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Judicial Review of Decisions Regarding Citizenship in Turkish Law

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Abstract

According to the 1948 Universal Declaration of Human Rights everyone has the “right to a nationality”. It should be noted that citizenship issues are related to a State’s sovereignty; that is why a state determines under its own law who are its citizens. This does not mean that States have unlimited power regarding citizenship. As one of the necessities of the rule of law is the judicial review of actions and acts of administration, decisions regarding Turkish citizenship as administrative acts are subject to judicial review. This paper focuses on citizenship as a legal bond between individual and State, the basic principles of Turkish law regarding citizenship, an understanding of the administrative appreciation regarding citizenship and the judicial control of decisions which lead to the acquisition and loss of Turkish citizenship.

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The Legal Bond Between State and Individual: Citizenship

According to the 1933 Montevideo Convention on Rights and Duties of States (article 1), the State, being subject to international law, should possess: A permanent population¹; a defined territory; a government and the capacity to enter into relations with other States. It should be noted that self-determination and recognition are additional factors which are required for the existence of a State². “The criterion of a permanent population is connected with that of territory and constitutes the physical basis for the existence of a state”³. This shows the international dimension of the importance of population. However the relationship between the State and the population is also important in national law because “a state exercises territorial jurisdiction over its habitants and personal jurisdiction over its nationals when abroad”⁴. So the State, because of economical, political and social reasons, needs to know who the population is composed of.

It is obvious that individuals want to know the society they are part of and the sovereign power they will ask for its protection. This is because the State and the individual have bilateral rights and obligations. Both need to know to whom they will ask for their rights and fulfill their obligations⁵.

All of this implies that there has to be a bond between individuals and the State. This bond has different names like “citizenship” and “nationality”. Although both “citizenship” and “nationality” refer to the legal relationship between person and state being

1 A population consisting of people who come together temporarily and then dissolve cannot be accepted as a constitutive element of a State. For more information see Hüseyin Pazarıcı, *Uluslararası Hukuk*, Ankara, Turhan Kitabevi, 2015, pp. 140-141.

2 Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, London, Routledge, 1998, p. 80.

3 *Ibid.*, p. 76.

4 *Ibid.*, p. 77.

5 Vahit Doğan, *Türk Vatandaşlık Hukuku*, Ankara, Savaş Yayınevi, 2015, p. 1.

interchangeable, in Turkish law “citizenship”⁶ can be defined “as a legal and political bond between a natural person and the State”⁷, while “nationality” refers to a legal and political bond between a natural person or a legal person or a vessel (including ships and aircrafts) and the State⁸. This paper focuses on the legal bond between natural persons and the State in Turkish law so the term “citizenship” will be used. The Turkish Citizenship Act (no. 5901) also uses the term “citizenship”. Some authors claim that the distinction between the two terms has other dimensions than ‘natural person’ – ‘legal person’ classification. According to these authors the term “citizenship” is in conformity with democratic-republican and equitable understanding which requires non-discrimination among natural persons bound to the state while the term “nationality” covers monarchies and overseas territories (colonies) and refers to the population of all states⁹.

The International Court of Justice defined citizenship in the *Nottebohm* case as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and

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- 6 According to the “legal status theory”, citizenship is the consequence of social necessity. It is a political and legal bond derived from social compulsion. In other words, citizenship is a legal relationship between the State and the person who acquired the legal status whose conditions have been unilaterally determined by the State previously. Gülin Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, Ankara, Yetkin Yayınları, 2015, p. 8.
- 7 Bilgin Tiryakioğlu, “Multiple Citizenship and its Consequences in Turkish Law”, *Ankara Law Review*, Vol. 3, No. 1 (2006), p. 3; Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 1; Doğan, *Türk Vatandaşlık Hukuku*, p. 5; Turgut Turhan and Feriha Bilge Tanrıbilir, *Vatandaşlık Hukuku*, Ankara, Yetkin, 2012, p. 23.
- 8 It should be noted that the European Convention on Nationality preferred the term “nationality” while regulating citizenship issues of natural persons. See art. 1 of “The European Convention on Nationality”. The text of the Convention is available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/166.htm>>, (access date: 20.05.2015).
- 9 Rona Aybay and Nimet Özbek, *Vatandaşlık Hukuku*, İstanbul, İstanbul Bilgi Üniversitesi Yayınları, 2015, p. 11.

duties”¹⁰. It is generally accepted that citizenship is a legal status in which its conditions are unilaterally determined by the state depending on its sovereignty, and it creates a legal bond between the individual who satisfies the required conditions and the State¹¹.

Although citizenship is a human right provided under the Universal Declaration of Human Rights as “everyone has right to a nationality”, principally, States are free to determine on their own laws on how and to whom citizenship will be granted¹². For example according to article 3 of the European Convention on Nationality each State shall determine under its own law who are its nationals. This authority of States’ is the consequence of their sovereignty¹³. This has also been underlined in decisions of the Council of State¹⁴.

The authority of States regarding citizenship is not an unlimited one. “Although nationality is in the State’s reserved domain and the general freedom of States in matters of nationality is well established in public international law, the law of nationality is increasingly coming under regulation by conventions regulating nationality”¹⁵. This is the first dimension of limiting States’ power regarding citizenship.

10 For “Nottebohm” decision see <<http://www.icj-cij.org>>, (access date: 03.06.2015).

11 Vahit Doğan and Hasan Odabaşı, *Vatandaşlık ve Yabancılar Hukuku*, Ankara, Seçkin, 2004, p. 18; Doğan, *Türk Vatandaşlık Hukuku*, p. 6; Vahit Doğan and Banu Şit, “Anayasal Vatandaşlık Kavramı”, *Türk Vatandaşlığı Kanunu Tasarısı Sempozyumu (29 Şubat 2008) Bildiriler*, eds. Vahit Doğan, Feriha Bilge Tanrıbilir and Banu Şit, Ankara, Seçkin, 2008, p. 13.

12 Tiryakioğlu, “Multiple Citizenship...”, p. 7.

13 Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 72; Doğan, *Türk Vatandaşlık Hukuku*, p. 3.

14 For the Council of State Decision 18.12.1964, E.1964/709, K. 1964/493 see Osman Fazıl Berki, Tuğrul Ansay and Tuğrul Arat, *Devletler Hususi Hukuku ile İlgili Danıştay ve Yargıtay Kararları, C. I (Tabiiyet Hukuku 1963-1975)*, Ankara, Ankara Üniversitesi Hukuk Fakültesi Yayınları, 1975, pp. 12-17.

15 Tiryakioğlu, “Multiple Citizenship...”, p. 7.

Within this framework the importance of recognition of the acquired citizenship in international law must be underlined. Such recognition depends on whether States act within the limits provided under international law or not while granting citizenships. National legal systems are supposed to consider international principles and criteria of international law. For example principles provided under the European Convention on Nationality was taken into consideration during enactment of the Turkish Citizenship Act (no. 5901)¹⁶. According to the Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930 article 1, “it is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality”¹⁷. So if citizenship is acquired in accordance with international treaties, international customary law and general principles of law, recognition of the concerned citizenship by other states is expected.

Another dimension of limiting States’ authority regarding citizenship is about the loss of citizenship. According to the Universal Declaration of Human Rights (article 15) and the European Convention on Nationality (article 4/c) “no one shall be arbitrarily deprived of his or her nationality”. This provision is completed with article 12 of the European Convention on Nationality stating that “each state party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality be open to an administrative or judicial review in conformity with its internal law”.

Within this framework there is another principle, namely the rule of law that leads to the limitation of States’ power regarding citizenship. The rule of law refers to “a government which offers to the individual, legal security and standards inspired by

¹⁶ Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 13.

¹⁷ For similar provision see article 3 of The European Convention on Nationality.

justice¹⁸. Then the question is, what constitutes the rule of law? The answer: it is a guarantee of human rights, legality of public administration, non retroactivity, separation of powers, democracy and of course the main concern of this paper which is “judicial control of public administration”¹⁹. The rule of law requires a judicial review of actions and acts of the administration. “Judicial review in administrative law...is an effective preventive and corrective means to keep administrative agencies within legal boundaries”²⁰. As decisions regarding citizenship are administrative acts, they are subject to judicial review. Legality of public administration and judicial control of public administration are provided under article 66 of the Turkish Constitution which regulates Turkish citizenship.

The Basic Principles of Law Regarding Citizenship under The Turkish Constitution

According to article 66 of the 1982 Turkish Constitution:

Everyone bound to the Turkish state with the bond of citizenship is Turkish²¹.

The child of a Turkish father or a Turkish mother is Turkish.

18 Sait Güran, “Administrative Law”, Introduction to Turkish Law, eds. Tuğrul Ansay and Don Wallace, Jr., The Netherlands, Wolters Kluwer - Law & Business, 2011, p. 57.

19 Ramazan Çağlayan, “Türk Hukukunda İdarenin Takdir Yetkisinin Yargısal Denetimi”, Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi, Vol. VII, No. 3-4 (December 2003), p. 171; Bülent Tanör and Necmi Yüzbaşıoğlu, 1982 Anayasasına Göre Türk Anayasa Hukuku, İstanbul, Beta, 2011, p. 105.

20 Güran, “Administrative Law”, p. 63.

21 It is one of the controversial clauses of the Turkish Constitution as it emphasises ‘being Turkish’ instead of ‘being a Turkish citizen’. For more information see Vahit Doğan and Banu Şit, “Anayasal Vatandaşlık...”, p. 19-22.

Citizenship can be acquired under the conditions stipulated by law and shall be forfeited only in cases determined by law.

No Turk shall be deprived of citizenship, unless he commits an act incompatible with loyalty to the motherland.

Recourse to the courts, against the decisions and proceedings related to the deprivation of citizenship, shall not be denied²².

The first paragraph states that Turkish citizenship has nothing to do with the religion, gender, race, national or ethnic origin of the person. It is a legal concept referring to the legal bond between an individual and the State. It should be noted that this was an attempt to prevent discrimination among Turkish citizens²³. Also, a “discriminative approach between the national by birth and the derivative Turkish national”²⁴ is not allowed.

According to paragraph 2 *jus sanguinis*, in other words, the transmission of citizenship by descent, is the principle for acquiring Turkish Citizenship at birth. This means Turkish citizenship is determined according to the citizenship of an individual’s parents. Paragraph 2 also emphasizes that there is no discrimination based on gender²⁵.

The third paragraph regulates the principle of legality in the law of citizenship. It is not possible to acquire or lose Turkish citizenship by depending on a condition or a reason not stated in the act.

22 The text of the Constitution is available at <https://global.tbmm.gov.tr/docs/constitution_en.pdf>, (access date: 29.05.2015).

23 Tiryakioğlu, “Multiple Citizenship...”, p. 4; Gülin Güngör, “The Acquisition of Turkish Nationality by Way of Marriage Following the June 2003 Amendment”, Ankara Law Review, Vol. 1, No. 1 (Summer 2004), p. 40; Ergin Nomer, “Türk Vatandaşlık Hukukunun Genel İlkeleri”, Vatandaşlık ve Yabancılar Hukuku Alanında Gelişmeler (Bilimsel Toplantılar) İstanbul 24-25 Eylül 1998, İstanbul, Papirüs Basım, 2000, p. 68.

24 Güngör, “The Acquisition...”, p. 40.

25 Nomer, “Türk Vatandaşlık Hukukunun Genel...”, p. 70.

According to the fifth paragraph, a judicial review of decisions of deprivation cannot be prevented. While deprivation was regulated under the Turkish Citizenship Act no. 403, it was a kind of loss of citizenship preventing re-acquisition of Turkish citizenship. When the Turkish Citizenship Act no. 403 was in force, those people who had acquired Turkish citizenship after birth but who were also abroad and involved in activities against the internal and external security of the Turkish Republic or the economical and financial security of the country could have been deprived. This provision could have been applied to Turkish citizens by birth only in times of war. It was considered as a political act, and that is why a special clause was included into the Constitution about judicial review. According to both the 1961 and 1982 Turkish Constitutions, all kinds of administrative actions and acts are subject to judicial review (article 125)²⁶. That is why existence of the article 66/5 is just an additional guarantee. Some authors claim that although deprivation is no longer a way of losing Turkish citizenship, article 66 can be understood as any type of loss contrary to the will of the concerned person are subject to judicial review²⁷. On the other hand there is also a claim that it is not possible to interpret article 66 in a way that covers all losses contrary to the will because of the principle of legality²⁸. It is believed that the existence of article 125 of the Turkish Constitution eliminates the necessity of understanding article 66/5 as a clause applicable to all types of losses contrary to the will of the concerned person.

Citizenship and Administrative Appreciation

According to the Council of Europe Recommendation No. R (80) 2, “discretionary power means a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most

26 For more information see Ergun Özbudun, *Türk Anayasa Hukuku*, Ankara, Yetkin Yayınları, 2014, pp. 128-130.

27 Doğan, *Türk Vatandaşlık Hukuku*, p. 196; Aybay and Özbek, *Vatandaşlık Hukuku*, p. 248.

28 Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 53.

appropriate”²⁹. In Turkish administrative law, issues “falling outside the scope of regulation by law constitute matters of administrative discretion”³⁰, in other words administrative appreciation³¹. Administrative appreciation is also defined as administration’s freedom of movement within legal rules³².

Granting citizenship is an act of State³³ and is considered within the framework of administrative appreciation in countries where the rule of law has predominance. The same attitude can also be observed in Turkish Law. It should be noted that the administration may exercise discretionary power related to cause and subject of administrative acts. This means that the administration has discretionary power to choose the kind of material or legal facts as a cause of a specific act or when certain conditions exist, to decide whether or not to do that specific act³⁴. Administrative appreciation given to the Authority (either to the Council of Ministers or the Ministry of Interior Affairs) while granting Turkish citizenship with the decision of competent authority is an example of the second case. When conditions stated in the Turkish Citizenship Act are satisfied by an alien, he/she may acquire Turkish Citizenship. However, fulfilling the conditions required do not grant an absolute right to that person to acquire Turkish citizenship (Turkish Citizenship Act article 10). While granting citizenship to aliens by means of “exceptions in acquiring Turkish citizenships” it is under the Council of Ministers right of discretion to determine “persons whose

29 The text of the Recommendation is available at < <https://rm.coe.int/.../DisplayDCTMContent?...> >, (access date: 07.04.2016).

30 Güran, “Administrative Law”, p. 56.

31 Administrative appreciation is the clashing point of administration’s wish of freely regulating the area within its own field of duties and efforts of administrative justice to have effective control over administration. See Çağlayan, “Türk Hukukunda...”, p. 171.

32 Çağlayan, “Türk Hukukunda...”, p. 207.

33 Before the 1961 Constitution the Council of State gave some decisions by depending on the act of state approach and refused to review decisions regarding citizenship. This approach was abandoned in 1952 with a decision of joint chambers. For more information see Şeref Gözübüyük, *Yönetmelik Yargı*, Ankara, Turhan Kitabevi, 2015, pp. 22-23.

34 Gözübüyük, *Yönetmelik Yargı*, p. 247-248.

acquisition of citizenship is necessary”³⁵. Another example underlining administrative appreciation is that the Council of Ministers may not give a decision of revocation even though the reasons exist (Turkish Citizenship Act article 29).

The right of discretion is not an unlimited power, and one of these limitations on the administrative appreciation is acting within the limits of the law; according to article 8 of the Constitution the executive power shall be exercised and carried out within the framework of the law. In order to decide on a citizenship issue, the administration must be empowered by a law and cannot take upon itself a field of activity without legislative authorization. It is obvious that “this principle constitutes an effective limitation on the administrative machinery, a real guarantee of the liberties of the individuals and a barrier to possible arbitrary rule by the administration”³⁶. Considering the principle of equality and protecting public interest³⁷ constitute the other two limitations on administrative appreciation³⁸.

The administration regulates its right of discretion by adopting directives in the field of citizenship law. Doctrine defines such directives as instructions given by superiors to show how the right of discretion can be used. Decisions of the Council of State emphasize that the right of discretion of administration related to naturalization is used within the limits of the State’s general security, long term interior and exterior national policies and political interests³⁹. For example in one case an Iranian citizen

35 Ergin Nomer, *Türk Vatandaşlık Hukuku*, İstanbul, Filiz Kitabevi, 2015, p. 171.

36 Güran, “Administrative Law”, p. 56.

37 Gözübüyük, *Yönelmel Yargı*, p. 247; Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 72; Güran, “Administrative Law”, pp. 56-57; Çağlayan, “Türk Hukukunda...”, p. 183.

38 The Council of Europe Recommendation No. R (80) 2 emphasizes that an administrative authority while exercising a discretionary power observes objectivity and impartiality apart from the principle of equality. See < <https://rm.coe.int/.../DisplayDCTMContent?...> >, (access date: 07.04.2016).

39 Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, pp. 73-74.

brought an action against the decision rejecting his application regarding the acquisition of Turkish citizenship by the Ministry of Interior Affairs. The administrative court decided that the administration has discretionary power while determining citizenship and this is the consequence of the State's sovereignty. According to the decision, as the mentioned person could not show that he is beneficial to the society, the Ministry, within its discretionary power, rejected his application by considering its duty of protecting the peace and security of the society. The plaintiff brought an action against the decision of the administrative court which found the Ministry's decision legal. As a consequence the Council of State approved the administrative court's decision by stating that it is in conformity with procedures and law (10th Chamber 23.01.2012, E. 2008/2042, K. 2012/109)⁴⁰.

As law makers cannot foresee all probabilities⁴¹, the necessity of administrative appreciation becomes obvious⁴². This authority provides administrations the flexibility to decide in accordance with the special conditions of the situation. Administrative appreciation is not about the legality of the administrative act but is instead about expediency⁴³. That is why the legality of administrative acts are subject to a judicial review while expediency is not (the 1982 Turkish Constitution article 125/4)⁴⁴.

40 See Nuray Ekşi, *Milletlerarası Özel Hukuk II Pratik Çalışma Kitabı, Vatandaşlık ve Yabancılar Hukukuna İlişkin Seçilmiş Mahkeme Kararları*, İstanbul, Beta, 2014, pp. 34-36.

41 Yıldızhan Yayla, "İdarenin Takdir Yetkisi", *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, Vol. 30, No. 1-2 (1964), p. 201.

42 Gözübüyük, *Yönetmelik Yargı*, p. 246.

43 It is not always easy to distinguish the legality from expediency. That is why the Council of State sometimes considers the expediency to some degree while controlling the legality. See Gözübüyük, *Yönetmelik Yargı*, p. 18.

44 For comparison of administrative appreciation and expediency see Çağlayan, "Türk Hukukunda...", pp. 196-201; for elements of expediency see Yayla, "İdarenin Takdir...", pp. 207-208.

Administrative Decisions Regarding Citizenship

The judicial review of administrative acts regarding citizenship was regulated for the first time under a Turkish citizenship act in 1964 with the Turkish Citizenship Act no. 403. There was no doubt that previously such acts could have been reviewed by the Council of State⁴⁵. What was new with the mentioned Act is that judicial organs apart from the Council of State became authorized for judicial review. Article 40 of the Act no. 403 was regulating the judicial review of decisions regarding Turkish citizenship which was a kind of repetition and approval of article 125 of the 1982 Constitution⁴⁶. The existence of this article prevented discussions that may arise about whether citizenship decisions other than deprivation would be subject to judicial review as article 66 of the Constitution only regulated the judicial review of decisions regarding deprivation. This would have led to an interpretation problem between articles 66 and 125 of the Constitution. As a result decisions of acquisition of Turkish Citizenship would have been left outside the judicial review⁴⁷.

Administrative decisions concerning Turkish citizenship are either about the acquisition or loss of Turkish citizenship. Decisions which lead to acquisition or loss are constitutive decisions. The authority for making such decisions either belongs to the Ministry of Interior Affairs or to the Council of Ministers⁴⁸.

45 Nomer, *Türk Vatandaşlık Hukuku*, p. 169.

46 When the 1961 Constitution was in force (before the 30.09.1971 amendments), article 114 was regulating the judicial review of administrative actions and acts. According to the mentioned article none of the administrative actions and acts could have been left outside the judicial review. This article led to some discussions as to whether it was eliminating administrative appreciation or not. For more information see Ali Ülkü Azrak, "İdari Yargı Denetiminin Sınırı Olarak İdarenin Takdir Yetkisi", *İdare Hukuku ve İlimleri Dergisi*, Vol. 6, No. 1-3 (1985), p. 19; Yayla, "İdarenin Takdir...", p. 210.

47 Nomer, *Türk Vatandaşlık Hukuku*, p. 170.

48 Nomer, *Türk Vatandaşlık Hukuku*, pp. 170-171; Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler* p. 233; Doğan and Odabaşı, *Vatandaşlık ve Yabancılar Hukuku*, p. 219; Doğan, *Türk Vatandaşlık Hukuku*, p. 194; Aybay and Özbek, *Vatandaşlık Hukuku*, p. 252.

The following methods of acquisition or loss of Turkish Citizenship require an administrative decision and are subject to administrative judicial review:

1. The acquisition of Turkish Citizenship with the decision of a competent authority including; the general way which requires the decision of the Ministry of Interior Affairs. Exceptions require the decision of the Council of Ministers, marriage where the decision of the Ministry of Interior Affairs is needed, and cases of re-acquisition which requires either the decision of the Ministry of Interior Affairs or the decision of the Council of Ministers. In cases of revocation, a decision from the Council of Ministers is necessary while in other cases the Ministry decides on the re-acquisition of Turkish citizenship.
2. The acquisition of Turkish citizenship by adoption that requires a decision from the Ministry of Interior Affairs.
3. The acquisition of Turkish citizenship by the right of choice requires the decision of the Ministry of Interior Affairs although the Ministry does not have the right of discretion while taking the decision.
4. The loss of Turkish Citizenship by the decision of a competent authority including: renunciation that needs the decision of the Ministry of Interior Affairs, revocation which requires the decision of the Council of Ministers and annulment that requires either the decision of the Ministry of Interior Affairs or the Council of Ministers depending on who gave the decision of acquisition.
5. The loss of Turkish citizenship by right of choice requires the decision of the Ministry of Interior Affairs, although the Ministry does not have the right of discretion while taking the decision.

Decisions regarding whether a person is a Turkish citizen or not are declarative decisions and such are taken by the Ministry of Interior Affairs. According to article 36 of the Turkish Citizenship Act, if there is a doubt as to whether or not a person is a Turkish citizen, the Ministry of Interior Affairs shall be consulted on the

matter⁴⁹. As a result when administrative or judiciary organs are not sure about someone's Turkish citizenship and/or are not convinced as a result of the evidence presented, the Ministry analyses the situation within the limits of law and international treaties which Turkey is party to, and informs the concerned authority about the result (By-Law on the Application of Turkish Citizenship Act article 63/1).

As a consequence, two types of disputes may arise in front of Turkish judicial organs regarding citizenship:

1. Where the subject of the action brought is an administrative decision on acquisition or loss of Turkish citizenship.
2. Where the subject of the action is not citizenship but in order to solve the basic issue it is necessary to determine the citizenship of the person connected to the case as a preliminary issue⁵⁰.

The first type is subject to judicial review by the administrative courts specializing in administrative law⁵¹ while the second type must be solved by consulting with the Ministry of Interior Affairs as stated above.

Consequently citizenships arising from administrative acts can be challenged because of being against the law or issues regarding competence, form, cause, subject and purpose by people whose interests are breached (Procedure of Administrative Justice Act article 2/1-a). It is possible to give the Council of State 10th Chamber's decision (27.04.2011, E. 2007/8150, K. 2011/1628) as an example for an administrative act that is challenged because of being against the law. In this case an Azerbaijani citizen applied for being received into citizenship exceptionally

49 The aim is to prevent each separate authority deciding on citizenship conflicts *ex officio* and to ensure that such conflicts are solved by a single competent authority. See Nomer, *Türk Vatandaşlık Hukuku*, p. 171.

50 Aybay and Özbek, *Vatandaşlık Hukuku*, p. 247; Nomer, *Türk Vatandaşlık Hukuku*, p. 166.

51 Güran, "Administrative Law", p. 63. For administrative justice system see Kemal Gözler and Gürsel Kaplan, *İdare Hukukuna Giriş*, Bursa, Ekin Basın Yayın Dağıtım, 2015, p. 340.

and his application was rejected because of not being a resident in Turkey for 2 years prior to the date of application, not having a residence permit which has at least 6 months remaining starting from the date of application, and not applying together with his wife. The mentioned conditions were regulated under a circular despite not being stated in the Turkish Citizenship Act no. 403. To ask for conditions which are not stated in the Act is against the principle of legality. That is why the decision of the rejection of application was found to be against the law by the 10th Chamber of the Council of State⁵².

Types of Administrative Suits and Procedure of Administrative Justice

All decisions regarding the acquisition and loss of citizenship are sent to the concerned person. Withdrawal, removal or alteration of the act can be demanded from the administrative authorities within the period provided for recourse to judicial review (Procedure of Administrative Justice Act article 11/1). It is possible to bring an action for annulment with a full remedy action or one following the other.

An action for annulment is the principal remedy against illegal administrative acts, regulations and by-laws. The plaintiff asks for the annulment of the illegal administrative act. A full-remedy action is an action brought before the court by the person who claims that the administration has infringed some right of his and asks for compensation⁵³.

The Council of State and administrative courts can do all kinds of examinations *ex officio* (on their own motions) and ask for necessary information and documents from the parties of the action (Procedure of Administrative Justice Act article 20/1). Such demands must be satisfied by the parties within the provided periods (Procedure of Administrative Justice Act article 20/1). According to article 38 of the Turkish Citizenship Act,

⁵² See Ekşi, Milletlerarası Özel Hukuk II Pratik Çalışma Kitabı, Vatandaşlık ve Yabancılar Hukukuna İlişkin Seçilmiş Mahkeme Kararları, pp. 11-19.

⁵³ Güran, "Administrative Law", p. 88.

information and documents on investigations and examinations regarding citizenship procedures shall be provided without any delay by public organizations and institutions.

The procedure followed during actions for annulment against administrative decisions regarding citizenship is the ordinary procedure and principles followed in administrative justice. There used to be special procedures provided under articles 40 and 41 of the Turkish Citizenship Act no. 403. But there is no such special provision included in the recent Turkish Citizenship Act. According to the Turkish Citizenship Act no. 403 article 40 an appeal may be submitted to the Council of State against any decision taken by any administrative office concerning a citizen. Although there is no such provision in the recent Turkish Citizenship Act, this does not mean that decisions regarding acquisition or loss of Turkish citizenship are not subject to judicial review. As mentioned above, all kinds of administrative actions and acts are subject to judicial review according to article 125 of the Constitution⁵⁴. Citizenship decisions made through the Turkish Citizenship Act are administrative decisions, which is why judicial reviews of such decisions are subject to the Act of the Council of State, the Act on The Establishment and the Duties of the Regional Administrative Courts, Administrative Courts and Tax Courts and the Procedure of Administrative Justice Act⁵⁵.

If it is alleged that a person present before any Turkish judicial body other than the Council of State is or is not a Turkish citizen, or the body concerned has doubts about this, the Ministry of Interior may be consulted on this matter. The Ministry of Interior shall declare its decision within one month at the latest.

If no application is submitted to the Council of State by those concerned within one month of the decision that has been given by the Ministry of Interior being communicated to the parties by the court which is hearing the case, then the Ministry decision shall become binding.

54 Doğan, *Türk Vatandaşlık Hukuku*, p. 196.

55 Aybay and Özbek, *Vatandaşlık Hukuku*, p. 248.

If an application is submitted to the Council of State in the manner set out in the second paragraph, then the case that is being heard shall be halted until the decision has been reached. The Council of State shall reach a binding decision on the applications that are made in accordance with the said paragraph within three months (Turkish Citizenship Act no. 403 Article 41).

Article 41 of the Turkish Citizenship Act no. 403 provided shorter periods for bringing an action when compared with the usual rules of administrative justice. This prevented extensions of cases, which was for the benefit of the people concerned. As there is no such rule in the recent Turkish Citizenship Act, the general provisions of the administrative justice must be applied. This means that the person concerned will apply to the Administrative Court against the decision of the Ministry of Interior Affairs and then to the Council of State for appeal. Application periods and the period for consideration of the case will be determined by the rules of the administrative justice. Some authors claim that this will lead to an unnecessary extension of cases⁵⁶.

Administrative acts which can be made a subject of action for annulment can be written/oral, positive/negative, clear/tacit, but should be of an executory nature and final. For example the rejection of a citizenship application by the Ministry of Interior Affairs is a definite, effective and negative decision⁵⁷. In a case where no answer was given to a citizenship application within 60 days because of it being at the investigation and preparation stage, the Council of State did not consider the issue as tacit rejection of the application. Consequently it was decided that the

⁵⁶ Aybay and Özbek, *Vatandaşlık Hukuku*, p. 256-257; according to an idea although there is no provision about the procedure to be followed when Turkish citizenship of someone is a preliminary issue in front of a court outside the administrative justice, the procedure provided under the Turkish Citizenship Act no. 403 article 41 will be applied. This is because article 41 is regulating the same procedure provided in administrative justice. See Doğan, *Türk Vatandaşlık Hukuku*, p. 198.

⁵⁷ Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 235.

issue is not subject to judicial review as there was no act of an executory nature⁵⁸.

In one case the decision of re-acquisition by the competent authority was challenged by the person who re-acquired Turkish citizenship. The plaintiff was a Turkish citizen who renounced his Turkish citizenship, acquired German citizenship, and then applied for re-acquisition of Turkish citizenship. As Germany did not approve dual citizenship, he challenged the decision of the Council of Ministers regarding re-acquisition. In this way he would have reverted to the privileged alien status as he was a Turkish citizen by birth and renounced Turkish citizenship with the permission of the competent authority. The court of first instance rejected the demand. However the Council of State cancelled the decision of the court of first instance by stating that it is not possible to decide on the re-acquisition of citizenship without examining whether legal conditions are existing or not. The decision also underlined that the Council of Ministers did not inform the applicant about the consequences of the amendment made in the German Citizenship Act and did not give any answer within the two years period which expired between the date of application and the date of decision. Also during the stated period, the Council of Ministers did not make any investigation or ask the plaintiff whether his demand is still valid or not. As a result the Council of State decided that the decision of the Council of Ministers is not in conformity with the law⁵⁹.

An action in administrative cases should be brought within 60 days if another period is not determined in special codes (Procedure of Administrative Justice Act article 7/1). So the time for bringing an action for annulment against administrative decisions regarding citizenship is 60 days. It is possible to commence an action for annulment first and then bring the full remedy action within 60 days starting from the notification of the decision rendered in the action for annulment (Procedure of

58 For the 10th Chamber decision 21.03.1985, E. 1982/3926, K. 1985/599 see Ekşi, *Milletlerarası Özel Hukuk II Pratik Çalışma Kitabı, Vatandaşlık ve Yabancılar Hukukuna İlişkin Seçilmiş Mahkeme Kararları*, pp. 46-47.

59 Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 236.

Administrative Justice Act article 12/1)⁶⁰. This period starts when decisions of loss/acquisition are sent to the application offices and in cases of revocation, when the decision is published in the official gazette. The Council of State 10th Chamber (09.11.2012, E. 2008/3620, K. 2012/5554) decided to nonsuit as the plaintiff did not bring the action within 60 days starting from the last date which he should have learned the decision of revocation of the Council of Ministers⁶¹.

To be able to bring a full remedy action against a decision regarding citizenship, there must be a causal relationship between the damage and the administrative act concerned and “the act/action of administration should cause a concrete, personal, actual and direct damage to the plaintiff”⁶². For example when the Council of State decides the annulment of a decision of revocation, in order to ask for immaterial compensation, the decision should not be the result of plaintiff’s own acts⁶³.

Parties of the Administrative Suit

According to the Procedure of Administrative Justice Act article 2/1-b, the plaintiff in an action for annulment is the person whose interest is breached as a result of an illegal administrative decision. In other words, “the plaintiff should have standing to sue, which means the existence of an adverse effect of the decision on his personal interests, which means existence of a

⁶⁰ Decisions of the Ministry that are presented to the Council of Ministers regarding an offer of rejection of the application in cases of acquisition are not subject to judicial review as they are not of an executory nature and final. See Nomer, *Türk Vatandaşlık Hukuku*, p. 173.

⁶¹ Ekşi, *Milletlerarası Özel Hukuk II Pratik Çalışma Kitabı*, *Vatandaşlık ve Yabancılar Hukukuna İlişkin Seçilmiş Mahkeme Kararları*, pp. 39-45.

⁶² Güran, “Administrative Law”, p. 88.

⁶³ If someone by insisting on not performing his military service leads the competent authority to take a decision of revocation, his demand for immaterial compensation loses its legitimacy. See Nomer, *Türk Vatandaşlık Hukuku*, p. 174.

considerable link between the plaintiff and the decision brought before the court for review”⁶⁴.

According to one of the decisions of the Constitutional Court (21.09.1995, E.1995/46, K. 1995/49), the aim of the “interest” criterion is to make sure that the administration acts in accordance with the law and people who have no connection with the administrative act will not be able to bring an action⁶⁵. In other words, “judicial review can be sought by those whose interests are involved through the remedy of annulment before the council of state or lower administrative courts”⁶⁶.

The Council of State underlines that the right to citizenship is a right bound to personality, so in cases of conflicts the right to bring an action exclusively belongs to the real owner of the right. That is why third parties cannot bring an action against citizenship decisions that are not about themselves⁶⁷. In some of the decisions of the Council of State (e.g. 10th Chamber 14.04.1987, E.1986/1906, K.1987/769) it is stated that the spouse of the person who lost Turkish citizenship has no direct relation with the administrative decision so the right to bring an action against the decision belongs to the person who lost the citizenship⁶⁸.

It should be noted that in cases of annulment of Turkish Citizenship, people who acquired citizenship with the concerned person also lose their citizenships. That is why in such cases they have the right to bring an action against annulment decisions as their personal interests are breached. According to the Turkish Citizenship Act, as none of the ways of acquisition of citizenship lead to the acquisition of Turkish citizenship by the spouse, there is no way for the spouse to lose his/her citizenship as a result of annulment⁶⁹. So annulment of Turkish Citizenship can only cause the loss of citizenship of children who acquired citizenship with the concerned person. It should be underlined that there

64 Güran, “Administrative Law”, p. 87.

65 Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 237.

66 Güran, “Administrative Law”, p. 73.

67 Doğan and Odabaşı, *Vatandaşlık ve Yabancılar Hukuku*, p. 225.

68 See Aybay and Özbek, *Vatandaşlık Hukuku*, p. 253.

69 Turhan and Tanrıbilir, *Vatandaşlık Hukuku*, p. 119.

can be an exceptional case where annulment may also affect the citizenship of the spouse. When the Turkish Citizenship Act no. 403 was in force, it was possible for a stateless woman to become a Turkish citizen in connection with her husband (article 15). This means if Turkish Citizenship of a man who became a Turkish citizen when Act no. 403 was in force is annulled according to the Turkish Citizenship Act no. 5901, his wife who became a Turkish citizen as a result of being stateless will also lose her citizenship⁷⁰. In such a case it is obvious that the spouse also has the right to bring an action against the decision of annulment.

Nazım Hikmet Ran lost his Turkish citizenship as a result of a decision of deprivation given by the Council of Ministers on 25.7.1951. This decision was given in accordance with the Turkish Citizenship Act numbered 1312 because of rendering services for a foreign state other than the military service⁷¹. His sister asked for withdrawal of the mentioned decision but her demand was rejected. Afterwards Nazım Hikmet Ran's sister brought an action against this decision and the administrative court decided that she had no capacity for bringing such an action as citizenship issues are personal and she has no interest⁷². This decision was approved by the Council of State (10th Chamber 17.2.1993, E. 1992/358-K 1993/672). Another action was brought by Kemal İnebolu⁷³ this time against the registration of the concerned deprivation decision to the

70 Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 176.

71 Aybay and Özbek, *Vatandaşlık Hukuku*, p. 253.

72 Nuray Ekşi and M. Aytaç Özelçi, "Nazım Hikmet'in Türk Vatandaşlığından Çıkarılmasına İlişkin Kararların Değerlendirilmesi", *İstanbul Barosu Dergisi*, Vol. 82, No. 5 (2008), p. 2300.

73 Kemal İnebolu who was not a relative of Nazım Hikmet Ran brought the action by claiming that anyone who feels himself responsible to the society should do something against such an illegal act (registration of the decision of deprivation) which has been done after the death of the universally known artist. See Ekşi and Özelçi, "Nazım Hikmet'in Türk Vatandaşlığı...", pp. 2307.

population register⁷⁴. The Plenary Session of the Administrative Law Divisions on 06.10.2005, with the decision E.2004/3, K.2005/2371, noted that UNESCO declared Nazım Hikmet to be a very important poet who affected Turkish and Eastern society's poetry, so the plaintiff has a contemporary interest in the nullity of the decision regarding the deprivation of Nazım Hikmet⁷⁵. However the 10th Chamber rejected the application as there is no way to review the expediency of administrative acts and added that there is no way of considering decisions of the Council of Ministers regarding the deprivation as void and also that the Ministry has no discretion while registering the decision of deprivation⁷⁶.

When an action is brought against a decision given by the Council of Ministers, the Prime Minister's Office must be shown as the defendant according to private international lawyers, while in administrative law, if the decision is not going to be enforced by the Council of Ministers, then the related Ministry which will apply the decision should be shown as the defendant. The Council of State solves the problem by showing both the Prime Minister's Office and the Ministry of Interior Affairs as defendants⁷⁷. According to the Procedure of Administrative Justice Act, if an action is brought without showing a defendant or by showing a wrong defendant, the real defendant will be

74 Decision of Nazım Hikmet Ran's deprivation has not been registered into the population register since 2002. See Ekşi and Özelçi, "Nazım Hikmet'in Türk Vatandaşlığı...", pp. 2302-2303.

75 The decision is available at <<http://emsal.danistay.uyap.gov.tr>>, (access date: 29.05.2015); Danıştay Kararları Dergisi, Vol. 111, (2006), pp. 72-74.

76 The decision 25.03.2008, E.2006/5858, K.2008/1450 is available at <<http://emsal.danistay.uyap.gov.tr>>, (access date: 29.05.2015); Ekşi and Özelçi, "Nazım Hikmet'in Türk Vatandaşlığı...", pp. 2309-2310. The Council of Ministers with the decision numbered 2009/14540 withdrew its decision regarding deprivation of the Turkish Citizenship of Nazım Hikmet Ran. See Aybay and Özbek, *Vatandaşlık Hukuku*, p. 254.

77 The Council of State 10th Chamber Decision 31.12.2008, E.2005/6371, K. 2008/9627 is available at <<http://emsal.danistay.uyap.gov.tr>>, (access date: 29.05.2015) also see Nomer, *Türk Vatandaşlık Hukuku*, p. 172; Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 239.

notified about the case (article 15/1-c), so it does not cause a big problem in practice⁷⁸.

Jurisdiction in Administrative Suits

If an action for annulment or a full remedy action is brought against the citizenship decisions of the Ministry of Interior Affairs, then the administrative courts are competent (Act on The Establishment and the Duties of the Regional Administrative Courts, Administrative Courts and Tax Courts no. 2576 articles 1 and 5). If an annulment or a full remedy action will be brought against citizenship decisions of the Council of Ministers, then the Council of State shall be the court of the first instance (Council of State Act article 24/1-a)⁷⁹.

If there is no other provision in the Procedure of Administrative Justice Act or in special acts, the administrative court located in the region of the administrative authority which made the administrative act shall have jurisdiction over the case (Procedure of Administrative Justice Act article 32/1). According to the Procedure of Administrative Justice Act article 36, "in full remedy actions other than the ones arising from administrative contracts, the administrative court which has the power to resolve the dispute that caused the damage, if the damage arose from... an action of administration, which is located in the region where... the action is taken, in other cases, which are located in the region of the plaintiff's residence shall have jurisdiction over the case". If an action for an annulment or a full-remedy action is brought against citizenship decisions given by the Council of Ministers, then the Council of State shall have jurisdiction over the case. The 10th Chamber of the Council of State (03.07.2013, E. 2013/3492, K. 2013/5814) refused to review a case brought by a Moldavian citizen who was asking for annulment of the decision of the Ministry of Interior Affairs regarding the rejection of

⁷⁸ Gözler, *İdare Hukukuna Giriş*, p. 359.

⁷⁹ Gözler, *İdare Hukukuna Giriş*, p. 355.

acquisition of citizenship as the Council of State has no jurisdiction over such a case as a court of first instance⁸⁰.

The Council of State is the highest court reviewing objections against decisions of the courts of the first degree and decisions of the Council of State acting as court of first instance in cases of citizenship conflicts⁸¹.

Conclusion

Citizenship, as a legal and political bond between a natural person and the State, is a human right, and everyone has right to a citizenship. Principally, states are free to determine their own laws regarding how and to whom citizenship will be granted as a result of their sovereignty. Consequently granting citizenship is considered within the framework of administrative appreciation.

In a state like the Turkish Republic where the rule of law has predominance, administrative actions and acts must be subject to judicial review to ensure that the administration is bound by law. Decisions regarding citizenship as administrative acts are subject to judicial review and this is guaranteed under article 125 of the 1982 Turkish Constitution.

It should be underlined that administrative appreciation is not about the legality of the administrative act but is instead about expediency. That is why according to the 1982 Turkish Constitution the legality of administrative acts are subject to judicial review while expediency is not. There used to be an attitude of the Council of State of refusing to review citizenship decisions by depending on the act of State approach which was abandoned before the 1961 Constitution came into force.

80 Ekşi, *Milletlerarası Özel Hukuk II Pratik Çalışma Kitabı, Vatandaşlık ve Yabancılar Hukukuna İlişkin Seçilmiş Mahkeme Kararları*, pp. 51-53. For a similar decision see The Council of State 10th Chamber 21.11.2013, E. 2013/6063, K. 2013/8285, Ekşi, *Milletlerarası Özel Hukuk II Pratik Çalışma Kitabı, Vatandaşlık ve Yabancılar Hukukuna İlişkin Seçilmiş Mahkeme Kararları*, pp. 53-55.

81 Güngör, *Tabiiyet Hukuku, Gerçek Kişiler-Tüzel Kişiler-Şeyler*, p. 241.

As can be understood from the examined decisions of the Council of State, the Court reviews the legality of the decisions of citizenship. The Council of State in its decisions underlines that while exercising discretionary power, the administration considers the State's general security, national policies and political interests which could be seen as a review of the discretionary powers. This is because the administration, while exercising its discretionary power, must act within the limits of the law and must consider the principle of equality and the protection of the public interest. As a consequence it is not always easy to distinguish the legality from expediency, so the Council of State sometimes considers the expediency to some degree while controlling the legality.

Although there used to be special provisions regarding the judicial review of citizenship decisions in the Turkish Citizenship Act no. 403, the recent Act (no. 5901) does not include such provisions. This does not prevent the judicial review of citizenship decisions, but leads to the application of general rules of administrative justice that may cause an unnecessary extension of cases.