İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 72: 71–95

DOI: 10.26650/annales.2023.72.0005
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 01.02.2023
Revision Requested: 22.02.2023
Last Revision Received: 14.03.2023
Accepted: 23.03.2023
Published Online: 20.04.2023

RESEARCH ARTICLE

Legal Aid Under Turkish Administrative Judicial Procedural Law

Nilay Arat*

Abstract
In this paper, the "legal aid" mechanism, which is an institution that enables parties to participate effectively in the judicial process and "balances" interference with the right of access to court, is discussed. The discussion focusses on the way it facilitates various possibilities of putting forward the claims and pieces of evidence of parties wishing to prove their claims. In this context, the legal aid institution is dealt with primarily within the framework of the right of access to court within the scope of the right to a fair trial. Then, under article 31 of the İYUK, the legal framework of the legal aid institution in the civil procedure is drawn and the application of the legal aid institution in the administrative jurisdiction is examined. This is done only in terms of administrative disputes, excluding cases related to tax disputes due to the difference in the nature of taxation transactions.

Keywords
Legal aid, Judicial assistance, Right to fair trial, Right to court, Administrative judicial procedure

* **Corresponding Author:** Nilay Arat (Assoc. Prof. Dr.), Kadir Has University, Faculty of Law, Department of XX, Istanbul, Türkiye. E-mail: nilay.arat@khas.edu.tr ORCID: 0000-0002-8625-054X

To cite this article: Arat N, "Legal Aid Under Turkish Administrative Judicial Procedural Law", (2023) 72 Annales de la Faculté de Droit d'Istanbul 71. https://doi.org/10.26650/annales.2023.72.0005

This work is licensed under Creative Commons Attribution-NonCommercial 4.0 International License

Introduction

Legal aid provides for a temporary exemption to any rightful person from the financial burdens of a case, due to his/her poverty.[1] In other words, legal aid is a mechanism foreseen to prevent injustice from being endured due to the inability to file a lawsuit or set up a defense properly in cases where the payment of the costs required by the claim and defense leaves the financial power of the claimant or defendant insufficient compared to the case in question.[2] Legal aid is considered to be an institution that enables parties to participate effectively in the judicial process and "balances" interference with the right of access to court, as it facilitates the parties' opportunities to put forward their demands and evidence, and to prove their claims.[3]

Legal aid provides an opportunity to realize the right of access to justice, as a requirement of the social state principle.[4] On the same parallel, the elimination of "inequality" between those in different economic positions in terms of bringing their cases to court also necessitates the existence of the legal aid institution. Indeed, legal aid finds its basis in the principle of equality.[5] As is well known, requesting legal protection through the court requires a certain fee and the expenses of the notification, witness and expert to be covered in this process. In the presence of certain conditions, the legal aid institution has taken its place in legal systems as a facilitating mechanism, as an opportunity which enables these payments not to be a barrier to the right to a fair trial in the pursuit of legality.

Legal aid has been enshrined in numerous international and supranational legal documents, such as the International Covenant on Civil and Political Rights[6], the

1 Baki Kuru, *Hukuk Muhakemeleri Usulü*, (6th edn, Demir 2001) 5418

2 İlhan Postacıoğlu and Sümer Altay, *Medeni Usul Hukuku Dersleri* (8th edn, Vedat 2020) 955

3 *Tacettin Ceylan*, App no 2017/39062 (AYM, 10 November 2021), § 66

4 "Today, in modern legal systems, the delivery of justice is free. … the parties do not pay any fee to the judge for this work. However, the parties have to pay some necessary expenses due to the trial, which may exceed the economic power and possibilities of the parties in some cases, and for this reason, there may be a danger of losing their rights for these people. The loss of a right just because of economic impossibilities and financial difficulties does not comply with social justice. In order to save the justice delivery service from being a service that only those with financial means can benefit from, people who are unable to pay the costs required by the trial should be exempted from these costs, albeit temporarily, and a proxy should be appointed if necessary." Ayşe Kılınç, "Bir İnsan Hakkı Olarak 'Adli Yardım'" (2011) 3(1) *Hukuk ve İktisat Araştırmaları Dergisi*, 1-10, 2; Ejder Yılmaz, "Yargılama Giderlerinin İşlevi ve Sosyal Hukuk Devleti", *Ejder Yılmaz Makaleler (1973-2013)* (Yetkin 2014), 399

5 Faruk Erem, "Adli Yardım", *İmran Öktem'e Armağan*, (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1970) 108; Ejder Yılmaz "Adli Yardım Kurumunun İdari Yargıda Uygulanması", *Ejder Yılmaz Makaleler (1973-2013)* (Yetkin 2014), 566.

6 "Article 14/3: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; .."

European Agreement on the Transmission of Applications for Legal Aid[7], the Council of Europe Committee of Ministers Resolution 78(8) on Legal Aid and Advice[8], the Council of Europe Committee of Ministers Resolution 93(1) on Effective Access to the Law and to the Justice for the Very Poor[9], and last but not least the Guidelines of the Committee of Ministers of the Council of Europe on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law[10].

I. Legal Aid as a Human Right

Legal aid is evaluated in terms of the right of access to a court within the scope of the right to a fair trial. Accordingly, the right of access to a court, which includes taking a dispute to court and asking for the dispute to be decided effectively, is an aspect of the right to a fair trial. Within the framework of the right to a fair trial under article 6 of the European Convention on Human Rights, "right to access to courts" is granted. However, this right is not absolute and is subject to limitations. Right of access to court is subject to limitations which do not impair the essence of the right while pursuing a legitimate aim. This right can be used if there is a reasonable relationship of proportionality between the means employed and the aims to be achieved.[11] Within the scope of the right to a fair trial regulated by article 6 of the ECHR, the right of access to a court is subject to limitations, as the right in question can be regulated by the state due to its nature and may change according to time and place in accordance with the needs and resources of the person and society.[12]

ECtHR takes the issue in hand and evaluates legal aid under two criteria: "lack of sufficient means to pay for legal assistance" (financial eligibility) and "the interest of justice requirement" (merits assessment).

If the expense of a trial process creates obstacles that undermine the essence of the right to access a court, it can be considered to be a violation under article 6/1 of the ECHR.[13] In this context, in cases where an effective defense cannot be made due to the material and legal complexity of the case and the procedure applied in the case, or in cases where representation with a lawyer is required, there may be a violation of the right to apply to the court according to the assessment made in terms of the

7 For full text, see < https://rm.coe.int/1680077322 > accessed 29 December 2022

8 For full text, see < https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e2bb2 > accessed 29 December 2022

9 For full text, see < https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804df0ee > accessed 29 December 2022

10 For full text, see < https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a1a347 > accessed 29 December 2022

11 *Ashingdane v UK*, App no 8225/78 (ECHR, 12 May 1983), § 57. *Stubbings and Others v UK* App no 22083/93, 22095/93 *(*ECtHR, 22 October 1996), § 50-52. *Sialkowska v. Poland* App no 8932/05 (ECtHR, 9 July 2007), § 102

12 *Golder v UK*, App no 4451/70 (ECHR, 21 February 1975), § 38

13 *Airey v Ireland*, App no 6289/73 (ECHR, 9 October 1979), § 24

financial situation of the person.[14] However, it is possible to examine the existence of these conditions separately for each case and to conclude a violation assessment.

Emphasizing the importance of the right of access to court in a democratic society, the ECtHR looks at the balance between the interest of proving the claim of the applicant in court and the costs of the proceedings, and it may consider that the essence of the right of access to court is violated when this balance is not observed.[15] Considering the special circumstances of the case, high costs of litigation can also be seen as violating the right of effective access to court.[16] In addition, sometimes decisions are made to the effect that the high amount of payment demanded is disproportionate and violates the right of access to court in the event that the applicant, who has insufficient financial resources, could not get a response from the legal aid office and decided to pay a high amount of security.[17] In this context, in cases where there is a disproportionate relationship in the balance between the applicant's financial means and the costs of going to court, his/her right of access to court is taken away, resulting in a violation of the right to seek justice.[18] However, the ECtHR refers to the margin of appreciation of the states in terms of the choice of means that realize the right of access to court, so although the legal aid institution could be chosen as one of these tools, it is not imposed on the states as an obligation[19], but the chosen method by the domestic authorities in a particular case must be compatible with the ECHR.[20] In cases where the legal aid institution is offered, said opportunity should be used in a non-arbitrary way: "It is also essential for the legal aid system to offer individuals substantial guarantees to protect those having recourse to it from arbitrariness".[21] At this point, the fact that the decision regarding the legal aid request is not subject to objection leads us to conclude that "the legal aid system does not offer all the necessary procedural safeguards that will protect the prosecutable from

14 *Airey v Ireland*, App no 6289/73 (ECHR, 9 October 1979), § 24; on the same parallel, the ECtHR takes into account the seriousness of the offense, severity of the sentence and the complexity of the case along with the personal situation of the accused, see *Quaranda v Switzerland*, App no 12744/87 (ECtHR, 24 May 1991), § 33ff

15 *Kreuz v Poland*, App no 28249/95 (ECtHR, 19 June 2001), § 60ff; *Mehmet and Suna Yiğit v Turkey*, App no 52658/99 (ECtHR, 17 July 2007)

16 "The fact that high court fees may constitute a violation of the right to access to court and right to a fair trial" see Ali Ulusoy, *İdari Yargılama Hukuku* (3rd edn, Yetkin 2022) 165

17 *Ait-Mouhoub v France*, App no 103/1997/887/1099 (ECtHR, 28 October 1998), §§57-58

18 Sibel İnceoğlu, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı -Kamu ve Özel Hukuk Alanlarında Ortak Yargısal Hak ve İlkeler* (4th edn, Beta 2013) 131; for detailed information on the ECtHR case law on right to court see David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *European Convention on Human Rights* (Oxford 2018); for detailed information on the ECtHR case law on legal aid in terms of Turkish Administrative Law see Müslüm Akıncı, *İdari Yargıda Adil Yargılanma Hakkı* (Turhan 2008) 201ff; Onur Kaplan "The Legal Aid in Turkish Administrative Procedure Law in the Light of the ECHR Case-Law", (2020) 20 *Law & Justice Review*, 89ff; for detailed information on the ECtHR, Turkish Constitutional Court and the Council of State case law on right to court see Sibel İnceoğlu, Nilay Arat and Erkan Duymaz *İdari Yargıda Adil Yargılanma Hakkına İlişkin Emsal Kararlar* (Avrupa Konseyi Yayınları 2022) 250ff

19 İnceoğlu, (n 18) 126

20 *Sialkowska v Poland*, App no 8932/05 (ECtHR, 9 July 2007), §107

21 *Eyüp Kaya v Turkey*, App no 17582/04 (ECtHR, 23 September 2008); §§22-26; *Kaba v Turkey*, App no. 1236/05, (ECtHR, 1 March 2011), § 24; *İlbeyi Kemaloğlu and Meriye Kemaloğlu v Turkey*, App no 19986/06, (ECtHR, 10 July 2012), §53; *Bakan v Turkey*, App no. 50939/99 (ECtHR, 12 June 2007), §74-78; *Mehmet and Suna Yiğit v Turkey*, App no 52658/99 (ECtHR, 17 July 2007), §31-39

arbitrariness".[22] Accordingly, the fact that the legal aid request is not decided with sufficient justification or that there is no objection mechanism against it points to the arbitrariness of the legal aid system.

Restrictions that prevent a person from applying to court or that make a court decision "significantly ineffective" constitute violation of the right of access to court.[23] In this context, the legal aid institution enables the parties to participate effectively in the proceedings by facilitating the opportunity to present their demands and evidence and to prove their claims, and it is accepted that it "balances" the interference with the right of access to the court.[24]

Considering the concept of "equality", "respect for human rights" and "social state" attributions expressed in article 2 of the Constitution, together with the phrase "Every Turkish citizen's enjoyment of the fundamental rights and freedoms in this Constitution in accordance with the requirements of equality and social justice" given in the preamble of the Constitution, the constitutional foundations of the legal aid institution are formed as a requirement of the right to a fair trial under article 36 of the Constitution.

There is no specific reason for restriction in terms of the right to a fair trial regulated in article 36 of the Constitution. However, this does not lead us to the conclusion that the right to a fair trial is an absolute right that cannot be limited. As stated in several decisions of the Constitutional Court, it is accepted that the rights and freedoms in other articles of the Constitution and the duties imposed on the State may constitute a limit to rights and freedoms for which no specific reason for restriction has been indicated.[25] In this context, it is accepted that imposing an obligation to pay judicial fees to those who benefit from judiciary serves the purpose of "disciplining exaggerated, coercive and frivolous demands" and thus preventing the courts from being busy with unnecessary applications.[26] In addition, since the purpose of the litigation expenses other than the fees is to finance the obligatory expenses during the trial, and since these are also considered by the person requesting the judicial service to be covered by the nature of the process, the obligation to pay the fees and other trial expenses results "from the nature of the right to access the court and is based on constitutionally legitimate purposes".[27] However, the restrictions in question should not harm the essence of the right and should be based on a legitimate aim. The means used should be proportional to the purpose of restriction, and should not impose

22 *Bakan v Turkey*, App no 50939/99 (ECtHR, 12 June 2007), §74-78

23 *Özkan Şen,* App no 2012/791 (AYM, 07 November 2013), §52

24 *Tacettin Ceylan*, § 66

25 File nr. 2014/177, Decision nr. 2015/49 (AYM, 14 May 2015)

26 *Famiye Beğim ve Mehmet Tahir Beğim*, App no 2017/21882 (AYM, 10 February 2021), §§41-49; *Özkan Şen*, §61; *Serkan Acar,* App no 2013/1613, (AYM, 02 October 2013), §39; see also Ulusoy (n16) 164

27 *Famiye Beğim ve Mehmet Tahir Beğim*, §45

hard burdens on the individual that would ultimately upset the fair balance sought to be established between the requirements of the public interest and the rights of the individual.[28] Based on all this , it is accepted that individuals may be charged with certain obligations in order to prevent the courts from being busy with unnecessary applications, the scope of which can be determined by the public authorities at their discretion, and that the stipulated obligations do not violate the right of access to the court unless they "make filing the case impossible or make it extremely difficult".[29]

Legal aid evaluation, which decides whether the fees and litigation expenses constitute an excessive burden for the applicant, should be carefully made in each case, so that a proportionality test is examined. The issue of whether it is determined with sufficient justification is also important when seeking the balance of the individual's right to court.[30]

II. Legal Aid Procedure

For administrative judicial proceedings, the legal aid institution is implemented by making use of the provisions of the Law No. 6100 on Civil Procedure (HMK), according to article 31 of the Law No. 2577 on Administrative Judicial Procedure (İYUK). Accordingly for the issues and concepts articulated under article 31 of the İYUK, in cases where there is no provision therein, the legal aid institution, (being one of the institutions under article 31) is applied to by making use of the civil trial procedure with reference to the HMK. However, legal aid is used by adapting it to the purpose, content, features and practice of the administrative judiciary, as with every concept that is used in the HMK with article 31 of the İYUK reference.[31] It is asserted that, for the application of the provisions of the HMK pertaining to the referred institutions under article 31 of the İYUK in an administrative case, it is necessary to investigate whether these provisions create results contrary to the specific characteristics of the administrative procedure and the requirements of the judicial review of the administration.[32] However, an opposite point of view might state that there is no difference between administrative jurisdiction and civil jurisdiction in terms of the principles and rules of the legal aid institution.[33] In point

28 *Özkan Şen,* §62

29 *Serkan Acar,* §39

30 *Tacettin Ceylan,* §67

31 Şeref Gözübüyük and Güven Dinçer *İdari Yargılama Usulü (Kanun – Açıklama – İçtihat)* (2nd edn, Turhan 2001) 794

32 "Due to the differences … between private law disputes and administrative disputes; it is not appropriate to identically apply the provisions of the Code of Civil Procedure regarding the institutions referred to in the first paragraph of Article 31, even in cases where there is no provision in the Administrative Judicial Procedure. The application of these institutions in an administrative case, however, is related to the specific characteristics of the relevant rule, the Administrative Judicial Procedure, the requirements of the Administrative Regime that dominates the public administration's activities in the field of public law, and the legality of the legal situation created by this procedure by the judicial body." Turgut Candan, "Hukuk Muhakemeleri Kanunu'nun Hükümlerinin İdari Yargıda Uygulanabilirliği", <https://turgutcandan.com/2021/04/08/hukuk-muhakemeleri-kanununun-hukumlerinin-idari-davalarda-uygulanabilirligi/ > accessed 14 December 2022

33 Yılmaz, (n 5) 568

of fact, there are indeed significant differences between the civil and administrative judicial procedures, as the parties to the case in administrative judicial procedure are not private law persons who are in legal relationship with equal and free will as in private law disputes.[34] From this point of view, the institutions utilized in the administrative judicial procedure by referring to the HMK find a field of application in accordance with the nature of the Administrative and Administrative Judicial Proceedings Law. It is also stated in the Danıştay Plenary Session of Administrative Law Chambers that "… it should be accepted that İYUK article 31 can be applied to the extent that it is compatible with the types of administrative cases, taking into account the nature of administrative cases."[35] In that sense, withdrawal from and acceptance of the case or recusation, referred by article 31 of the İYUK to HMK, the administrative judiciary builds up its own application compatible with the principles of rules of the Administrative and Administrative Judicial Procedural Law. In such cases it is observed that the administrative judiciary benefits from the jurisprudence of civil courts (Yargıtay and Regional Civil Courts) in the application of the referred institutions.[36] As for the legal aid institution it is observed that the administrative judiciary follows mostly the provisions of the HMK with almost no reference to the jurisprudence of civil courts. Although, the practice to date is as such it should not be overlooked that the İYUK reference to HMK also aims to benefit from the experience and jurisprudence of civil proceedings.[37] While utilizing legal aid provisions in the administrative judiciary, the administrative and civil procedures feature both identical and distinct applications. In addition, it also needs to be pointed out that, according to articles 27/6 and 52/3 of the İYUK, financial guarantee is not required for the stay of execution claims for the ones that are granted legal aid. Therefore, the HMK reference is not applicable to the extent that legal aid is regulated under the İYUK.

A. Conditions for Benefiting from Legal Aid

Legal aid is regulated under articles 334-340 of the HMK. According to article 334/1 of the HMK, those who are partially or completely incapable of paying the necessary trial or follow-up expenses without putting the livelihood of themselves and their family into serious difficulty could benefit from legal aid. However, in order for these persons to benefit from this aid, it must be clear that their claims are not groundless. Legal aid could be used in claims and defenses, temporary legal protection requests and enforcement proceedings.

34 Metin Günday, "Hukuk Usulü Muhakemeleri Kanunu Hükümlerinin İdari Yargıda Uygulanma Alanı", *İdari Yargının Yeniden Yapılandırılması ve Karşılaştırmalı İdari Yargılama Usulü Sempozyumu (11-12 May 2001)* (Danıştay Başkanlığı Yayınları No.63 2003) 9ff; see also Erol Çırakman, "Hukuk Yargılama Usulünün İdari Yargıda Uygulanabilirliği" *İdari Yargıda Son Gelişmeler Sempozyumu* (Danıştay Yayınları 1982) 102ff

35 File nr. 2020/1094, Decision nr. 2020/1856 (Danıştay Plenary Session of Administrative Law Chambers, 14 October 2020)

36 As an example, see File nr. 2017/915, Decision nr. 2017/2524, (Danıştay 6th Chamber, 12 April 2017).

37 Bahtiyar Akyılmaz and Murat Sezginer and Cemil Kaya, *Türk İdari Yargılama Hukuku*, (6th edn, Savaş 2021) 668.

In this context, there are two conditions in which one could benefit from legal aid:

- Inability to pay

- The claim not being manifestly ill-founded.

The condition regarding inability to pay is not considered to be an ongoing state of poverty, but rather has to do with the financial situation of the person and his/her inability to meet the costs of the trial.[38] Therefore, the lack of solvency here is not a "poverty" condition, but a situation of "economic inadequacy" in terms of litigation expenses.[39] In this context, when an individual has to meet the costs of the trial, there must be a situation of "danger of financial distress".[40] In this context, it is accepted that the fact that individuals are represented by a lawyer during the trial process would not result in the rejection of the legal aid request due to the lack of "inability to pay" condition.[41]

In the examination of solvency, it is important that the courts not make a "categorical evaluation" by determining the financial situation of the person requesting legal aid, as well as litigation expenses.[42] There is no legal provision regarding the means of proof to be evaluated in the examination of the person's inability to pay. In this framework, it should be accepted that all kinds of documents enabling the judge to evaluate the financial situation of the person and create an opinion about the inadequacy of the financial situation could be submitted.[43] Besides, the legislator puts forth that not only the claimant's own economic situation, but also his/her family's economic situation should be taken into consideration. In point of fact, article 334/1 of the HMK defines those who can benefit from this right as "People who are partially or completely incapable of paying the necessary trial or follow-up expenses without putting their own and their family's livelihood into a difficult situation". In this regard, jurisprudence of the Council of State considers the following documents as proof of poverty: a poverty certificate received from the elected neighborhood

38 Hakan Pekcanıtez and Oğuz Atalay and Muhammed Özekes, *Medeni Usul Hukuku*, (9th edn, Oniki Levha 2021) 568

39 Ramazan Arslan and Ejder Yılmaz and Sema Taşpınar Ayvaz and Emel Hanağası, *Medeni Usul Hukuku* (7th edn, Yetkin 2021) 728

40 Hakan Pekcanıtez, *Medeni Usul Hukuku* (15th edn, Oniki Levha 2018) 2418

41 "… the applicants, claiming that they do not have the financial means, applied for legal aid and submitted documents to the court in order to fulfill their obligations to prove their poverty. However, considering that the applicants were represented in the case with a lawyer, the Court rejected their legal aid requests without making any effort to investigate their poverty situation. … The fact that the applicants were represented by a lawyer alone cannot be a sufficient reason for the rejection of the legal aid request. Such a categorical approach prevents the real financial situation of those concerned from being taken into account. … Based on the fact that the applicants hired a lawyer, it cannot be concluded that their financial strength is sufficient to cover the costs of the proceedings – without making a determination that they paid the lawyer a fee. This approach of the court deprived the applicants of the possibility of benefiting from temporary exemption from paying legal costs by proving their poverty." *Famiye Beğim ve Mehmet Tahir Beğim*, §§55-56; on the same parallel see *Tacettin Ceylan*, § 69

42 Zehreddin Aslan and İrfan Barlass and Kahraman Berk and Nilay Arat and Mutlu Kağıtçıoğlu and Halil Altındağ, Gamze Gümüşkaya and Şebnem Sayhan and Mehmet Akif Bardakçı and Cihan Yüzbaşıoğlu, *Açıklamalı İçtihatlı İdari Yargılama Usulü Kanunu (Vergi Yargılaması Dahil)*, Zehreddin Aslan (Ed) (3rd edn, Seçkin 2022) 396

43 Aslan et al (n 42) 395

representative/headman (signed by the headman and two members), letters from the traffic branch directorate that there is no vehicle registered in the name of the person in question, letters from the Bağ-Kur and Social Insurance Directorate that no pension or assistance is attached to the person making the request.[44] The decision is generally based upon the evaluation of registered movable and immovable property. In addition, it is observed that in practice, the fact that all the litigation expenses related to the case have been covered by the plaintiff is put forward as a reason for the rejection of the legal aid request.[45]

The proof of the claimant's inability to pay is accepted as full proof.[46] It is accepted that the court could conduct research on the financial and social situation of the claimant in order to evaluate and determine whether this condition is fulfilled due to the fact that the principle of ex officio investigation becomes operational.[47] In Civil Procedure Law, it is accepted that the request for legal aid is an ex parte proceeding, that the principle of ex officio investigation is applied in ex parte proceedings unless there is a contrary provision, and, since there is no contrary provision regarding legal aid, that the principle of ex officio investigation is valid in the request for legal aid.[48] Accordingly, an individual making the request in terms of concrete events will already have submitted documents and evidence to the file that shows his/her lack of solvency. However, since the ex officio investigation principle is applicable, the court may, for example, request information and documents by writing to the relevant official institutions and consider the economic situation. Even if the requesting individual has not submitted a "poverty certificate" obtained from the headman's office, the court, if it deems necessary, may request this document from the relevant headman and take it into account in its evaluation.

In examining the decisions of the Council of State as regards to the lack of solvency proof, it is observed that the legal aid request was rejected in cases where the plaintiff did not present the documents regarding the financial situation showing that s/he was not in a position to cover the legal expenses, together with the summary of the case and the evidence on which s/he would base his/her claim.[49] However, in such cases, an interim decision that would be issued to further request a financial situation document[50] would be more appropriate in terms of realizing the right of access to

44 File nr. 2017/333, Decision nr. 2018/503, (Danıştay 10th Chamber, 12 Februry 2018); File nr. 2016/13856, Decision nr. 2018/505, (Danıştay 10th Chamber, 12 February 2018); File nr. 2009/3631, Decision nr. 2009/3579, (Danıştay 8th Chamber, 01 June 2009); File nr. 2008/2007, Decision nr. 2010/1843, (Danıştay 10th Chamber, 09 March 2010)

45 File nr. 2014/5592, Decision nr. 2016/720, (Danıştay 6th Chamber, 23 February 2016); File nr. 2020/955, Decision nr. .2020/993 (İzmir Regional Administrative Court 5th Administrative Case Chamber, 13 October 2020)

46 Süha Tanrıver, *Medeni Usul Hukuku*, (4rd edn, Yetkin 2022) 1204.

47 Tanrıver (n 46) 1204.

48 Pekcanıtez and Atalay and Özekes (n 38) 573.

49 Danıştay Plenary Session of Tax Court Chambers 30.12.2020 File nr. 2019/1801, K.2020/1610.

50 File nr. 2021/4257 Decision nr. 2022/120 (Danıştay 13th Chamber, 19 January 2022); see dissenting vote in File nr. 2019/1801, Decision nr. 2020/1610, (Danıştay Plenary Session of Tax Court Chambers, 30 December 2020); also see File

court. There are also cases in which Danıştay decided that examining the solvency requirement would require the evaluation of further documents.[51]

In addition, it is accepted that the applicant's claim is weakened in terms of proof since the courts do not give credit to all the documents which claimants submit to reveal their financial situation in the legal aid request and neither do they specify which documents will be relied upon to reveal the unfavorable economic situation of the parties.[52] Accordingly, in cases where the request for legal aid is not supported with sufficient proof of poverty, it may be suggested that the courts should reveal/ indicate which documents fall within the scope of those that are deemed suitable.

In situations where the request is not manifestly ill-founded, it is not necessary to prove that the person is the rightful party of the case.[53] The claimant must not be in a "clearly unfair situation" in his/her claim and must form an "approximate opinion" before the judge.[54] It is observed that the Council of State rejected the legal aid request on the grounds that the condition of not being manifestly ill-founded was not met in full remedy cases where the application to the administration was not made within the time limit, and the refusal decision taken upon the late application was the subject of the lawsuit.[55] It is suggested that the condition of not being manifestly ill-founded should be interpreted narrowly and therefore the person should not be expected to prove that s/he is justified in his/her claim.[56] Indeed, at this stage, it is sufficient for the court to conclude that the person is right in his/her claim by interpreting the condition narrowly, since the court will not make an assessment by going into the merits of the case. In this context, approximate proof is accepted in the proof of the justification condition.[57]

In a few cases, if there are specific regulations regarding legal aid, it may be possible for the claimant to benefit from this aid without being subject to the aforementioned two conditions.[58] Law No. 4539 on the Adoption of the Decree-Law on the Settlement of Legal Disputes Arising from Disasters and Facilitating Certain

nr. 2009/313 (Van 2nd Administrative Court's judgment, 12 February 2009) (unpublished court decision) from Mustafa Köksal "Adli Yardım (Müzahereti Adliye) Kurumunun İdari Yargıdaki Uygulaması (2009) 40 *Terazi Hukuk Dergisi*, 97, 101, fn. 6 "By considering this interim decision … by applying to the municipality if he resides within the boundaries of the municipality, or to the village council of elders if he resides within the boundaries of the village. Requesting information on a) the profession of the plaintiff and what job he is engaged in, how he makes a living, b) his movable and immovable property, c) the amount of tax he pays to the state, d) the state and situation (economic situation) of his family, e) requesting the attorney of the claimant to obtain a certificate showing whether he has the ability to pay the cost of the lawsuit and submit it to the case file."

51 File nr. 2008/1136, Decision nr. 2011/4131 (Danıştay 10th Chamber, 10 October 2011)

52 *Tacettin Ceylan*, §§ 68-70

53 Arslan and Yılmaz and Taşpınar Ayvaz and Hanağası (n 39) 729

54 Pekcanıtez and Atalay and Özekes (n 38) 569

55 File nr. 2012/8689, Decision nr. 2015/795, (Danıştay 10th Chamber, 26 February 2015)

56 Aslan et al (n 42) 396

57 Tanrıver (n 46) 1204

58 Kuru (n 1) 5420

Transactions in Natural Disaster Zones article 3/1, Law No. 4308 on the Treatment of Civil Actions and Enforcement Proceedings of Military Persons during Mobilization or in Extraordinary Situations, article 1.

B. Persons Eligible to Benefit from Legal Aid

Eligibility criteria are set out under article 334 of the HMK. Although legal aid is regulated as an opportunity for real persons to use, article 334/2 of the HMK stipulates that public benefit associations and foundations could benefit from legal aid if they are justified in their claims and defenses and are unable to pay the necessary expenses partially or completely without being in financial difficulty. In this overall picture, as can be understood from the text of the article, legal entities, except for public-benefit associations and foundations, do not fall under the category for benefiting from legal aid. In that case, as could also be construed from the jurisprudence of Yargıtay[59], corporations and alike legal entities are not eligible for benefitting from legal aid. From this point of view, as will be expressed below under the title "Foreigners and Legal Aid", it is not possible for companies with foreign element to benefit from such opportunity.

Being a party in administrative courts depends on the acquisition of legal personality within the scope of the capacity to be a party, and the capacity to sue/file a lawsuit is dependent on the condition of violation of interest in terms of annulment cases and the condition of violation of rights in terms of full remedy cases. Private legal personalities such as companies, associations, foundations or unions can acquire legal personality as specified in their legislation. Only as such can legal personalities of private law acquire the capacity to become parties. It is accepted that private legal persons who do not have legal personality do not have the capacity to be a party in administrative cases.[60] It is observed that public legal personalities are handled with a different approach in terms of being a plaintiff and defendant. It is generally accepted that a legal entity that is not a public legal personality could be a defendant in administrative cases. However, there is no consensus on the point that legal entities that are not public legal personalities can be plaintiffs.[61]

59 File nr. 2012/16745, Decision nr. 2013/15211 (Yargıtay 11th Chamber, 09 September 2013); File nr. 2015, 5208, Decision nr. 2015/5910 (Yargıtay 15th Chamber, 19 November 2015); File nr. 2015/3915, Decision nr. 2015/4401 (Yargıtay 15th Chamber, 14 September 2015)

60 For an example see "… It is not possible for an unincorporated company, which does not have a legal personality and does not have the capacity to benefit from and use civil rights, to become a party at any stage of the proceedings, including the appeal, in the judicial authorities. … the lawsuit filed on behalf of the partnership should be rejected in terms of competence; ..." File nr. 2000/8454, Decision nr. 2003/4807 (Danıştay 7th Chamber, 19 November 2003)

61 See "… to accept the title of defendant of administrative authorities that do not have legal personality; while not accepting that they be plaintiffs cannot be reconciled with the principles of procedural law in general and administrative procedural law in particular. Even though public administration organizations that have certain powers and duties in the administrative structure do not have legal personality, they should be given the capacity to be a party and litigation for disputes arising from their activities." (Lutfi Duran, «Danıştay'ın 1979 Yılı Kararları Üzerine Kısa Mülahazalar», 13 (3) Amme İdaresi Dergisi, 1980); " … If it is necessary to take all kinds of legal initiatives – including jurisdictions – for the resolution of legal disputes that may arise from its actions and transactions, being a plaintiff or a defendant is the inevitable result of

Legal entities that can benefit from legal aid are determined by the HMK as public benefit associations and foundations. If their status as legal entities is evaluated within the scope of administrative cases, their formation of legal personality is determined by the provisions of the Civil Code. Thus, for public benefit associations, the notification of establishment, the association's charter and the necessary documents are given to the highest local authority, and for the latter, these documents are kept in the registry of the court of the settlement. Accordingly, public benefit associations and foundations will be able to request legal aid in administrative cases which fall within the scope of having the capacity to take action in a lawsuit filed since the date of acquiring legal personality.

A recent case is given of a request for legal aid being examined at the Konya Regional Administrative Court in which a union was party to the case to sue an individual administrative act regarding a member. By referring to article 19/f of the Code on Public Servants Unions and Collective Bargaining the court found that the union was acting as a "custodian" and therefore the legal aid request was to be determined by taking into account the claimant (individual)'s financial situation, not the union's.[62] Therefore, the administrative judiciary, having a legitimate ground in a specific law, took the issue in hand by gaining a broad perspective and allowing the applicant to enjoy his/her right to court by ensuring equality of arms.

Moreover, though this would be rare, some public legal entities could be plaintiffs in administrative cases. In such exceptional cases, since it is accepted that a request for legal aid could only be made by public benefit associations and foundations under the HMK, it should be clear that such legal aid requests would not be accepted.

Under the HMK, both parties of the case could benefit from legal aid.[63] However, since the defendant is generally the administration in administrative proceedings, it is accepted that the plaintiff could benefit from legal aid in such proceedings.[64] It is argued that due to the "unequal" relationship between the parties to the proceedings in the administrative jurisdiction, it is more likely that interpretation in favor of the person would be applied in order to eliminate this inequality.[65] It is not possible to disagree with the aforementioned proposition, because in ensuring the equality of arms, individuals who have an unequal relationship with the public power should be able to enjoy their right to defense in the most effective way during the trial process.

these administrative activities. ... it is not possible to deprive the administrations of being parties and litigation capacity within narrow molds by strictly adhering to the legal personality, and to keep it on the defendant scale of the procedural law scales." File nr. 1971/1, Decision nr. 1979/1 (Danıştay General Assembly on Unification of Case Law, 08 March 1979)

62 File nr. 2020/957, Decision nr. 2020/776 (Konya Regional Administrative Court 2nd Administrative Case Chamber, 31 March 2020)

63 Arslan and Yılmaz and Taşpınar Ayvaz and Hanağası (n 39) 729

64 Turgut Candan, *İdari Yargılama Usulü Kanunu*, (4th edn, Adalet 2011) 791

65 Güven Süslü, "Türk Hukuku'nda Adil Yargılanma Hakkı Çerçevesinde Bir Mahkemeye Başvuru Hakkı ve Bu Alanda Devletin Pozitif Yükümlülüğü", (2014) 6(16) *Hukuk ve Adalet Eleştirel Hukuk Dergisi*, 83, 115

Apart from the parties, it is accepted that those who intervene in the case or who are notified of the case could also benefit from legal aid.[66]

C. Scope of the Legal Aid

Legal aid provides a "temporary" exemption to a person whose claim is not clearly ill-founded and who is incapable of meeting the costs of the proceedings. While the said exemption covers the court fees, it does not result in the exemption from expenses such as the notification expenses to be made during the trial, the advance of evidence or the expense advance for the plaintiff.[67] The latter are paid in advance from the Treasury.

According to the evaluation of the court, the institution of legal aid provides one, more, or all of the following opportunities, as per article 335 of the HMK:

- Temporary exemption from all litigation and follow-up expenses,
- Exemption from providing security for litigation and follow-up expenses,
- Advance payment by the State for all expenses that must be incurred during the lawsuit and enforcement proceedings,
- If the case needs to be followed up with a lawyer, obtaining a lawyer to be paid later.[68]

Under the HMK there is no specification for types of cases in which a request for legal aid could, or could not, be made. Under the case law of civil procedure, and also in scholarly writing, it is observed that there is no distinction for types of cases. Under the administrative judiciary legal aid is dealt with in both annulment actions and full remedy actions.

If the request for legal aid is accepted, this does not include the automatic provision of a lawyer. However, pursuant to Article 335/3 of the HMK, if the case needs to be followed up with a lawyer, the provision of a lawyer to be paid later depends on the court's separate decision.

Legal aid continues until the finalization of the court decision. Accordingly, individuals whose legal aid request is accepted from the court of first instance continue to benefit from this opportunity at the legal remedy stage. Accordingly, the Council of State decides that there is no need for a new decision to be made about the legal aid request - made at the legal remedy stage - of the plaintiffs whose legal aid

66 Gözübüyük and Dinçer (n 31) 794

67 Arslan and Yılmaz and Taşpınar Ayvaz and Hanağası (n 39) 730

68 In this context, articles 176-181 of the Attorneyship Law No. 1136 and the Legal Aid Regulations of the Union of Turkish Bar Associations are applicable.

requests had previously been accepted.[69]

Legal aid does not cover litigation expenses prior to the request and acceptance of legal aid, as per article 337/3 of the HMK. Indeed, the Council of State declares that, "it is clear that the decision regarding the acceptance of the legal aid request will not cover the trial expenses for the whole phase of the case, but only the trial expenses after the date when the plaintiff appealed against the decision and requested legal aid ….".[70]

Since the legal aid decision is personal, it only applies to the person who made the legal aid request and to whom the aid was provided, and it is valid only for the disputed decision.[71]

In cases where the subject matter of the lawsuit is increased through an amendment petition, it is accepted that the legal aid decision covers the further expenses incurred due to this improvement and that these fees and expenses will also be paid.[72]

D. Procedure for Requesting Legal Aid

Legal aid is requested from the court where the request regarding the original claim will be made pursuant to Article 336 of the HMK.[73] Since the general rule is for requests to be made in "written form" in administrative proceedings, it is accepted that the request for legal aid must also be made in writing and that verbal applications will not be processed.[74] The aforementioned request could either be brought before filing a lawsuit or together with the lawsuit.[75] It is accepted that the request for legal aid could be made at the same time as the petition is made , or it could be made at any stage of the lawsuit before the final decision is reached.[76] The request is made to the court of first instance if the case is in the first instance proceedings, and to the

69 "From the examination of the file; upon the plaintiff's request for legal aid …, the claimant's legal aid request has been accepted by the decision of the Administrative Court … and the decision to accept the legal aid request will continue until the final judgment is finalized in accordance with the legislation; As the trial process of the case continues and the decision of the first instance court regarding the merits of the plaintiff has not been finalized yet, it has been concluded that there is no room for a decision on the claimant's request for legal aid at the appeal stage." File nr. 2020/2273, Decision nr. 2020/3453, (Danıştay 2nd Chamber, 24 November 2020); on the same parallel also see File nr. 2020/4737, Decision nr. 2021/965, (Danıştay 12th Chamber, 24 February 2021); File nr. 2020/2272, Decision nr. 2020/3667, (Danıştay 2nd Chamber, 29 December 2020)

70 File nr. 2020/2476, Decision nr. 2020/2418, (Danıştay 5th Chamber, 17 June 2020)

71 Pekcanıtez (n 40) 2430

72 Pekcanıtez (n 40) 2431

73 "…it is clear that the legal aid would be requested from the court where the original claim or the matter will be decided and will be decided by that court." File nr. 2021/744, Decision nr. 2021/1098, (Danıştay 10th Chamber, 11 March 2021,); on the same way see also File nr. 2014/10421, Decision nr. 2015/5156, (Danıştay 6th Chamber, 11 September 2015)

74 Candan (n 64) 792

75 Arslan and Yılmaz andTaşpınar Ayvaz and Hanağası (n 39) 730

76 Gözübüyük, Dinçer (n 31), p.794. As there is no time limit in the law regarding the request for legal aid in terms of the civil trial procedure, it is accepted that it is possible to make this request up to the end of the trial. Pekcanıtez, (n 40) 2424

regional administrative court or the Council of State in the legal remedies stage.[77] In practice, in the administrative judiciary, in cases where an application for legal aid is made, there is a procedure that the court of first instance should give the decision on the request for legal aid.[78]

The person requesting legal aid is obliged to submit to the court a summary of his/her claim regarding the case, the evidence on which (s)he will base his/her claim, and a document showing his/her financial situation that shows that (s)he is not in a position to meet the litigation expenses of the case. In practice, mostly income and assets documents are submitted. It is very important at this stage that all the necessary documents for the legal aid request are added to the application in their entirety, since a delayed decision made by the court for the completion of the necessary documents would prolong the court process. The document regarding the legal aid request is exempt from all kinds of fees and taxes.

In case the legal aid is requested before the lawsuit is filed, the statute of limitations regarding the right of the subject to the actual lawsuit is not interrupted, since in fact, the legal aid request is not a subjective right request.[79]

E. Examination of the Request for Legal Aid by the Court

Pursuant to Article 337 of the HMK, the court may decide on the legal aid request without holding a hearing, or it may decide by holding a hearing upon a request. In the administrative jurisdiction procedure, it is accepted that the legal aid request will be examined and decided on the basis of the documents.[80] It is accepted that the legal aid request should be examined first by the court, and that if there is an issue in any of the first examination matters, a decision cannot be made on these issues without a decision on legal aid, with the exception of distinct applications regarding authority.[81] In addition, in the event that a legal aid request is submitted after the court decision regarding the payment of missing fees, postage stamps or legal expenses during the lawsuit, the legal aid request must be decided first.[82]

As the legal aid request is not considered to be one of the issues to be decided by single judge courts under the İYUK, Danıştay – for the evaluation of the legal aid request by the courts – concludes that if the legal aid request is not examined by the court but by a rapporteur judge at the first examination stage, the legal aid evaluation should be considered not to have been examined in a manner compatible

77 File nr. 2021/17256, Decision nr. 2021/2428, (Danıştay 2nd Chamber, 07 July 2021)

78 Akyılmaz and Sezginer and Kaya (n 37) 735 fn. 263-264

79 Pekcanıtez, (n 40) 2424

80 Candan (n 64) 792

81 Köksal (n 50) 104

82 Akyılmaz and Sezginer and Kaya (n 37) 735-736

with the legal procedure and should be found to be unlawful. However, as all other issues until the perfection of the file are in line with the law - other than the legal aid evaluation - Danıştay deems it unnecessary for other matters to be repeated other than the legal aid request by referring to the "procedural economy principle". In addition, after the court's decision on the legal aid request (to be valid from the stage of the lawsuit petition) has been made, a decision based again on merits shall accordingly be given.[83]

It must also be pointed out that the legal aid request is not an issue which the appellate courts can examine upon the decisions of first examination of the first instance courts. The reason for such, as stated by Danıştay, is that issues to be examined by the regional administrative courts on the first examination of the first instance courts are laid down *numerous clausus* under the İYUK.[84]

In the evaluation of a request for legal aid, proof that the requirements exist for the request to be accepted is also examined. In this context, in assessing whether the claim is manifestly ill-founded, as stated above, the claimant should not be asked to form an opinion on whether or not (s)he is right.[85] In point of fact, the examination made regarding the aforementioned conditions is not an evaluation on the same level as the clear illegality sought in the terms of the decision of stay of execution or on the merits of the case.[86] If the legal aid request is rejected, the reason for not accepting the information and documents submitted to the court must be clearly stated in the court decision. In this context, the Constitutional Court, in its individual application decisions, points to the function of the courts of first instance in terms of evaluating the legal aid requests. It also mentions the importance of the reason for rejection within the framework of its duty to examine the effects of the rejection of requests on the rights guaranteed by the Constitution.[87] In this context, the importance of justification of refusal in the evaluation of proportionality is revealed by emphasizing that the protection of fundamental rights and freedoms is primarily the duty of the first instance courts and, in parallel, that the courts of first instance are more suited to the task of evaluating material facts than the Constitutional Court.[88]

83 File nr. 2020/3499, Decision nr.2020/3381 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 09 December 2020); File nr. 2019/6086, Decision nr. 2020/3591 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 17 December 2020); File nr. 2019/5812, Decision nr. 2020/2639 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 10 November 2020); File nr. 2019/3824, Decision nr. 2020/1625 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 25 June 2020)

84 File nr. 2018/6356, Decision nr. 2020/3661 (Danıştay 8th Chamber, 17 September 2020)

85 Aslan et al (n 42) 398-399

86 Aslan et al (n 42) 398

87 *S.B.,* App no 2017/19758, (AYM, 02 December 2020), §39

88 *Famiye Beğim ve Mehmet Tahir Beğim*, § 49. "… Courts of Instance are in a better position than the Constitutional Court in terms of evaluating the legal aid requests of the applicants. As a matter of fact, the Constitutional Court has no duty to determine whether the applicants are entitled to legal aid during the trial in the court of instance. However, it is the duty of the Constitutional Court to examine the effects of the rejection of the aforementioned demands on the rights guaranteed by the Constitution. In this context, the reasoning of the courts of instance when rejecting their legal aid requests is important." *S.B.,* § 39

In case the legal aid request is rejected, an objection can be made to the court that issued the decision within one week from the notification. The decision made after the objection is final.

The legal aid decision could not be taken to appeal alone. It is possible to examine the court decision regarding the legal aid request at the stage of appellate procedure followed by the final decision.[89] The Council of State, even at times when the objection procedure against the rejection of the legal aid request is not provided under the law, accepted that the rejection of the legal aid request may be subject to appeal together with the final decision, by emphasizing that the finality of the decisions regarding the legal aid request is an interim decision.[90]

Providing the opportunity to object against legal aid decisions and the necessity of presenting the reason for the refusal of legal aid, has a strengthening effect on the right to legal aid within the scope of the right to a fair trial. Hence, such a scenario strengthens the effectiveness of the legal aid institution and uplifts the standard of examination of the legal aid decision in cases of refusal.

In appeal applications, where the legal aid request has been accepted at the first instance stage, the file is accepted together with the legal aid request, and all procedures are held and concluded as such.

A first-time request for legal aid could be made at the appeal stage to the regional court of appeals as well as to the Council of State at the cassation stage. As for the procedure at the appeal and cassation stages[91], in the case of a first-time request for legal aid at the stage of appeal, fees and expenses are not charged until a decision is made on legal aid. The file is first examined in terms of the legal aid request, and if the request is accepted by the Chamber Committee, the expenses are covered from the legal aid services allowance, the perfection of the file is completed, and the proceedings of the case are held over as a file with legal aid. In case the legal aid request is not accepted, the petitioner is notified that it has not been accepted and that the deficiency regarding the fee and postage should be completed within seven days. If legal aid is requested at the stage of cassation, fees and expenses are not charged and the file is first sent to the Council of State to be examined in terms of legal aid request. If the legal aid request is not accepted, the claimant is notified that it has been denied and that the deficiency regarding the fees and postage fee should be completed within fifteen days, pursuant to article 48/2 of the İYUK.[92]

89 Akyılmaz and Sezginer and Kaya (n 37) 736

90 File nr. 2009/9171, Decision nr. 2013/2229, (Danıştay 10th Chamber ,12 March 2013); File nr. 2012/335, Decision nr. 2013/1490, (Danıştay 15th Chamber, 21 March 2013); File nr. 2013/100, Decision nr. 2013/1943, (Danıştay 15th Chamber, 14 March 2013)

91 See Leyla Kodakoğlu, *İstinaf Sürecinde Bölge İdare Mahkemesinde Görevli Personelin Görev Tanımı ve İş Akışı Rehber El Kitabı*, (Avrupa Konseyi Yayınları, 2022)

92 File nr..2015/4528, Decision nr. 2016/1687 (Danıştay 10th Chamber, 28 March 2016)

Although it is not possible to file an individual application before the Constitutional Court directly against the interim decision without exhausting the judicial process, the Constitutional Court states that "in cases where not filing individual application against the interim decision may cause the consequences of the violation of fundamental rights and freedoms to aggravate, it is possible to file an individual application against the interim decision before the judicial process is completed."[93]

Although the refusal of a legal aid request constitutes a final provision, since it is a certainty in a formal sense[94], the person whose legal aid request is rejected pursuant to Article 337/2 of the HMK may request legal aid again based on any subsequent changes in his/her financial situation.

When the legal aid request is rejected, the lawsuit fee must be paid by the individual who requested legal aid upon the refusal decision.

According to HMK article 338, if it is revealed that the beneficiary of legal aid deliberately gave false information about his/her financial situation or if his/her financial situation is understood to have improved, the legal aid decision is annulled.

F. Payment of Delayed Trial Expenses

In the event that the person benefiting from legal aid loses the case, according to the principle of "loser pays the costs of the case" under Turkish Law, all advancing expenses and advances paid by the State due to the legal aid decision are collected from the losing plaintiff. In such cases, pursuant to Article 339/1 of the HMK, if deemed appropriate by the court, it may be decided that plaintiff may pay the litigation expenses in equal installments within a maximum of one year. However, within the framework of Article 339/2 of the HMK, in cases that will cause the victimization of the person benefiting from legal aid, the court may also decide to fully or partially exempt the collection of litigation expenses to be paid, or the person may be exempted by the State. Accordingly, it could be asserted that it is possible for economically weak individuals who request legal aid to benefit from such aid with absolute exemption as well as temporary exemption.[95]

If the person renounces the case, (s)he will be liable for litigation expenses as if (s)he loses the case in accordance with Article 312 of the HMK. However, in this case, the court must decide whether this situation will lead to the victimization of the person and decide for full or partial exemption from payment.[96]

93 *Famiye Beğim ve Mehmet Tahir Beğim*, § 34.

94 Pekcanıtez and Atalay and Özekes, (n 38) 572; *Tacettin Ceylan*, § 33

95 Süslü, (n 65) 113.

96 Akyılmaz and Sezginer and Kaya (n 37) 734-735

For persons whose legal aid request has been accepted and who have benefited from this opportunity, the attorney's fee of the lawyer appointed by the bar association with the request of the court is paid from the Treasury pursuant to Article 340 of the HMK.

G. Foreigners and Legal Aid

The requirements explained above are also applicable for foreigners in terms of legal aid. Foreigners' ability to benefit from legal aid depends on reciprocity. In this context, in addition to the conditions required for the acceptance of the legal aid request (namely, inability to pay and the claim not being clearly groundless), an evaluation will also be made regarding whether or not the reciprocity condition is fulfilled.[97]

Reciprocity could either be legal or de facto.[98] In the legal framework, the existence of an international agreement to which the country of nationality of the claimant and Turkey are both party , or the existence of a bilateral agreement between Turkey and the country of which the claimant is a citizen, is required to prove reciprocity.[99] In the absence of such, it is accepted that it is sufficient to prove that there is an actual practice in favor of Turkish citizens in the country of which the claimant is a citizen.[100]

Regarding the eligibility criteria for foreigners, it is not possible for companies with foreign element to benefit from legal aid, as other than real persons, only public benefit associations and foundations are allowed to request legal aid.

Within the scope of the Law on Foreigners and International Protection No. 6458, it is important that the necessary information and documents are fully submitted in the application for legal aid, since the evaluation process of the legal aid request will be interrupted if the foreigners in the country do not have or do not submit an identity document such as a passport, not to mention the communication problems that may arise due to residence problems.

Concluding Remarks

"Legal aid" that enables parties to participate effectively in the judicial process and "balances" the interference with the right of access to court by facilitating the

97 "Considering that there is a multilateral agreement between the Russian Federation and the Republic of Turkey regarding the issue of legal aid in the response letter given by the Ministry of Justice in the incident, it is understood that the reciprocity condition sought as a condition of benefiting from legal aid has been fulfilled. In this case, the court should investigate whether the necessary conditions for legal aid (lack of ability to pay and the claims are not clearly groundless) are met and a decision should be made on this issue, but in its decision the Court rejects the legal aid request … on the ground that the condition of reciprocity with the Russian Federation is not fulfilled. … the decision is not legal." File nr. 2015/4837, Decision nr. 2016/1832, (Danıştay 10th Chamber, 31 March 2016)

98 Pekcanıtez (n 40) 2421

99 Pekcanıtez (n 40) 2421

100 Kılınç (n 4) 207; Pekcanıtez (n 40) 2421

opportunities of the parties to put forward their claims and evidence, undoubtedly has great significance in ensuring equality between the parties within the scope of "equality of arms" before the administrative courts. It effectively serves to ensure the right to a fair trial in administrative proceedings. The application of legal aid in administrative judicial procedural law is utilized through article 31 of İYUK that makes reference to the HMK. Accordingly, the organization and implementation of the institution in the civil procedure law directs the practice of the institution in the administrative judiciary. However, the concept in question finds an area of application in the administrative judiciary in accordance with the principles and nature of Administrative and Administrative Judicial Procedural Law.

It is clear that the legal aid institution, which is considered to be a requirement of the social state principle and is applied under the principle of equality, is implemented with some differences from the civil procedure law. Indeed, there are distinct applications in the administrative judicial procedure due to the unique features of this procedure. In examining the rules and practice of the legal aid institution several important issues stand out.

As a written procedure is the general rule in administrative judiciary it results in distinct utilization of legal aid claims within the administrative judiciary rather than in civil judicial procedure. According to the HMK the evaluation may also be made by hearing, whereas under the practice of the administrative judicial procedure – by taking into account the written procedure – such requests are mostly made in writing and examined on the basis of petition.

In addition, both sides of the proceedings under the HMK can request legal aid. However, for administrative cases it is accepted that the plaintiff could benefit from legal aid, since the defendant is generally the administration in administrative judicial procedure.

As regards the evaluation of the legal aid request by administrative courts, in case of lack of financial eligibility while making such examination courts shall be proactive and should ask for all required documents from the necessary authorities. There is a tool for both in civil and administrative judicial procedure law, namely "ex officio investigation". By exercising ex officio authority, the court can get the necessary information in order to examine the need of legal aid and make maximum use of such opportunity for those that most need it.

Administrative courts' "ex officio investigation" authority in the examination of files within the scope of article 20 of the İYUK gives room to enable individuals to enjoy their right to court through the evaluation of the financial eligibility criteria for granting legal aid. In cases where the applicant requesting legal aid is unable to

submit the necessary documents, or where an adequate evaluation cannot be made from the documents submitted by the claimant, administrative courts may act within the scope of the "equality of arms" principle which in turn results in requesting for information and documents in order to carry out comprehensive research and to realize the right of access to court. Indeed, in a few administrative cases, it is observed that determination without further detailed examination of the financial condition is held unlawful on the grounds that it is not possible to conduct sufficient research with the available documents. In particular, since there are also fee exemptions for a few administrations, it becomes necessary for the administrative courts to perform ex officio investigation more carefully in favor of individuals in terms of legal aid requests.

The legal aid request is applied without distinction of case type. However, it is significant that the financial situation examination is evaluated sensitively within the framework of the ex officio investigation principle especially in terms of full remedy actions, taking into account that such cases are subject to proportional fees/charges. The fact that the amount of fees is determined depending on the amount of compensation claimed in full remedy cases could sometimes create an obstacle to individuals' right to access courts.

Other than the distinct features of application of legal aid under administrative judiciary there are two issues to be pointed out in realizing the right of access to court in terms of the legal aid institution. The first is the reason for the refusal of the legal aid request and the second is the objection/appeal procedure against the rejection of the legal aid request.

The obligation of the court to put forward a reason for the rejection of the legal aid request is of vital importance in terms of realizing the right to a fair trial. Indeed, the unjustified rejection of the said request may lead to the conclusion that the evaluation might be arbitrary. It should be demonstrated with concrete evaluation and justification that the examination of the issue by the court is not arbitrary. The Constitutional Court draws attention to the importance of the function of the courts of instance, which examines the request for legal aid, in this regard.

Additionally, in order to use the right of access to court more effectively, a full and complete judicial review of the refusal of the legal aid request shall be possible, and this will only be possible if the refusal is presented with concrete justification. Besides, the existence of the mechanism of objection to the court decision regarding the legal aid request in the legal system is one of the most important building blocks that ensure the right of access to court. It is essential for the realization of the right to a fair trial that the above-mentioned issues, in the legal framework and in practice regarding legal aid, are carefully considered and implemented.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Akıncı M, *İdari Yargıda Adil Yargılanma Hakkı* (Turhan, 2008)

Akyılmaz B - Sezginer M - Kaya C, *Türk İdari Yargılama Hukuku* (6th Ed., Savaş 2021)

Arslan R - Yılmaz E - Taşpınar Ayvaz S – Hanağası E, *Medeni Usul Hukuku* (7th. Ed., Yetkin, 2021)

Aslan Z - Barlass İ - Berk K - Arat N - Kağıtçıoğlu M - Altındağ H - Gümüşkaya G - Sayhan Ş - Bardakçı M.A. - Yüzbaşıoğlu C, *Açıklamalı İçtihatlı İdari Yargılama Usulü Kanunu -Vergi Yargılaması Dahil* (Ed. Zehreddin Aslan) (3rd Ed., Seçkin, 2022)

Candan T, "Hukuk Muhakemeleri Kanunu'nun Hükümlerinin İdari Yargıda Uygulanabilirliği", https://turgutcandan.com/2021/04/08/hukuk-muhakemeleri-kanununun-hukumlerinin-idari-davalarda-uygulanabilirligi/ (Online Access 14.12.2022)

Candan T, *İdari Yargılama Usulü Kanunu* (4th Ed., Adalet, 2011)

Çırakman E, "Hukuk Yargılama Usulünün İdari Yargıda Uygulanabilirliği" *İdari Yargıda Son Gelişmeler Sempozyumu* (Danıştay Yayınları, 1982)

Duran L, "Danıştay'ın 1979 Yılı Kararları Üzerine Kısa Mülahazalar", 13 (3) *Amme İdaresi Dergisi* (1980)

Erem F, "Adli Yardım", *İmran Öktem'e Armağan* (Ankara Üniversitesi Hukuk Fakültesi Yayınları, 1970) 107-124

Gözübüyük, Ş - Dinçer, G, *İdari Yargılama Usulü (Kanun – Açıklama – İçtihat)* (2.Ed., Turhan, 2001)

Günday M, "Hukuk Usulü Muhakemeleri Kanunu Hükümlerinin İdari Yargıda Uygulanma Alanı" *İdari Yargının Yeniden Yapılandırılması ve Karşılaştırmalı İdari Yargılama Usulü Sempozyumu (11-12 May 2001)* (Danıştay Başkanlığı Yayınları No.63, 2003) 79-86

Harris D - O'Boyle M - Bates E - Buckley C, *European Convention on Human Rights* (Oxford, 2018)

İnceoğlu S, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı (Kamu ve Özel Hukuk Alanlarında Ortak Yargısal Hak ve İlkeler)* (4th. Ed., Beta, 2013)

İnceoğlu S - Arat N - Duymaz E, *İdari Yargıda Adil Yargılanma Hakkına İlişkin Emsal Kararlar*, (Avrupa Konseyi Yayınları, 2022)

Kaplan O, "The Legal Aid in Turkish Administrative Procedure Law in the Light of the ECHR Case-Law" *Law & Justice Review* (Year 11, Issue 20, June 2020) 89-107

Kılınç A, "Bir İnsan Hakkı Olarak 'Adli Yardım'" *Hukuk ve İktisat Araştırmaları Dergisi* (V.3, N.1, 2011) 1-10

Kodakoğlu L, *İstinaf Sürecinde Bölge İdare Mahkemesinde Görevli Personelin Görev Tanımı ve İş Akışı Rehber El Kitabı* (Avrupa Konseyi Yayınları, 2022)

Köksal M, "Adli Yardım (Müzahereti Adliye) Kurumunun İdari Yargıdaki Uygulaması" *Terazi Hukuk Dergisi* (No.40, Aralık 2009) 97-112

Kuru B, *Hukuk Muhakemeleri Usulü*, V.5 (6th Ed., Demir, 2001)

Pekcanıtez H, *Medeni Usul Hukuku* V. III (15th Ed, Oniki Levha, 2018)

Pekcanıtez H - Atalay, O - Özekes, M, *Medeni Usul Hukuku* (9. Ed., Oniki Levha, 2021)

Postacıoğlu İ - Altay S, *Medeni Usul Hukuku Dersleri* (8th Ed.,Vedat, 2020)

Süslü G, "Türk Hukuku'nda Adil Yargılanma Hakkı Çerçevesinde Bir Mahkemeye Başvuru Hakkı ve Bu Alanda Devletin Pozitif Yükümlülüğü" *Hukuk ve Adalet Eleştirel Hukuk Dergisi* (V.6, N.16, 2014) 83-117

Tanrıver S, *Medeni Usul Hukuku*, V.I, (4rd Ed., Yetkin, 2022)

Ulusoy A, *İdari Yargılama Hukuku*, (3rd Ed., Yetkin, 2022)

Yılmaz E, "Adli Yardım Kurumunun İdari Yargıda Uygulanması" *Ejder Yılmaz "Makaleler (1973-2013)* V.1 (Yetkin, 2014) 565-575

Yılmaz E, "Yargılama Giderlerinin İşlevi ve Sosyal Hukuk Devleti" *Ejder Yılmaz "Makaleler (1973-2013)* V.1 (Yetkin, 2014) 383-403

Judgements of the European Court/Committee of Human Rights

Airey v Ireland, App no 6289/73 (ECHR, 9 October 1979)

Ait-Mouhoub v France, App no 103/1997/887/1099 (ECtHR, 28 October 1998)

Ashingdane v UK, App no 8225/78 (ECHR, 12 May 1983)

Bakan v Turkey, App no. 50939/99 (ECtHR, 12 June 2007)

Eyüp Kaya v Turkey, App no 17582/04 (ECtHR, 23 September 2008)

Golder v UK, App no 4451/70 (ECHR, 21 February 1975)

İlbeyi Kemaloğlu and Meriye Kemaloğlu v Turkey, App no 19986/06, (ECtHR, 10 July 2012)

Kaba v Turkey, App no. 1236/05, (ECtHR, 1 March 2011)

Kreuz v Poland, App no 28249/95 (ECtHR, 19 June 2001)

Mehmet and Suna Yiğit v Turkey, App no 52658/99 (ECtHR, 17 July 2007)

Stubbings and Others v UK App no 22083/93, 22095/93 *(*ECtHR, 22 October 1996)

Sialkowska v. Poland App no 8932/05 (ECtHR, 9 July 2007)

Quaranda v Switzerland, App no 12744/87 (ECtHR, 24 May 1991)

Judgements of Turkish Constitutional Court

File nr. 2014/177, Decision nr.2015/49 (AYM, 14 May 2015)

Famiye Beğim ve Mehmet Tahir Beğim, App no 2017/21882 (AYM, 10 February 2021)

Özkan Şen, App no 2012/791 (AYM, 07 November 2013)

S.B., App no 2017/19758, (AYM, 02 December 2020)

*Serkan Acar*App no 2013/1613, (AYM, 02 October 2013)

Tacettin Ceylan, App no 2017/39062 (AYM, 10 November 2021)

Judgements of Administrative Courts

File nr. 1971/1, Decision nr. 1979/1 (Danıştay General Assembly on Unification of Case Law, 08 March 1979)

File nr. 2000/8454, Decision nr. 2003/4807 (Danıştay 7th Chamber, 19 November 2003)

File nr. 2009/313 (Van 2nd Administrative Court's judgment, 12 February 2009)

File nr. 2009/3631, Decision nr. 2009/3579, (Danıştay 8th Chamber, 01 June 2009)

File nr. 2008/2007, Decision nr. 2010/1843, (Danıştay 10th Chamber, 09 March 2010)

File nr. 2008/1136, Decision nr. 2011/4131 (Danıştay 10th Chamber, 10 October 2011)

File nr..2009/9171, Decision nr. 2013/2229, (Danıştay 10th Chamber,12 March 2013)

File nr. 2013/100, Decision nr. 2013/1943, (Danıştay 15th Chamber, 14 March 2013)

File nr. 2012/335, Decision nr. 2013/1490, (Danıştay 15th Chamber, 21 March 2013)

File nr. 2012/8689, Decision nr. 2015/795, (Danıştay 10th Chamber, 26 February 2015)

File nr. 2014/10421, Decision nr. 2015/5156, (Danıştay 6th Chamber, 11 September 2015)

File nr. 2014/5592, Decision nr. 2016/720, (Danıştay 6th Chamber, 23 February 2016)

File nr. 2015/4528, Decision nr. 2016/1687 (Danıştay 10th Chamber, 28 March 2016)

File nr. 2015/4837, Decision nr. 2016/1832, (Danıştay 10th Chamber, 31 March 2016)

File nr. 2017/915, Decision nr. 2017/2524, (Danıştay 6th Chamber, 12 April 2017).

File nr. 2017/333, Decision nr. 2018/503, (Danıştay 10th Chamber, 12 Februry 2018)

File nr. 2016/13856, Decision nr. 2018/505, (Danıştay 10th Chamber, 12 February 2018)

File nr. 2020/957, Decision nr. 2020/776 (Konya Regional Administrative Court 2nd Administrative Case Chamber, 31 March 2020)

File nr. 2020/2476, Decision nr. 2020/2418, (Danıştay 5th Chamber, 17 June 2020)

File nr. 2019/3824, Decision nr. 2020/1625 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 25 June 2020)

File nr. 2018/6356, Decision nr. 2020/3661 (Danıştay 8th Chamber, 17 September 2020)

File nr. 2020/955, Decision nr. 2020/993 (İzmir Regional Administrative Court 5th Administrative Case Chamber, 13 October 2020)

File nr. 2020/1094, Decision nr. 2020/1856 (Danıştay Plenary Session of Administrative Law Chambers, 14 October 2020)

File nr. 2019/5812, Decision nr. 2020/2639 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 10 November 2020)

File nr. 2020/2273, Decision nr. 2020/3453, (Danıştay 2nd Chamber, 24 November 2020)

File nr. 2020/3499, Decision nr. 2020/3381 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 09 December 2020)

File nr. 2019/6086, Decision nr. 2020/3591 (Ankara Regional Administrative Court 13th Administrative Case Chamber, 17 December 2020)

File nr. 2020/2272, Decision nr. 2020/3667, (Danıştay 2nd Chamber, 29 December 2020)

File nr. 2019/1801, Decision nr. 2020/1610, (Danıştay Plenary Session of Tax Court Chambers, 30 December 2020)

File nr. 2020/4737, Decision nr. .2021/965, (Danıştay 12th Chamber, 24 February 2021)

File nr. 2021/744, Decision nr. 2021/1098, (Danıştay 10th Chamber, 11 March 2021)

File nr. 2021/17256, Decision nr. 2021/2428, (Danıştay 2nd Chamber, 07 July 2021)

File nr. 2021/4257, Decision nr. 2022/120 (Danıştay 13th Chamber, 19 January 2022)

Judgements of Civil Courts

File nr. 2012/16745, Decision nr. 2013/15211 (Yargıtay 11th Chamber, 09 September 2013)

File nr. 2015/3915, Decision nr. 2015/4401 (Yargıtay 15th Chamber, 14 September 2015)

File nr. 2015, 5208, Decision nr. 2015/5910 (Yargıtay 15th Chamber, 19 November 2015)