REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

PLENARY ASSEMBLY

JUDGMENT

KRİSTAL-İŞ TRADE UNION APPLICATION

(Application Number: 2014/12166)

Date of Judgment: 2/7/2015

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PLENARY ASSEMBLY

JUDGMENT

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Rapporteur	: Okan TAŞDELEN
Applicant	: Kristal-İş Trade Union (Glass, Cement, Ceramics and Soil Industry Workers' Union)
Representative	: Att. Abdi PESOK

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicant Trade Union maintained that its right to form a trade union, right to collective bargaining agreement and to collective agreement and right to strike had been violated on the ground that its decision to go on strike upon the failure to reach an agreement during the collective bargaining agreement negotiations was suspended by virtue of the decree

of the Council of Ministers; and that its request for the stay of execution of this suspension order was dismissed. The applicant accordingly requested the Constitutional Court to issue an interim measure.

II. APPLICATION PROCESS

2. The individual application was directly lodged with the Constitutional Court on 23 July 2014. Upon the preliminary examination of the petitions and annexes thereto under administrative aspect, it has been found established that there was no deficiency which would prevent the referral of the application to the Commission.

3. On 5 September 2014, the First Commission of the Third Section decided that the examination on the admissibility be made by the Section, and therefore the case-file be referred to the Section.

4. On 15 September 2014, the President of the Section decided that the examination on the admissibility and merits be made concurrently and that one copy of the application be submitted to the Ministry of Justice ("the Ministry") for receiving its observations.

5. The Ministry of Justice submitted its written observations to the Constitutional Court on 15 October 2014.

6. The Ministry's observations were served on the applicant on 27 October 2014. The applicant submitted its counter-statements to the Constitutional Court on 10 November 2014.

7. As at the meeting of the First Section held on 21 May 2015, it was found necessary that the application, by its very nature, must be concluded by the Plenary Assembly, the application was referred to the Plenary Assembly pursuant to Article 28 § 3 of the Internal Regulations of the Court.

III. THE FACTS

A. The Circumstances of the Case

8. As indicated in the application form and annexes thereto, the facts of the application may be summarized as follows:

9. As any agreement could not be reached between the applicant Kristal-İş Trade Union and the Turkish Glass, Cement, Ceramics and Soil Industry Workers' Union during the

24th Period Negations for the Collective Bargaining Agreement conducted by and between them, the Kristal-İş Trade Union went on strike on 20 June 2014. This strike was in force in six companies and ten different factories and covered all sub-sectors of the glass industry (flat glass, automotive glass, household glassware, bottle, glass fibre, thermal glasses and etc.)

10. By the decree of the Council of Ministers which was dated 25 June 2014 and published in the Official Gazette dated 27 June 2014 and no. 2903, it was decided *"the strike enforced by the Kristal-İş Trade Union in the workplaces affiliated to the Türkiye Şişe ve Cam Fabrikaları Anonim Şirketi ("Turkish Bottle and Glass Factories Corporation") be suspended for 60 days as the strike has been found to be disturbing public health and national security"*.

11. The applicant Trade Union brought an action for the annulment of this order before the 10th Chamber of the Supreme Administrative Court over the file no. 2014/3628, and accordingly the stay of execution was requested.

12. On 16 July 2014, the request for the stay of execution was dismissed by a majority vote by the 10th Chamber of the Supreme Administrative Court. In the reasoning part of this decision, it was specified that ninety percent of the glass manufacturing in our country was performed by these workplaces which were on strike; and that given the fact that it was noted in the letters of the Ministry of Economy, the Ministry of National Defence, the Ministry of Health and the Secretariat General of the National Security Council submitted by the Prime Ministry, which was the plaintiff, that the strike in question had the effect of disturbing public health and national security, the issues asserted by the applicant were not considered to be a ground which would require the stay of execution of the suspension order.

13. Two members of the Chamber expressed their dissenting opinions by indicating that there were no valid and plausible evidence proving that the strike was disturbing national security and public health and that the decision to go on strike was taken on the basis of economic grounds which were not prescribed in the law. The dissenting members made the following assessments: a) the right to strike may only be suspended on the basis of grounds specified in the law; it was not possible to give a suspension order by relying on an economic, political or any other ground; b) there was no definition concerning the notions of national security and public heath which were shown as a ground for the restriction or prohibition of many fundamental rights and freedoms; and a wide interpretation of these notions, which were abstract and indefinite in nature, would lead to the suspension of almost all strikes for

the above-mentioned reasons; c) the notions of national security and public health were defined, respectively, in the judgments dated 19 April 2006 and no. E.2003/6134 and K.2006/2551 and dated 15 October 1997 and no. E.1995/6497 and K.2005/3777 which were rendered by the 10th Chamber of the Supreme Administrative Court; d) it must be explained in a clear manner leaving no room for doubt that how and in what way the halt of manufacturing for a certain period of time due to the enjoyment of the right to strike - a constitutional right and a safeguard for the worker – had disturbed national security and/or public health, and in doing so, the principle of proportionality and the requirements of a democratic society must be taken into consideration.

14. On 23 July 2014, the applicant lodged an individual application.

Developments Taking Place Subsequent to the Individual Application

15. The decision on the dismissal of the request for the stay of execution was served on the applicant on 4 August 2014.

16. On 6 August 2014, the applicant objected to the dismissal decision.

17. On 23 September 2014, the Plenary Session of the Chambers for Administrative Cases of the Supreme Administrative Court dismissed the applicant's objection on the grounds that the execution of the administrative act did not lead to damages which were difficult or impossible to compensate and that the administrative act was not also explicitly unlawful.

18. Two members expressed their dissenting opinions in respect of the decision dismissing the applicant's objection. The dissenting members primarily indicated that as the suspension period of 60 days which started running as from the objection date had expired, it may be asserted that the conditions set out in Article 27 of the Law no. 2577 did not occur; and that it became impossible to proceed with the strike upon the order for the suspension of the strike and that the right to strike and to bargain collectively, which was a constitutional right, was abolished *de facto* and *de jure* by the decree of the Council of Ministers given the fact that the dispute would be resolved by the Supreme Arbitration Board in the event that the parties failed to reach an agreement at the end of the suspension period. These two members therefore considered that the condition of existence of damage difficult to compensate (*telafisi güç zarar*) had occurred due to the continued performance of the administrative act; and that as to the other condition, an examination must be carried out in order to determine whether

the administrative act was explicitly unlawful and that accordingly a judgment should have been rendered.

19. The proceedings as to the merits of the case are still pending.

B. Relevant Law

20. Article 54 § 5 of the Constitution entitled *"the right to strike and lockout"* reads as follows:

> *"In cases where a strike or a lockout is prohibited or suspended, the dispute shall be settled by the Supreme Arbitration Board at the end of the suspension period. The disputing parties may apply to the Supreme Arbitration Board by mutual agreement at any stage of the dispute. The decisions of the Supreme Arbitration Board shall be final and have the force of a collective labour agreement."*

21. Article 63 entitled *"suspension of the strike and lockout"* of the Law on the Trade Unions and Collective Bargaining Agreements dated 18 October 2012 and no. 6356 reads as follows:

> "*(1) In the event that a legal strike or lockout which has been decided or started is in the nature of disturbing public health or national security, the Council of Ministers may suspend this strike or lockout for a period of sixty days upon such a dispute. The suspension period shall start running as from the date when the decree of the Council of Ministers is published.*
>
> *(2) Upon the entry into force of the suspension order, a mediator designated pursuant to Article 60 § 7 shall make every endeavour for the settlement of the dispute throughout the suspension period. Within this period, the parties may refer the dispute to a special arbitrator upon mutual agreement.*
>
> *(3) In case of the parties' failure to reach an agreement at the end of the suspension period, the dispute shall be resolved by the Supreme Arbitration Board upon the application by any of the parties within six business days. Otherwise, the trade union shall forfeit its authority".*

22. The relevant parts of Article 27 §§ 2 and 7 entitled *"Suspension of the execution"* of the Code of Administrative Procedure no. 2577 and dated 6 January 1982 are as follows:

> "*(2) (Amended Paragraph: On 02/07/2012 and by Article 57 of the Law no. 6352) In the event that the implementation of an administrative act results in damage which is difficult or*

impossible to compensate and it is also explicitly unlawful, the Supreme Administrative Court or the administrative courts may order the stay of execution, by showing reason, after the defence submissions of the defendant administration are received or upon the expiry of the period allocated for defence submissions. The administrative acts effect of which would disappear for being implemented may be suspended without taking the defence submissions of the administration. However, a new decision shall be taken upon the submission of the defence arguments by the relevant administration. The orders for the stay of execution are to indicate for which grounds the administrative act is clearly unlawful and what the damages which are likely to occur in case of implementation of this act and which are difficult or impossible to compensate are.

(...)

(7) In case of being given by the Chambers of the Supreme Administrative Court, the orders in respect of the requests for the stay of execution may be objected to for only once before the Plenary Session of the Chambers for Administrative or Tax Cases according to their subject-matters (...) within seven days as from the day when the order is notified. The authorities before which an objection is raised are to conclude the objection within seven days as from the date it has received the file. The decisions rendered in case of objection shall be final."

IV. ASSESSMENT AND GROUNDS

23. At the meeting held on 2 July 2015, the applicant's individual application which was dated 23 July 2014 and numbered 2014/12166 was examined, and the Constitutional Court accordingly concluded the followings.

A. The Applicant's Allegations

24. The applicant Trade Union indicated that according to the decree of the Council of Ministers, the strike which was in force at the workplaces experiencing dispute would be suspended for a period of 60 days, and if the parties failed to reach an agreement or the parties did not bring the dispute before a special arbitrator at the end of this period, the matter would be resolved by the Supreme Arbitration Board upon the application to be made by one of the parties until 1 September 2014. The applicant accordingly asserted that pursuant to Article 54 of the Constitution, as the decisions to be rendered by the Supreme Arbitration Board were final and had the force of collective bargaining agreement, the suspension order *de facto* turned into a strike ban. Moreover, the applicant noted that merely relying on the grounds

specified in the Code in an abstract manner without any justification would not suffice; that as per the judicial decisions, the notions of national security and public health must be interpreted narrowly; and that the decree of the Council of Ministers failed to indicate the link between the strike and the grounds relied on in the suspension order. The applicant stated that the Committee of Freedom of Association, which was the auditing body of the International Labour Organization, had found the orders for the suspension of strike given in 2003 and 2004 in breach of the Convention no. 87. Accordingly, it maintained that there had been a breach of the right to form a trade union, the right to collective bargaining agreement and collective agreement and the right to strike enshrined respectively in Articles 51, 53 and 54 of the Constitution. Relying on the alleged violations, the applicant requested the Constitutional Court to decide on, as a measure, the stay of execution of the suspension order.

25. The applicant also noted that the effective remedy in the present incident was the request for the stay of execution; however, the Supreme Administrative Court had dismissed its requests in respect thereof. The applicant Trade Union considered that the action for annulment, which was still pending, did not constitute an effective remedy. It indicated that it was not possible for the Supreme Administrative Court to adjudicate on the merits of the action for annulment until the dispute was referred to the Supreme Arbitration Board within the framework of the provisions set forth in Article 63 of the Law no. 6356; and that a judicial decision which would be rendered subsequently would not have a bearing on the decision of the Supreme Arbitration Board, which was in the force of a collective bargaining agreement.

B. Assessment

26. The Constitutional Court is not bound by the legal qualification of the incidents by the applicant and makes its own assessment as to the legal characterisation of the facts.

27. The right to form trade union constitutes a part of the freedom of association. This right also entails granting permission for the trade union activities performed for the protection of the interests of its members. Within this framework, in spite of not constituting a separate group of rights, the right to strike and to collectively bargain is one of the most significant remedies which may be relied on by the trade unions with a view to protecting the interests of their members (for similar judgments of the ECtHR, see . *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, § 154; and *Schmidt and Dahlström v. Sweden*, no. 5589/72, 6 February 1976, § 36). Therefore, the Constitutional Court examined the applicant's complaint under the right to form trade unions.

1. Admissibility

a. Determination of the Effective Remedy

28. In its observation, the Ministry of Justice has indicated that the case-file was still pending before the Plenary Session of the Chambers for Administrative Cases of the Supreme Administrative Court for the examination of the objection raised by the applicant to the Supreme Administrative Court's dismissal of its request for the stay of execution. The Ministry has also underlined that if the Supreme Administrative Court rendered a judgment for annulment, the suspension order would be deemed as if it had never been given; and that for reinstatement, the administration would have to perform *de facto* and *de jure* actions.

29. In its reply, the applicant maintained that the decision to be rendered by the Supreme Administrative Court for the annulment of the order for the suspension of the strike would not ensure the reparation of the violation of the rights to form trade unions and to strike and that they could not re-utilize these rights. As regards the request for the stay of execution, the applicant alleged that as the Plenary Session of the Chambers for Administrative Cases did not render a decision within seven days in spite of being envisaged so in Article 27 § 7 of the Law no. 2577, they had to sign a collective bargaining agreement on 28 September 2014; and therefore, raising an objection to the dismissal of the stay of execution was no longer an effective remedy.

30. All administrative and judicial remedies available for an act or action alleged to have led to a violation must be exhausted before lodging an individual application with the Constitutional Court. What really matters is the respect by the public authorities for the rights and freedoms and the elimination of a probable violation thereof through ordinary administrative and/or judicial remedies. Therefore, the remedy of individual application may be resorted only in cases when the violation found cannot be eliminated in spite of exhausting ordinary remedies prescribed in the law (see *Hamit Kaya*, no. 2012/338, 2 July 2013, § 29).

31. However, the remedies required to be exhausted correspond to remedies which are practicable and effective ones capable of offering a reasonable prospect of success and providing a redress for the applicant's complaints. Moreover, it is essential to take into consideration the particular circumstances of the concrete application in making a review as to the compliance with the rule of exhaustion of domestic remedies. In this sense, not only the existence of formal remedies in the legal system but also the general context in which they

operate, as well as the personal circumstances of the applicant must be realistically taken into consideration. Therefore, the question as to whether the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies must be examined by having regard to the particular circumstances of the application (see S.S.A., no. 2013/2355, 7 November 2013, § 28; and for a similar judgment of the ECtHR, see *İlhan v. Turkey*, no. 22277/93, 27 July 2000, §§ 56-64).

32. In the present incident, the applicant Trade Union went on strike during the negotiations held for the collective bargaining agreements with a view to protecting its members' interest. By the decree of the Council of Ministers dated 25 June 2014, the execution of this strike was suspended for a period of 60 days. Therefore, the applicant not only brought an action for annulment but also requested the stay of execution of the suspension order.

33. At the end of the period of 60 days, the Trade Union would have to refer the dispute to the Supreme Arbitration Board or sign a collective bargaining agreement for the settlement of the dispute pursuant to Article 63 § 3 of the Law no. 6356 with a view to avoiding forfeiture of its authority. In the present application, the latter took place. In the event that a dispute is brought before the Supreme Arbitration Board, the decision to be rendered is final and has the force of a collective bargaining agreement pursuant to Article 54 of the Constitution. Therefore, subsequent to this stage, a dismissal judgment to be rendered as to the merits of the case within the scope of an administration action could not revive the right to strike enjoyed for the protection of the rights set forth in the collective bargaining agreement. Therefore, under the circumstances of the present incident, conclusion of the action for annulment in terms of its merits cannot be qualified as a remedy that must be exhausted within the meaning of Article 148 § 3 of the Constitution.

34. Consequently, it must be acknowledged that in the present application, the remedy offering a reasonable prospect of success and capable of providing a solution in respect of the applicant's allegation that its right to strike was denied is the procedure of the stay of execution which may enable the re-implementation of the Trade Union's decision to go on strike.

b. Admissibility

35. Article 148 § 3 of the Constitution reads as follows:

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

36. Article 45 § 2 entitled *"the right to individual application"* of the Law on the Establishment and Rules of Procedures of the Constitutional Court no. 6216 and dated 30 March 2011 reads as follows:

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

37. Pursuant to the above-mentioned provisions, the ordinary legal remedies must be exhausted for having recourse to the Constitutional Court through individual application. Respect for the fundamental rights and freedoms is a constitutional duty of all organs of the State, and it is the duty of the administrative and judicial authorities to redress the right violations occurring due to neglect of this duty. In principle, an alleged violation of the fundamental rights and freedoms must be raised primarily before the inferior courts and examined and resolved by these tribunals (see *Ayşe Zıraman and Cennet Yeşilyurt*, no. 2012/403, 26 March 2013, § 16).

38. The individual application before the Constitutional Court is a legal remedy of subsidiary nature which may be resorted in the event that the alleged right violations cannot be redressed by the inferior courts. Due to the subsidiary nature of the individual application mechanism, the ordinary legal remedies must be primarily exhausted for lodging an individual application with the Constitutional Court. Pursuant to this provision, the applicant must duly raise his complaint, which would be brought before the Constitutional Court, primarily before the competent administrative and judicial authorities on time; must timely adduce his evidence and information on this matter before these authorities; and must also show due diligence in order to pursue his case or application during this period (see *Ayşe Zıraman and Cennet Yeşilyurt*, cited-above, § 17).

39. Moreover, pursuant to Article 5 § 2 of the Law no. 6216, all administrative and judicial remedies prescribed in the law in respect of the act, action or negligence alleged to cause violation must be exhausted before lodging an individual application; in other words, all

conditions for lodging an application must be fulfilled at the date when the individual application is lodged. Having said that, if there is no remedy or the available remedies are not effective, the Constitutional Court may decide to examine an application, taking into consideration the circumstances of the present incident (see *Ümit Ata*, no.: 2012/254, 6 February 2014, § 33).

40. On the other hand, in interpreting the procedural rule concerning the exhaustion of the available remedies, adoption of a kind of interpretation which would prejudice the individuals' right of access to court must be avoided.

41. It cannot be concluded that setting certain conditions for the procedure of bringing an action or resorting to legal remedies would lead to a violation of the right to directly access to court. Nevertheless, in implementing procedural rules, the courts must, on one hand, abstain from strict formalism which would impair the fairness of the proceedings and, on the other hand, excessive flexibility which would abolish the procedural rules prescribed by law. The right of access to court would have been violated in the event that the procedural rules become a kind of obstacle for the handling of the individuals' cases by a competent court, instead of serving for the interest of justice by means of ensuring legal certainty and properly conducting the proceedings (see *Kamil Koç*, no. 2012/660, 7 October 2013, §§ 65 and 68; for similar judgments of the ECtHR, see *Walchli v. France,* no. 35787/03, 26 July 2007, § 29; *Efstathiou and Others v. Greece,* no. 36998/02, 27 July 2006, § 24; and *Osu v. Italy,* no. 36534/97, 11 July 2002, § 31).

42. In its decisions concerning similar incidents; in the event that an application has been lodged without exhausting the domestic remedies, the ECtHR deals with whether the domestic remedies were exhausted by the date of the examination on the admissibility thereof. If the procedures available in the domestic law are completed, the ECtHR does not declare the application inadmissible for non-exhaustion of domestic remedies and proceeds with the examination of the applications fulfilling the other admissibility criteria under its substantive aspect (see *Gavriliţă v. Moldova*, no. 22741/06, 22 April 2014, § 53; *Mercuri v. Italy*, no. 14055/04, 22 October 2013, § 27; *Yelden and Others v. Turkey*, no. 16850/09, 3 May 2012, § 40; *E.K. v. Turkey* (dec.), no. 28496/95, 28 November 2000 and *Reringeisen v. Austuria*, no. 2614/65, 16 July 1971, §§ 89-93).

43. In the present application, the request for the stay of execution of the order given for the suspension of the strike was dismissed by the 10th Chamber of the Supreme

Administrative Court on 16 July 2014. The applicant Trade Union lodged an individual application with the Constitutional Court on 23 July 2014 before raising an objection to the dismissal of its request before the Plenary Session of the Chambers for Administrative Cases of the Supreme Administrative Court and without awaiting for the outcome of its objection.

44. The applicant's objection to the dismissal of its request for the stay of execution was dated 6 August 2014 and concluded on 23 September 2014 (see §§ 16 and 17 above).

45. In the light of the above-cited principles, although this application was lodged without exhaustion of the available remedies, it must be concluded that the available remedies have been exhausted under the circumstances of the present incident as it has been observed that the examination as to the applicant's objection to the dismissal of its request for the stay of execution was completed within the process of the individual application.

46. It must be accordingly held that this application, which is not manifestly ill-founded and in respect of which any other ground which would render it inadmissible has not been found, must be declared admissible.

2. Merits

47. In its observations, the Ministry has indicated that in the light of the ECtHR's relevant case-law, Article 11 of the European Convention on Human Rights ("the Convention") encompasses the principle of protecting the occupational interests of the members of the trade unions by means of acting jointly; that the means which would be resorted by the State for the protection of the common interests of the members of the trade unions and the right to strike, which constitutes one of these means, must not be prohibited completely and generally; that the right to strike is of importance for the protection of the interests of these members; however, it is not a compulsory element of Article 11; and that in case of an interference therewith, the issue as to whether this interference was necessary in a democratic society is dealt with.

48. In its reply, the applicant asserted that in its various judgments, the ECtHR noted that the right to strike was explicitly protected under Article 11 of the Convention; and that this right was an integral part of this article.

49. Article 51 § 1 of the Constitution entitled *"the right to form trade unions"* reads as follows:

"Employees and employers have the right to form unions and higher organizations,

without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations. No one shall be forced to become a member of a union or to withdraw from membership."

50. Article 53 § 1 of the Constitution entitled *"the right to collective bargaining agreement and collective agreement"* reads as follows:

"Workers and employers have the right to conclude collective labour agreements in order to regulate reciprocally their economic and social position and conditions of work."

51. Article 54 §§ 1, 2 and 4 of the Constitution entitled *"the right to strike and lockout"* reads as follows:

"Workers have the right to strike during the collective bargaining process if a disagreement arises. The procedures and conditions governing the exercise of this right and the employer's recourse to a lockout, the scope of, and the exceptions to them shall be regulated by law.

The right to strike and lockout shall not be exercised in a manner contrary to the rules of goodwill, to the detriment of society, and in a manner damaging national wealth.

(...)

The circumstances and workplaces in which strikes and lockouts may be prohibited or suspended shall be regulated by law."

52. Article 11 of the Convention entitled *"the freedom of assembly and association"* reads as follows:

"*(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

53. In democracies, existence of organizations through which citizens may convene and pursue common purposes is a significant element of a proper society. Moreover, such an *"organization"* has fundamental rights that must be respected and protected by the State. The trade unions which are the organizations aiming at the protection of the interests of their own members in the employment sphere form a significant part of freedom of association which is the right to come together by means of establishing collective formations in order to protect their own interests. The right to form trade unions introduces the freedom to organize by means of forming groups with a view to protecting their individual and common interests and is not considered to be an independent right but one form or a special aspect of the freedom of association (see *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, §§ 31 and 32).

54. On the other hand, the phrase "for the protection of his interests" specified in Article 11 of the Convention is not considered as redundant. These words clearly show that the Convention safeguards the trade union actions to be performed by the trade union members with a view to protecting their occupational interests. The Contracting States are expected to both allow the conduct and development of these actions and also to make them possible (see *National Union of Belgian Police / Belgium*, no. 4464/70, 27 October 1975, § 39).

55. In this scope, the right to strike, which is not expressly enshrined in Article 11, is considered as one of the most important of the means serving for the protection of the trade union members' interests (see *Schmidt and Dahlström v. Sweden*, cited-above, § 36). The right to collectively bargain must be considered as a fundamental element of the right to form trade unions (see *Demir ve Baykara v. Turkey*, cited-above, § 154).

56. Article 51 of the Constitution imposes both negative and positive obligations on the State. The State's negative obligation not to interfere with the individuals' and trade unions' freedom of association enshrined in Article 51 is made subject to conditions permitting interferences on the basis of the grounds set out in the second to the sixth paragraphs of Article 51 (see *Tayfun Cengiz*, cited-above, § 37). On the other hand, *"the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights"* (see *Wilson, National Union of Journalists and Others v. the United Kingdom*, no. 30668/96, 30671/96 and 30678/96, 2 October 2002, § 41).

57. In fact, the boundaries between the State's positive and negative obligations do not always lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of the positive obligations or negative obligations of the State, regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole (for a similar judgment of the ECtHR, see *Sorensen and Rasmussen v. Denmark*, no. 52562/99 and 52620/99, 11 January 2006 § 58). In concluding whether such a fair balance was ensured or not, the Constitutional Court would bear in mind that the bodies exercising public power has a certain margin of appreciation in this field (see *Tayfun Cengiz*, cited-above, § 37).

58. The right to form trade unions, a right that may be restricted, is subject to restriction regime of the fundamental rights and freedoms set out in the Constitution. The grounds for imposing a restriction in respect of this right are set forth in the second paragraph and et seq. of Article 51 of the Constitution. However, it is explicit that such restrictions that may be imposed in respect of these freedoms must also be limited. The criteria set out in Article 13 of the Constitution must be taken into consideration in imposing a restriction on the fundamental rights and freedoms. Therefore, the restrictions imposed on the right to form trade unions must be reviewed within the framework of the criteria set out in Article 13 of the Constitution and within the scope of Article 51 therein (see *Tayfun Cengiz*, cited-above, § 38).

59. In the light of the above-mentioned principles, in assessing whether there was a breach of the right to form trade unions in the impugned incident, the Constitutional Court would examine primarily the question as to whether there was an interference or not and subsequently the question as to whether such an interference relied on justified grounds.

a. Existence of Interference

60. The applicant Trade Union maintained that the suspension of their decision to go on strike for a period of 60 days by virtue of the Decree of the Council of Ministers constituted proportionate to its right to form trade unions. In its observations, the Ministry did not make any assessment on this allegation.

61. It is explicit that the applicant’s right to form trade unions was interfered with due to the suspension of its decision to go on strike taken within the scope of a union activity.

b. Whether the Interference Constitutes a Violation

62. In order to conclude whether the above-mentioned interference led to a violation of Article 51 of the Constitution, this interference must be examined in the light of the principles of lawfulness, pursuing a legitimate aim, being necessary in a democratic society and of proportionality.

i. Lawfulness

63. The principle of lawfulness is not limited with setting forth the restrictions for rights and freedoms in law merely in form but also amounts to the necessity that they must be appropriate in terms of content for realizing a certain purpose. In this respect, the law text must be formulated in a manner which would enable the individuals - by means of getting legal assistance if necessary - to foresee, to an explicit and certain degree, which concrete act or actions would be subject to which legal sanction or outcome. Therefore, before its implementation, a law must be foreseeable to a sufficient degree in respect of its probable effects and outcomes. However, as it cannot be always expected that a law text demonstrates all outcomes and effects, the degree of the desired explicitness may be determined by taking into consideration factors such as the content of the text in question and the status and extent of the field aimed to be regulated and of the mass being addressed to by this law. A law which is in this nature must also be easily accessible (see *Günay Okan*, no. 2013/8114, 17 September 2014, § 23; and the Constitutional Court's judgment no. E.2011/62, K.2012/2 and dated 12 January 2012).

64. The Constitutional Court has reached the conclusion that Article 63 of the Law no. 6356 which is entitled *"suspension of strike and lockout"* met the criterion of *"lawfulness"* (§ 21 above).

ii. Legitimate Aim

65. An interference with the right to form trade unions may be considered to be legitimate only when this interference was made for the purposes of maintaining national security, public order, preventing the commission of offence and protecting public health, public moral and the other individuals' rights and freedoms.

66. In giving a suspension order, the Council of Minister relied on the ground that the

strike in question was disrupting public health and national security. As a ground for its dismissal of the request for the stay of execution, the 10th Chamber of the Supreme Administrative Court relied on the statement included in the letters submitted to it and indicating that this strike met the above-mentioned two unfavourable conditions. However, the Supreme Administrative Court did not make any assessment as to in what aspect this strike disrupted public health and national security.

67. The Constitutional Court has considered that even if the order for suspension of the strike is accepted to pursue legitimate aims listed in Article 51 § 2 of the Constitution, it is not necessary, under the particular circumstances of the present application, to solve the matter of legitimacy of the interference regard being had to the assessments that must be made as to whether the interference was necessary.

iii. Being Necessary in a Democratic Society and Proportionality

68. In its observations, the Ministry has indicated that in case of an interference with the freedom of association, it would be established whether this interference was necessary in a democratic society; and that the principle of being necessary in a democratic society encompasses the elements envisaging that the act constituting an interference results from a pressing social need and is proportionate to the legitimate aim pursued.

69. As the right to form trade unions is not absolute, it may be subject to certain restrictions. Therefore, an assessment must be made as to whether the restrictions relying on the grounds set forth in Article 51 § 2 of the Constitution are compatible with the requirements of a democratic social order and with the principle of proportionality which are guaranteed in Article 13 of the Constitution.

70. Democracies are the regimes where the fundamental rights and freedoms are ensured and guaranteed to the largest extent. Restrictions which have infringed upon the very essence of the fundamental rights and freedoms and entirely rendered them unusable cannot be considered to be in compliance with the requirements of a democratic social order. Therefore, the fundamental rights and freedoms may be restricted only by law, under exceptional circumstances, on condition of not infringing upon the very essence of these rights and freedoms and to the extent required for maintaining the democratic social order (see the Constitutional Court’s judgment no. E.2006/142, K.2008/148 and dated 24 September 2008). In other words, if the restriction imposed ceases the enjoyment of the right

and freedom in question or dramatically renders their enjoyment difficult by means of infringing upon the very essence of the right and freedom or impairs the balance between the aim and means of the restriction, which is in breach of the principle of proportionality, this restriction will be against the democratic social order (see *Bekir Coşkun* [Plenary], no. 2014/12151, 4/6/2015, §§ 49 and 50).

71. Another safeguard which must be primarily taken into consideration in case of a restriction on the fundamental rights and freedoms is *"the principle of proportionality"* set out in Article 13 of the Constitution. This principle is a safeguard that must be primarily taken into account in in the applications concerning imposition of a restriction on the fundamental rights and freedoms. The requirements of a democratic social order and the principle of proportionality are not set out as two separate criteria in Article 13 of the Constitution, and there is an indivisible link between these two criteria (see *Bekir Coşkun*, cited-above, § 53). The Constitutional Court examines whether there is a reasonable link and balance between the aim and means.

72. According to the judgments of the Constitutional Court, the proportionality reflects the link between the aims and means of restriction imposed on the fundamental rights and freedoms. The review of proportionality means review, on the basis of the desired aim, of the means selected for attaining this aim. Therefore, it must be assessed whether the means of interference selected for attaining the desired aim is convenient, necessary and proportionate (see *Bekir Coşkun*, cited-above, § 54).

73. The centreline of the assessments to be made in respect of the impugned incident is to whether the inferior courts could plausibly set forth the grounds on which they relied in their decisions were *"necessary in a democratic society"* and compatible with the *"principle of proportionality"* in respect of the restriction imposed on the right to form trade unions.

74. The notion of *"necessary"* corresponds to *"a pressing social need"* (for a similar judgment of the ECtHR, see *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 48). In that case, it must be assessed whether a judicial or administrative interference with the freedom of association and the right to form trade unions has met a pressing social need. Within this framework, the interference must be proportionate to a legitimate aim. In the second place, for the justification of the interference, the grounds indicated by the public authorities must be relevant and sufficient (for a similar judgment of the ECtHR, see *Stankov*

and the United Macedonian Organisation Ilınden v. Bulgaria, no. 29221/95 29225/95, 2 October 2001, § 87).

75. In the present incident, as the parties failed to reach an agreement during the 24th Period Negotiations for Collective Bargaining Agreement, the applicant Trade Union went on strike on 20 June 2014. By the decree of the Council of Ministers entering into force by 27 June 2014, the suspension of the strike for a period of 60 days was ordered for disturbing public health and national security.

76. In its action brought against the Council of Ministers, the applicant also requested the stay of execution which was capable of offering an effective solution for its complaint. The 10th Chamber of the Supreme Administrative Court concluded that the conditions requiring the stay of execution did not appear on the grounds that ninety percent of the glass manufacturing had been performed by the workplaces which were on strike and as indicated in the letters submitted by the relevant institutions, the strike in question had the effect of disturbing public health and national security. Although the applicant Trade Union raised an objection to this judgment, the Plenary Session of the Chambers for Administrative Cases could rendered its judgment only on 23 September 2014; namely, upon the expiry of the suspension period of 60 days. The applicant's objection was dismissed on the ground that the conditions requiring the stay of execution did not appear.

77. The applicant noted that it had to sign the collective bargaining agreement on 28 August 2014 for avoiding the forfeiture of its authority to conclude collective bargaining agreement as its request for the stay of execution was not concluded within the suspension period.

78. The Constitutional Court has defined the phrase of *"national security"* as a general notion which may be extended according to the practitioners' personal opinions and understanding, which may be subject to subjective comments and which would result in various and gradual practices even corresponding to arbitration (see the Constitutional Court's judgment no. E.1973/41, K.1974/13 and dated 25 April 1974).

79. Likewise, the applicant Trade Union went on strike in the year of 2003, and this strike was also suspended by the decree of the Council of Ministers for disrupting public health and national security. In the action for annulment and the stay of execution, which was brought by the applicant, the 10th Chamber of the Supreme Administrative Court noted that a

legal strike may be considered to disrupt national security within the meaning prescribed in the law only when serious threats which would require the State to be taken under special protection and security have occurred. Having regard to the information included in the file, the opinion submitted by the Secretariat General of the National Security Council and indicating that the strike would not cause a great trouble for national security and to the workplaces which were on strike and the nature of works performed therein, the Supreme Administrative Court concluded that the strike which had been suspended was not in the nature of disrupting national security in the manner as set forth in the Law. It was also indicated that economic grounds relied on by the administration would not legitimize the suspension order, and the request for the stay of execution was accordingly accepted (see the decision for the stay of execution of the 10th Chamber of the Supreme Administration Court dated 12 January 2004 and no. E.2003/6134). Subsequently, the Supreme Administrative Court held that the order suspending the strike be annulled (see the judgment of the 10th Chamber of the Supreme Administration Court dated 19 April 2006 and no. E.2003/6134 and K.2006/2551).

80. Following the above-mentioned decision for the stay of execution, the application Trade Union once again went on strike. However, the Council of Ministers again ordered the suspension of the strike on the ground of public health and national security. In the action brought thereupon, the 10th Chamber of the Supreme Administrative Court reiterated its definition of public security. With regard to public health, it was indicated that a significant section of the society must face with a serious threat in terms of health or in social terms in connection therewith and there must occur losses and damages which were impossible to redress. Having regard to the opinion which was submitted by the Secretariat General of the National Security Council and of the same nature with the previous one and to the workplaces and works to be affected by the strike, the Supreme Administrative Court concluded that the suspended strike was not disrupting national security and public health. Therefore, it was decided that the decree of the Council of Ministers be annulled (see judgment of the 10th Chamber of the Supreme Administrative Court dated 19 April 2006 and no. E.2003/6134 and K.2006/2551).

81. In the present incident, it appears possible that the grounds of national security and public health, which are forming a basis for the suspension order, correspond to a pressing social need. However, given the significance of the examination as to the stay of

execution for the protection of the rights of the applicant trade union, this pressing need must be demonstrated in the dismissal decision in a plausible and explicit manner. In addition, the decisions for the stay of execution and annulment rendered in similar cases underline the need for the justification as to why the strike in the present incident was considered to have disrupted national security and public health.

82. In the dismissal decision rendered by the 10th Chamber of the Supreme Administrative Court, the opinions submitted by the relevant institutions concerning public health and national security were only mentioned. The Supreme Administrative Court did not make its own assessment on this matter. Moreover, when combined with the Supreme Administrative Court's failure to make sufficient explanation about national security and public health, the expression that the strike would be in effect in the workplaces performing ninety percent of the glass manufacturing may also lead to the impression that economic grounds were taken as a basis for the dismissal of the request for the stay of execution. Therefore, it cannot be concluded that the grounds given in the Supreme Administrative Court's decision in which the request for the stay of execution of the order suspending the strike was dismissed were relevant and sufficient (see § 74 above).

83. For these reasons, it has been concluded that it was not proven that the order suspending the strike met a pressing social need; and that this order *"was not necessary in a democratic society"*. Consequently, the Constitutional held that there was a breach of the applicant's right to form trade unions guaranteed in Article 51 of the Constitution.

3. Article 50 of the Law no. 6216

84. The applicant requested, as a measure, the stay of execution of the suspension order.

85. Article 50 § 2 of the Law no. 6216 entitled *"Decisions"* reads as follows:

> *"If the violation found established 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 eliminated. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favour 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 case-file, if possible, in a way that will eliminate the violation and the consequences thereof as indicated by the Constitutional Court in its judgment."*

86. In the present incident, the applicant did not claim any pecuniary and non-pecuniary compensation.

87. It has been concluded that a total amount of TRY 1,706.10 which consists of an application fee of TRY 206.10 and a counsel's fee of TRY 1,500.00 and which was paid by the applicant and determined according to the documents in the file be paid to the applicant as the court expense.

88. It has been held that a copy of this judgment be sent to the relevant chamber of the Supreme Administrative Court for information.

V. JUDGMENT

The Constitutional Court has **UNANIMOUSLY** held on 2 July 2015 that

A. The applicant's

1. Allegations that its right to form trade unions was violated be **DECLARED ADMISSIBLE**;

2. Right to form trade unions guaranteed in Article 51 of the Constitution was **VIOLATED**;

B. A copy of this judgment be **SENT** to the relevant chamber of the Supreme Administrative Court;

C. The court expense of TRY 1,706.10 consisting of the fee of TRY 206.10 and the counsel's fee of TRY 1,500.00 be **REIMBURSED TO THE APPLICANT**;

D. The payment would be made within four months following the date of application to be made to the Ministry of Finance upon the service of this judgment; and in case of any delay in payment, a statutory interest would be charged for the period from the expiration date of the prescribed period to the payment date.