.

15. With the decision of the Secretary General dated 4/1/2013, it was indicated that the request was not found to be appropriate. The expressions found in the justification of the ruling are as follows:

> "*… with this regulation, no authority has been vested in the General Secretariat regarding the examination of the documents within the scope of article 52 of the code no. 1602, which have been delivered by the defendant administration.*

However, the referred decision (b) was taken, regarding an evaluation of your request to be made by the General Secretariat. In compliance with the aforementioned referred Decision (b), your request for an examination was evaluated, to be found inappropriate. In the aforementioned referred decision (b), it is expressed that 'this can be objected to.'

16. By the applicant, no objections were made regarding the said decision.

17. The First Chamber of the HMAC, with its decision dated 3/7/2013 and no. M.2012/1188, D.2013/783 has ruled that the case be dismissed and confidential documents be returned. Some expressions found in the justification of the decision are as follows:

"*… It was understood that, with the letter dated 04.01.2012 the counsel of the claimant was informed by the General Secretariat that the request of the counsel of the claimant was not found to be appropriate but also that this was objectionable; and that the counsel of the defendant made no objections against such decision of the General Secretariat.*

…

From the documents that have been sent by the defendant administration within the scope of article 52 of the Code no. 1602 (the statements of the parties and the administrative investigation report) and from the petitions and briefs it is understood that; ... and that the claimant, despite being previously acknowledged about the majority of such matters, has not made the examination required in a timely fashion and that he has not taken the required measures.

…

…It is a fact that the claimant has notified his seniors at the last phase, triggering the performance of an administrative investigation. However, the claimant has failed to take the measures that he should have taken at the very outset. For example, the claimant is responsible for the security of the condominium/military unit as the commander. The fact that he does fail to investigate the civilians that he stated to have arrived in luxury cars is not a matter that can be put merely aside by saying that they had told that they were the elder brothers of Capt. C. Essentially, considering that Yeşilli is a minor garrison, that the staff are cohabitants in the condominium, it is possible to propose that this situation is a fault of the claimant, even though he does not have a full command of all that has come to pass. From this perspective, it has been assessed that the appointment of the claimant to a post, which is not independent, in another garrison from the district gendarmerie command that has a wide scope of responsibility and that is independent and optional, contains no contradictions with the law."

18. The decision was notified to the attorney of the applicant on 24/7/2013.

19. The applicant lodged an individual application on the date of 23/8/2013.

20. Also, the applicant has resigned from his duty while the case that was lodged with the request that the transaction of appointment be revoked was in progress.

B. Relevant Law

21. Article 157 of the Constitution with the side heading of *"High Military Administrative Court"* is as follows:

"*The High Military Administrative Court, even though it has been established by non-military offices, is the first and the last instance court that provides judicial review of disputes*

arising from administrative transactions and acts that are of interest to military persons and that relate to military service. However, in disputes arising from military liability, the condition that the person concerned should be under military service shall not be sought.

The members of the High Military Administrative Court who are of military judge class shall be elected with secret vote among class one military judges, out of three nominees who shall be nominated for each vacant position and by the absolute majority of the president and the members of the court who are of this class; the members thereof who are of non-justice class shall be elected from among the officers the rank and qualities of whom are prescribed in the code, by the President of the Republic from among three members who shall be nominated by the Chief of General Staff for each vacant position.

The duration of office for members who are of the non-justice class shall be a maximum of four years.

The President of the Court, the Chief Prosecutor and presidents of the chambers shall be appointed from among those of the justice class with respect to their rank and order of seniority.

(Amended paragraph: 7/5/2010-5982/21 art.) The establishment, the functioning and the trial procedures of the High Military Administrative Court, and the disciplinary and personal affairs of the members thereof shall be regulated with law with regard to the principles of the independence of courts and the tenure of judges.

22. Article 4 entitled "Guarantee" of the Code of the High Military Administrative Court , which is dated 4/7/1972 and No. 1602 is as follows:

"*The President, the Chief Prosecutor, Presidents of the Chambers and the members of the High Military Administrative Court; shall serve, as the judges of the High Military Administrative Court, under the guarantee provided to them by the Constitution of the Republic of Turkey.*"

23. Articles 8, 9 and 10 of the Code no.1602 are as follows:

"Election of members

Article 8 – (Amended: 25/12/1981 – 2568/1 art.)

The members of the High Military Administrative Court who are of military judge class shall be elected among class-one military judges, out of three nominees who shall be nominated for each vacant position and by the absolute majority of the president and the members who are of this class;

the members who are of non-justice class shall be elected

by the President of the Republic from among three members who shall be nominated by the Chief of General Staff for each vacant position.

"*Appointment:*

Article 9 – (Amended: 25/12/1981 – 2568/1 art.)

Appointments to the Presidency of the High Military Administrative Court, to the Office of the Chief Prosecutor, to the presidencies of chambers and members' positions shall be made for those who have been selected with regard to ranks and the order of seniority, with the Decree, which shall be undersigned by the Minister of National Defense and the Prime

Minister and which shall be approved by the President of the Republic. Appointments shall be published in the Official Gazette.

It is obligatory that the President, the Chief Prosecutor and the presidents of the chambers are of the military justice class.

"Duration of Office:

Article 10 – (Amended: 25/12/1981 – 2568/1 art.)

The duration of office for members who are not of the military justice-class shall be a maximum of four years."

24. Article 52 of the Code No. 1602 with the side heading *"Examination outside of the file"* is as follows:

"*Chambers or the Board of Chambers can both carry out all sorts of examinations concerning the cases that they are trying, by themselves, and request from the parties and from other related places that the documents that they deem necessary be sent and all sorts of information be given within the duration of time they shall determine. It shall be obligatory that the decisions on this matter be fulfilled by those concerned within the period thereof. In the event that there are valid reasons, this period may be extended for once only.*

In the event that one of the parties fail to fulfill the requirements of the interim decision, the effect of this situation on the decision to be delivered shall be evaluated by the court in advance and this matter shall also be separately stated in the interim decision.

However, if the requested information and documents are related to the security or high interests of the Republic of Turkey or to the foreign states together with the security and high interests of the Republic of Turkey, the Prime Minister, the Chief of General Staff or the related minister might not provide this information and documents by notifying the justification thereof.

(Amended paragraph four: 19/6/2010-6000/20 art.) The information and documents in the case file shall be open to the parties and their attorneys. So much so that; of the information, documents and files that have been made to be brought by the court or sent by the administration, those regarding which a condition has been imposed not to be examined by the parties and their attorneys for the purposes of protecting the private information, honor, dignity and safety of other individuals and instances or keeping the investigation methods of the administration secret as well as those in the personal file of the personnel except for the subject of the case cannot be made to be examined by the parties and their attorneys.

(Additional paragraph: 19/6/2010-6000/20 art.) If the information and documents that are of such a nature that they cannot be made to be examined by the parties and their attorneys are of such a quality that they cannot be separated from other documents that are open to the parties and their attorneys as per their locations, the copies that will be made to be examined by the parties and their attorneys shall be sent once the relevant parties are blacked out by the administration.

(Additional paragraph: 19/6/2010-6000/20 art.) The plaintiff party or his/her attorney can object to the court with the claim that the information and documents that have been blacked out or not provided are matters that would constitute the basis for the defense. Information and documents that were previously blacked out or not provided can be made to

be examined by the opposing party within the framework to be determined by the court, in matters that are deemed to be rightful following the examination of this objection by the court.

(Additional paragraph: 19/6/2010-6000/20 art.) Information and documents that are obtained as per these provisions and are classified cannot be used by the parties and their attorneys for another purpose outside the court. The relevant provisions of codes shall remain reserved regarding those who act to the contrary."

25. Article 38 of the Internal Regulations of the High Military Administrative Court that became effective upon publication in the Official Gazette No. 14251 dated 5/12/1984 is as follows:

"It is obligatory that the counsels or the representatives thereof who wish to examine the files demonstrate their letters of proxy or representation papers and, whenever needed, their identification cards. The provisions of the Attorney's Code No. 1136 shall be reserved.

Parties, too, can examine the documents by demonstrating their identification cards.

Files can only be examined under the supervision of the respective president, member, rapporteur, Chief Prosecutor, prosecutor, Secretary general or the first secretaries of the sections.

Confidential information and documents that are found among the files of the case cannot be shown to the parties or the counsels thereof.

The discretion of confidentiality in the event of uncertainty shall rest with the board presidents, Chief Prosecutor or the Secretary General."

IV. EXAMINATION AND JUSTIFICATION

26. The individual application of the applicant dated 23/8/2013 and numbered 2013/6428 was examined during the session held by the court on 26/6/2014 and the following were ordered and adjudged:

A. Claims of the Applicant

27. The applicant, indicating that, in the case that he lodged for the cancellation of his appointment to the Van garrison, a decision which was illegal has been made, that the examination of the confidential and non-confidential evidence that have been submitted by the defendant in addition to the defense was not allowed despite his request, hence his failure to exercise his right to claim and to defense as needed; that the HMAC, despite having no qualities as to being a penal tribunal, was biased towards the prosecution file that was submitted by the defendant administration and made imputations that he has committed crimes, that the HMAC is not impartial and independent because of its establishment and the class officials within its body; has claimed that his right to a fair trial was violated and requested that, in order for the remedy of such violation, a retrial be made and the material and spiritual damages that he has incurred be ruled.

B. Evaluation

28. The complaints of the applicant being in relation with the violation of the right to a fair trial and the presumption of innocence, they need to be examined separately.

29. As per the paragraphs no. three of article 148 of the Constitution and no. (1) of article 45 of the Code on Establishment and Rules of Procedures of the Constitutional Court no. 6216 dated 30/3/2011, the right to individual application to the Constitutional Court has been vested in persons who claim that any one of their rights and freedoms within the scope of the European Convention on Human Rights and the protocols to which Turkey is a party to, which have been guaranteed by the Constitution are violated.

30. Paragraph four of article 148 of the Constitution is as follows:

"In individual application, examination cannot be done on matters that need to be taken into account in the legal remedy"

31. Paragraph (2) of article 48 of the Code numbered 6216 with the side heading *''The conditions and evaluation of admissibility of individual applications"* is as follows:

"*The Court, ... can rule on the inadmissibility of applications, which are clearly devoid of grounds.*"

32. Paragraph (6) of Article 49 of the Law numbered 6216 with the side heading of *''Examination as regards the merits"* is as follows:

"Examination of the sections of individual applications regarding a court decision shall be limited to whether or not a basic right has been violated and the determination of how such violation can be remedied. Examination on issues that have to be observed in legal remedies shall not be performed by sections.

1. In Terms of Admissibility

a- The Claim that the Presumption of Innocence was Violated

33. The applicant has claimed that the presumption of innocence has been violated indicating that the HMAC, although having no quality as to being a penal tribunal, has heeded the prosecution file that was submitted by the defendant administration and made imputations that he has committed crimes.

34. The Ministry did not provide any views regarding the admissibility of this portion of the application.

35. The presumption of innocence, which is the subject of the applicant's claim of violation is regulated in the paragraph four of article 38 of the Constitution and paragraph no (2) of article 6 of the Convention.

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

"*Nobody can be considered as guilty until the guiltiness thereof is established de jure.*"

37. 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.*"

38. The presumption of innocence, guarantees that nobody is accepted as guilty without a final ruling that the person has committed a crime. As a result of this, the innocence of the person being 'essential', the burden of proof of criminality shall rest with the defense, and nobody can be charged with the liability to prove that s/he is not guilty. Moreover, nobody can be

labeled and treated as guilty by the judging authorities and public offices until their guilt is established *de jure*. (App. No. 2012/665, 13/6/2013, § 26).

39. Within this framework, the presumption of innocence, as a rule, is a principle that covers persons who are charged with a crime and the regarding whom a sentence has not been ruled. Regarding persons for whom the offense charged has led to a sentence, the claim regarding the presumption of innocence is without the valid grounds since they no longer hold the status of '*a person who is charged with a crime*.' However, in cases where, as a result of the criminal case where it is established that s/he has not committed the crime s/he is charged with or where it cannot be ascertained that s/he has definitely committed the crime, hence a decision of acquittal is ruled, it shall be accepted that the presumption of innocence regarding such person prevails. Because, in such cases, the criminality of the person within the meaning of clause four of article 38 the Constitution and clause no. (2) of article 6 of the Convention has not been established and the person, for this reason, cannot be considered as guilty.

40. For the presumption of innocence is valid in trials where a decision is made regarding the crime charged, the administrative cases that are considered within the framework of the '*discrepancies regarding the civil rights and obligations*' mentioned in article 6 of the Convention, as a rule, are outside of the scope of the area of application of the presumption of innocence. However, the administrative judicial offices, in the establishment of the material event that is the subject of dispute in the administrative case, must act in congruity with the decision of acquittal previously made by the penal court that handled the same material event (for similar decisions by the ECtHR, see. *X/Austria*, App. No. 9295/81, 6/10/1982, s.d.; *C/United Kingdom*, App. No. 11882/85/710/1987 sd.) This rule, as long as the decision of acquittal that has been ruled about the person is not questioned, shall not constitute an impediment that the person is sanctioned within the framework of the responsibility of discipline by way of using a lower standard of proof within the scope of the same material event (for a similar decision by the ECtHR, see. *Ringvold/Norway*, App. No. 34964/97, 11/2/2003, § 38).

41. Within this framework, in administrative disputes that are extrinsic to the penal case but which are also maintained as a result of actions that are subject of the criminal case, it shall contradict the presumption of innocence when, despite a decision of acquittal that has been made regarding the person, the trial process, which serves as the basis of such decision is taken as basis and the decision of acquittal is thus questioned. In return, so as to serve as the basis of the administrative dispute, the mentioning of the fact that he has been tried or the decision in relation thereto, even if the person has been acquitted, shall not suffice to be able to acknowledge that the person has been treated as guilty, hence to make reference to the violation of the presumption of innocence. In order thereto, the justification of the decision has to be considered as a whole and the final decision has to be examined as to whether it is exclusively based on the precept that the person has committed the acts which the person has stood trial for and was ultimately acquitted (App. No. 2012/665, 13/6/2013, § 29).

42. On the other hand, it would be beneficial to remember that the penal and criminal procedural law, and disciplinary law are disciplines that are subject to different rules and principles. Accordingly, the behavior of the public official might require disciplinary responsibility along with its compliance with the definition of offense. In such cases the criminal procedure and the disciplinary prosecution shall be conducted separately and with the exception of provisions that the person has not committed the charged act, the ruling of the penal court as a result of the criminal procedure shall not be directly binding for the disciplinary offices (App. No. 2012/665, 13/6/2013, § 30). However, in case of assessments that are carried out

within such scope, considerations that the person is not free of guilt contrary to the decision of acquittal that has been taken regarding the person should be refrained from, even if it is based on lack of evidence.

43. Unless there is a ruling that implies or accepts the guilt of the person, it can be considered to suffice for the starting or for the application of disciplinary transactions or those regarding administrative sanctions, when, only, an investigation has been launched. (App. No. 2012/998, 7/11/2013, § 65).

44. In the material event, as a result of the investigation that has been carried out regarding the dispute between the spouses of the two officers at the district gendarmerie command and regarding the entry and egress of civilian individuals to and from the condominium area, the applicant who was the district gendarmerie commander has been appointed to the Van garrison.

45. Even if the investigation at the command was launched upon the notification of the applicant, establishing that not being acquainted with the entirety of the events taking place at both the condominium and the unit is a shortcoming and that he has not taken, in the beginning, the precautions that he should have taken, the HMAC has came to the conclusion that there is no illegality in the transaction concerning the appointment of the applicant.

46. The HMAC, in the statements in its decision and in the legal review it has made while examining the transaction of appointment has not employed the expression of guilty for the applicant nor it has established that he has committed a crime, and dismissed the case lodged against the transaction of appointment for reasons stemming from the administrative lack of the applicant.

47. For reasons explained, nothing concerning the violation of the presumption of innocence of the applicant has been established, thus it must be decided that this section of the application is inadmissible on grounds of '*being expressly devoid of grounds.*'

b- Claim Regarding the Violation of the Right to a Fair Trial

48. The applicant has claimed that the defendant administration did not allow the confidential documents that have been submitted to the HMAC to be examined and that the HMAC, because of its establishment and the class officers in its body, is neither impartial nor independent.

49. The complaints of the applicant, which are under this heading must be examined separately.

i. Claim that the Examination of Confidential Documents was not Allowed

50. The applicant propounds that he was not notified of the confidential documents that have been submitted by the defendant administration, the application that he had made concerning the examination of such documents was rejected and hence, his right to a fair trial violated.

51. In its letter of opinion, the ministry has indicated that the HMAC, as it made a ruling for the case, has established its judgment also by evaluating confidential documents, yet the applicant's request to examine such documents was rejected by the Secretariat General of the HMAC, and also, although the applicant was informed of his right to object to such a transaction of not allowing the examination of the documents the applicant, himself, did not make any objections against this

transaction concerning not allowing the examination of the confidential documents and thus it must be assessed whether or not the applicant has exhausted the administrative and judicial remedies in relation to his complaint regarding the matter.

52. In his petition of response the applicant has reiterated the claims that were found in the application form.

53. In the incident, it is seen that the confidential documents that have been submitted by the defendant administration were not notified to the applicant, that a decision was not made regarding the application of the applicant that he has made to the HMAC and the request was forwarded to the Secretariat General, the request was rejected upon reference to the decision taken by the court although it was indicated by the Secretariat General that it had no authority to make a decision regarding the matter and that such decision was not objected to.

54. In accordance with the secondary quality of individual application, the applicant, primarily, needs to convey his/her claims as to the effect that his/her 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 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 (App. No. 2012/1049, 16/4/2013, § 32).

55. It was concluded that it could not be considered as the non-exhaustion of application remedies when; although the applicant did not object to the decision of the Secretariat General, that he has both requested from the Chamber of the HMAC that the information and documents, which were not sent to him for concerns of confidentiality, be allowed to be examined and that it is not clearly understood that the meaning which comes out of the arrangement in art. 52 of the Code No. 1602 concerning the objection which is to be made by those concerned against the confidential documents that were not sent, is not the same meaning as making a request at the Chamber concerned about the matter, and that; after the applicant requested the confidential documents against the fact that it was indicated in the decision of the Secretariat General that a decision had been made by making a reference to the decision of the court although it had no authority to take a decision regarding the matter, and after such request was rejected by the Secretariat General and the applicant still has made no objections thereto.

56. Also, in the decision concerning the examination of the information and documents dated 25/4/2012 and No. M.2011/1292 of the Second Chamber of the HMAC, which is included in the file No. 2013/7611 of the individual application that was made to our Court, it is seen that a decision regarding the examination of the information and documents, which fall under the scope of paragraph four of article 52 of the Code No. 1602 was taken directly, without making the secretariat General an intermediary therein.

57. In this case, the applicant's complaint concerning that his own examination of confidential documents is not allowed is not expressly bereft of grounds. It should be decided that the application, where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible.

ii. The Claim that the High Military Administrative Court is not Independent

58. On the other hand, the applicant has claimed that his right to a fair trial was violated by propounding that the HMAC is not impartial and independent because of its establishment and the class officers therein.

59. The Ministry has not provided its opinion against such claim.

60. Applications where the applicant cannot prove his claims of violation of rights, where there is no intervention against basic rights or where the legitimacy of such intervention is expressly legitimate and applications which are merely composed of complicated and coerced complaints can be accepted to be expressly without grounds (App. No. 2012/1334, 17/9/2013, § 24).

61. As indicated while this matter was previously examined by the Constitutional Court, the formation of the HMAC, its status and duties have been ensured in the Constitution, as well as the Code concerned. It is seen that the independence of the military judges who are appointed to the HMAC have been taken under guarantee by the Constitution and the provisions of the Code concerned, that there are no issues to damage the independence of the military judges regarding the procedures of working and appointment thereof, that they are not accountable to the administration as a result of their decisions and that issues pertaining to discipline are examined and ruled by the High Disciplinary Board of the HMAC (App. No. 2013/1134, 16/5/2013, § 29). On the other hand, the tenure of members who are class officers which is a maximum of four years, that they are subject to the Disciplinary Board mentioned above regarding disciplinary issues, that they are not subjected to any evaluation by administrative or military authorities during the course of their tenure have reinforced such officers' independence against the administration (for similar decisions by the ECtHR, see. Mustafa Yavuz and Others/Turkey (sd.), App. No. 29870/96, 25/5/2000; Bek/Turkey, App. No. 23522/05, 20/4/2010, § 30).

62. In the material incident, nothing as to the court not being independent and impartial was established, and it must be decided that this part of the application is inadmissible for '*being expressly devoid of grounds.*'

2- Regarding the Merits

63. The applicant has claimed that the rejection of his request regarding the examination of the confidential documents that have been submitted by the defendant administration as annexes of the defense has violated his right to a fair trial.

64. In the letter of opinion of the ministry, it was concluded that during the evaluation as to whether not allowing the examination of the confidential documents would violate the right to a fair trial or not, the decisions of the ECtHR concerning such matter have to be considered.

65. In his petition of response, the applicant has reiterated his claims that were also in his application form.

66. In the case, which is the subject of the application, the claim of the applicant that the examination of confidential documents was not allowed will be examined from the perspective of right to adversarial trial.

67. Paragraph one of Article 36 of the Constitution with the side heading *"Freedom to claim rights"* is as follows*:*

> *"Everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means."*

68. The relevant part of article 6 of the Convention with the side heading *"Right to a fair trial"* is as follows:

> "*In the determination of his civil rights and obligations or ofany criminal charge against him, everyone is entitled to a fairand public hearing within a reasonable time by an independentand impartial tribunal established by law.*"

69. The production and evaluation of evidence including the right to call witness during the trial held are accepted within the scope of the principle of the equality of arms accepted as one of the elements of the right to a fair trial and this right and the right to a reasoned decision are also concrete manifestations of the right to a fair trial just as the right to trial in a reasonable time. In many of its decisions over which it carries out an examination in accordance with article 36 of the Constitution, the Constitutional Court includes principles and rights such as the right to a reasoned decision and the principle of the equality of arms which are both stipulated in the wording of the Convention and included within the scope of the right to a fair trial through the case law of the ECtHR within the scope of article 36 of the Constitution by way of interpreting the relevant provision in the evidence of article 6 of the Convention and the case law of the ECtHR (App. No. 2012/13, 2/7/2013,§ 38).

70. 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 the subjection of the parties to a case to the same conditions in terms of procedural rights and the fact that one of the parties has the opportunity of stating its claims and defenses before a court in a reasonable way without it being put at a weaker position than the other one (App. No. 2013/1134, 16/5/2013, § 32). As a rule, applicants are not obliged to prove that an advantage granted to the opposing party of the case has harmed them or that they have been negatively affected by this situation. Even though there is no evidence that an advantage which is offered to one of the parties and not to the other gives rise to a *de facto* negative outcome, the principle of equality of arms is still considered to be violated. (See., ECtHR, *Zagorodnikov/Russia*, App. No. 66941/01, 7/6/2007, § 30).

71. The principle of adversarial trial requires that the right to have information on the material of the case and to make comments thereon be entitled to the parties, hence requires that parties participate actively in the entirety of the trial. In this regard, the court not hearing the parties, its non-provision of the opportunity to object the evidence might cause the activity of trial become contradictory with equity (for a similar decision by the ECtHR, see. *Ruiz-Mateos/Spain*, App. No.12952/87, 23/06/1993, § 63). The principle of adversarial trial is closely related with the principle of equality of arms and these two principles are of mutually complementary quality. For in the event of violation of the principle of adversarial trial, the balance between the parties regarding their being able to defend their cases will be disrupted. That adversarial trial is accepted also in cases concerning civil rights, requires the active participation of the parties in the entire trial, including their being present at the hearing during a trial concerning a civil right(App. No. 2013/1780, 20/3/2014,§ 25).

72. In its decision Miran/Turkey, which is one of its many decisions where the ECtHR has considered the limitation of access of the parties to documents that are indicated to be basic for the ruling and confidential as grounds for violation, the court in the case that was tried at the High Military Administrative Court has decided that art. 6/1 of the ECHR had been violated regarding the complaint concerning the impossibility of access to documents marked as '*confidential.*' (*Miran/Turkey,* App. No. 43980/04, 21/4/2009). In a similar decision the ECtHR has ruled that article 6/1 of the ECHR was violated with the justification that non-provision of access to documents marked as '*confidential*' is contradictory to the equality of arms and the principle of adversarial trial (*Güner Çorum/Turkey,* App. No. 59739/00, 31/10/2006, §§, 21-30).

73. In the incident concerned, the applicant, upon the non-delivery of the confidential and non-confidential documents that were sent as an appendix to the defense by the General Command of the Gendarme to himself in the case that he had lodged with the request that the transaction concerning his appointment be cancelled, has requested from the HMAC that such documents be allowed to be examined, the HMAC, with the decision that it has taken on the date of 27/12/2012 has ruled that there are no grounds to make a decision regarding such request by indicating that, in compliance with paragraphs four and six of article 52 of the Code No. 1602 and article 38 of the Internal Regulation of the HMAC, the documents can be requested from the section where the file is at regarding the progress thereof, that the Chamber of the HMAC can make a decision on this issue upon the objection to be made on the decision of the section concerned regarding non-examination of the documents, that the Secretariat General is responsible regarding this issue as the case file is at the Secretariat General. Upon such decision, the Secretary General of the HMAC, with the decision dated 4/1/2013 has indicated that it had to make an evaluation as a requisite of the decision by the HMAC although it was not given any authority in compliance with article 52 of the Code No. 1602, regarding the examination of the documents, and that it had dismissed the decision, and that the decision could be objected to at the Chamber of HMAC. The applicant has not objected to this transaction and the HMAC, in the decision that it has taken on the date of 3/7/2013, has dismissed the case by evaluating the documents (the statements of the parties and the administrative investigation report) that have been sent as per article 52 of the Code No. 1602, the petition for the case and the briefs.

74. Protection of the right to a fair trial by taking the principle of equality of arms and the right to adversarial trial under guarantee at all stages of a trial including the procedural rules of criminal cases and cases concerning civil rights and liabilities is a requisite of being a state of law. The main rule is to ensure parties' participation to the trial in equal conditions; that they are knowledgeable about the evidence they exhibit and views that they present and that they are given the opportunity to inform their opinions thereupon; and it is possible that the trial procedure includes some exceptions such as public safety, protection of witnesses who are under the risk of retaliations and keeping procedures of prosecution confidential. Even under such circumstance, ensuring the opportunity for the person concerned to make an objection at the court regarding information and documents that are not given or that are blacked out is a requisite for taking the fair trial under guarantee. Such issues have been iterated in the general justification and the article justification of the Code No. 6000, which is dated 19/6/2010 that amends article 52 of the Code No. 1602, and the decision *Aksoy (Eroğlu)/Turkey* of the ECtHR dated 31/10/2006 has been given as the reason for the amendment.

75. With article 20 of the Code No. 6000, paragraph four of of the article 52 of the Code No. 1602 has been amended and paragraphs five and six have been added to the article. With this new arrangement that has been made it has been stipulated that; the information and documents in the case file are open to the parties and their counsels; yet of the information, files and documents that have been brought by the court or that have been sent by the administration, those the examination by the parties and the counsels thereof of which is restricted for reasons of protection of private information and honor, reputation and safety of other persons or offices as well as to keep the prosecution methodologies of the administration confidential, and also those that are in the personal files of the staff which are excluded from the subject of the case may not be allowed to be examined by the parties and their counsels; that, if such information and documents, which are of the quality that does not allow the examination of the parties and their counsels are inseparable, regarding their place, from other documents, then, their copies to be examined can be sent as long as the portions concerned are blacked out by the administration; that the claimant or the counsel thereof can make an objection at the court with the claim that the information and the documents that have not been given are aspects that can serve as the basis of the defense, and that; such objection can be examined by the court which can allow, within the scope of issues that are deemed to be rightful and within the framework to be set by the court, the examination by the other party of the information and documents that have been blacked out or that have not been given.

76. In the material event, it is seen that in the case that has been tried at the HMAC, the confidential documents that have been submitted by the defendant administration were not notified to the applicant; a decision has not been taken regarding the application that the applicant has made to the HMAC and that such request was forwarded to the Secretariat General, and the request was dismissed by the Secretariat General with reference to the decision that was made by the court whereby it was indicated that the latter had no authority to make a decision thereupon and that such decision was not objected to.

77. In this case, the applicant has made an application, in line with the procedure prescribed in the Code no. 1602, to the HMAC for the examination of the documents that he was not notified of but which were seen to be taken as the basis of the judgment; it is seen that in the decision neither of the Secretariat General nor of the HMAC an argument to reveal that such confidential documents were not given to the applicant for examination for reasons of protection of private information and honor, reputation and safety of other persons or offices as well as to keep the prosecution methodologies of the administration confidential as well as for other reasons that can be deemed to be rightful have been put forth; and that the request was dismissed without any grounds so much so as not to leave any room for the review of such issues and it was concluded that, as a result of not allowing the examination of the confidential documents that have been submitted as attachments of the defense of the administration, which have been taken as the basis of the judgment in the ruling of the HMAC, the principle of equality of arms and the right of adversarial trial of the applicant have been violated.

78. Due to the aforementioned reasons, it should be decided that the applicant's right to a fair trial guaranteed in Article 36 of the Constitution has been violated.

3. In Terms of Article 50 of the Code No. 6216

79. The applicant has requested that a retrial be made so as to remedy the violation of his right to a fair trial and that it be decided that the material and spiritual damages that he has incurred be compensated.

80. 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."*

81. In the trial, which is the subject of the application, it has been established that not allowing the applicant's examination of the confidential documents that have been sent by the defendant administration has prevented him from submitting his opinion of such documents hence the violation of his right to a fair trial and this violation, as well as the outcomes of such violation are of the quality that can be remedied with a retrial.

82. Although the applicant has requested that the material and spiritual damages that he claims that he has incurred be remedied, since the Court has decided that the case be retried, such request, at this stage, has to be dismissed.

83. It should be decided that the total trial expense of 1.698,35 TRY as incurred by the applicant , consisting of 198,35 TL for the application fee and 1.500,00 TRY for counsel's fee, as determined as per the documents in the file should be paid to the applicant and that a sample of the decision be sent to the First Chamber of the HMAC so as to remedy the violation and the results thereof.

V. JUDGMENT

In the light of the reasons explained, it is decided **UNANIMOUSLY** on the date of 26/6/2014 that;

A. as a result of,

1. The complaint that the High Military Administrative Court is not impartial '*being expressly devoid of any grounds,*'

2. The complaint concerning the violation of the presumption of innocence '*being expressly devoid of any grounds,*'

IS INADMISSIBLE,

3. That the complaint concerning the non-notification of confidential documents **IS ADMISSIBLE,**

B. That the right to a fair trial **HAS BEEN VIOLATED** as a result of non-notification of the confidential documents,

C. That a sample of the decision **BE SENT** to the Presidency of the First Chamber of the HMAC so as to remedy the violation as well as the outcomes thereof,

D. That the requests of the applicant regarding compensation be **DISMISSED**,

E. The total trial expense of 1,698.35 TRY including the application fee of 198.35 TRY and the counsel's fee of 1,500.00 TRY, which were incurred by the applicant be **PAID TO THE APPLICANT,**

F. That the payments be made within four months as of the date of application by the applicant to the Ministry of Finance 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	Member	Member
Alparslan ALTAN	Serdar ÖZGÜLDÜR	Osman Alifeyyaz PAKSÜT

Member	Member
Recep KÖMÜRCÜ	M. Emin KUZ